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

Advice Memorandum

DATE: March 19, 2001

TO: Curtis A. Wells, Regional Director
Region 16

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

SUBJECT: Serendipitous Films
Case 16-CA-20653

Teamsters Local 745
Cases 16-CB-5849; 16-CB-5867

518-4040-1716
524-5073-8300
524-5073-8400
548-6001-1200
548-6001-5000
548-6030-3390
548-6030-3390-7500

These Section 8(a)(1), (2) and (3) and 8(b)(1)(A) and (2) cases were submitted for advice as to whether the alleged discriminatee was unlawfully discriminated against within the meaning of the Act based on his lack of Union membership, where he was hired but not permitted to work on the Employer's film.[1]

FACTS

On or about August 16, 2000,[2] Billy Getzwiller, Transportation Coordinator for Serendipitous Films ("the Employer"), contacted the alleged discriminatee, J.D. Hicks, about working for the Employer as Transportation Captain[3] on "Keyman," a low-budget film utilizing a non-union production crew to be shot in Dallas, Texas in September. Getzwiller and Hicks both belong to Teamsters Local 104, based in Tucson, Arizona.

On August 22, Getzwiller and Hicks attended a "Keyman" production meeting. The evidence indicates that Hicks attended this meeting on his own time. On August 24, Hicks

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[1] Although the Region did not discuss the alleged Section 8(a)(2) violation, we conclude for the reasons set forth herein that the Employer's recognition of the Union violated Section 8(a)(2).

[2] All dates refer to 2000 unless otherwise indicated.

[3] The Region has determined that this is not a statutory supervisor position.

and the Employer executed a Crew Deal Memo Agreement, which set forth the terms and conditions of his employment on "Keyman." Hicks was to be paid $1,000 per six-day week for four weeks of production, starting September 5, with an estimated completion date of September 30.

On August 25, Getzwiller contacted Ron Schwab, International Representative for the Teamsters Motion Picture and Theatrical Production Division, as is his usual practice.[4] According to the Employer, Schwab referred Getzwiller to Tyson Johnson and Danny Carpenter, Secretary-Treasurer and Steward, respectively, of Teamsters Local 745 ("the Union"). Getzwiller contacted Carpenter, who said, I've been hearing about you and we're going to have some Teamster problems. Getzwiller explained that the film's budget was only $500,000, but that he always hired Teamsters on his shows. Carpenter told Getzwiller that unless the Employer signed a Union contract, the Union would picket the first day of filming, shut down production, and no equipment would be available to the Employer. The Union alleges that Getzwiller told Carpenter that he needed one driver, and Carpenter replied that more than one driver would be required (given the equipment the Employer planned to use). Getzwiller said he could only afford one driver, but would check with his superiors. The Union denies that there was any discussion of a contract or that any threats were made.

On August 26, Carpenter met with Getzwiller and Susan Kirr, the film's producer. Getzwiller told Carpenter that he had spoken with Schwab, and hoped to hire Union members. Carpenter replied, Fine, but I have final say.

On August 29, after scouting locations all day, Getzwiller returned a phone call from Carpenter. The Employer alleges that Carpenter reiterated that the Employer would have Teamster problems unless it signed a Union contract. The Union contends that Getzwiller informed Carpenter that he had yet to speak with his superiors about using more drivers, that the two discussed the number of drivers required, and that Getzwiller indicated that he planned to contact Schwab.

The Employer maintains that on August 30, Getzwiller and Kirr told Carpenter they were trying to figure out their needs. Getzwiller later spoke with Schwab regarding

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[4] [*FOIA Exemptions 6, 7(C), and 7(D)*] he had done numerous non-union shows in the past where he nevertheless employed Teamsters drivers.

the equipment the Employer anticipated using. Schwab agreed to allow Getzwiller to tow certain equipment with his own truck, but insisted that two other drivers be hired. The Union asserts that on August 30, Getzwiller told Carpenter that Schwab had approved the Employer's equipment and driver needs. Getzwiller then asked Carpenter if he could request a specific driver. Carpenter said yes, and Getzwiller requested Hicks. Carpenter said that the Union's referral system would preclude Hicks from working as a driver. Getzwiller said he understood, because Teamsters Local 104 operated the same way. That evening, Carpenter contacted a driver and secured his agreement to work on the show.[5]

The Employer alleges that on August 31, Carpenter became angry when he learned that the Employer planned to use more equipment than he understood to be the case. In a conference call that evening, the parties agreed there would be four drivers plus Getzwiller. During this conference call, the subject of Hicks' employment came up twice, and both times Carpenter said, J.D. Hicks will not work this show. Carpenter also said Roycroft would be the first driver hired. The Union contends that it had prepared a two-page letter agreement for the Employer's consideration that day, but drafted a more comprehensive contract after learning about the additional equipment the Employer intended to use. The Union contends that the parties failed to resolve their differences during the conference call, but that Schwab advised Kirr and Getzwiller that more drivers would be required.

On September 1, Carpenter hand delivered a letter from Johnson to Kirr. According to the Employer, Carpenter said that the parties would need to execute a full contract, and twice stated that Hicks would not work the show. Carpenter told Kirr the Union had drawn up a contract, which was available for her signature at the Union hall. [*FOIA Exemptions 6, 7(C), and 7(D)*] Carpenter told Kirr that he would shut down production and certain equipment would be unavailable if she failed to sign the contract by 5 p.m. However, [*FOIA Exemptions 6, 7(C), and 7(D)*] Carpenter said only that certain equipment would be unavailable and she would have no drivers unless she signed the contract. After Carpenter left, Getzwiller and Kirr decided Hicks had to be let go or the Employer risked disruptive behavior by the Union. Getzwiller then phoned Hicks and told him that he could not work the show because it had been organized.

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[5] Although not identified, Carpenter apparently contacted a Union driver named Billy Joe Roycroft.

Later that afternoon, Kirr went to the Union hall and signed the contract, which contained an exclusive hiring hall provision. Shortly after the contract had been signed, Carpenter called and told Getzwiller that Roycroft would be the first driver hired. The Union maintains that when Carpenter delivered Johnson's letter, Kirr told him that Hicks had been hired as a driver. Carpenter advised Kirr that he and Getzwiller had already discussed this matter, and that if the Employer signed a Union contract, drivers were to be hired from the Union's referral list. Carpenter added that because Hicks was not on the list, the Union would file a grievance if Hicks were used.

Filming began on September 5, as scheduled, and was completed on September 29. The Employer obtained drivers, including Roycroft, through the Union's hiring hall. Hicks did not work on the film.

ACTION

We agree with the Region that if Hicks is an employee of the Employer rather than an applicant, then the Union and the Employer each violated the Act. We find that Hicks was, in fact, an employee of the Employer at the time the Union sought and caused his termination. Accordingly, we conclude that complaint should issue, absent settlement, alleging that the Union violated Section 8(b)(1)(A) and (2) by causing the Employer to terminate Hicks, and that the Employer violated Section 8(a)(3) and (1) by acquiescing to the Union's demand that it terminate Hicks. We further conclude that the contract executed by the Employer and the Union violated Section 8(a)(1) and (2) and Section 8(b)(1)(A). Thus, absent settlement, complaint should issue alleging these independent violations as well.

A. Hicks' Alleged Discriminatory Discharge

Initially, we note that reliance upon representation case law is inapposite to determine Hicks' employee status. Because not all statutory employees of an employer are entitled to vote in representation elections, Hicks' voting eligibility is not dispositive of his entitlement to protection under the Act for purposes of the instant case.[6]

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[6] We note that the Board has fashioned an R-case voting eligibility standard specifically for the motion picture industry. See, e.g., Medion, Inc., 200 NLRB 1013, 1014 (1972) (given "peculiar characteristics" of motion picture industry and "employment pattern disclosed by this record," Board accorded voting eligibility to all employees employed by employer on at least two productions for minimum of five

We rely upon International Photographers, Local 659 (Medway Productions)[7] in support of our conclusion that the Union unlawfully caused the Employer to terminate Hicks, and that the Employer violated Section 8(a)(3) and (1) by terminating Hicks. In that case, the Board adopted an ALJ's finding that the respondent union violated Section 8(b)(1)(A) and (2) by causing an employer to ban a cameraman, whom the employer had hired, from working on its production.[8] As summarized by the ALJ,

> At the end of August, Michael Weil [owner of a film production company which was not a signatory to the union's industry contract] discovered that he was about to obtain a contract from Medway [which was a signatory to the union's industry contract] to film a documentary of "Purple Haze." He immediately telephoned Michael Anderson, a well-regarded cameraman who had previously worked for him, and Anderson was hired on the spot to film the featurette. On September 4, Weil was apprised by Medway's publicist that ... the award of the production contract was contingent upon his employment of union members. Upon receipt of this information, Weil informed Anderson that his services could not be utilized because he did not possess union membership. 250 NLRB at 373.

However, not until September 12 did Weil execute his contract with Medway, which included a provision requiring Weil to honor Medway's obligation to hire through the respondent's hiring hall. Id. at 371. Thus, like Hicks,

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working days during year preceding issuance of direction of election, and who were not terminated for cause or quit voluntarily prior to completion of last job for which employed); American Zoetrope Productions, Inc., 207 NLRB 621, 623 (1973) (Medion rule modified to eliminate five-day requirement where record disclosed that most unit jobs lasted only one or two days, and Board found fact of having been re-employed and having completed last job a more significant indication of likelihood of future employment than total number of days worked).

[7] 250 NLRB 367 (1980).

[8] The complaint also alleged a Section 8(a)(3) violation. However, the parties reached a settlement on this issue prior to the hearing before the ALJ. 250 NLRB at 372.

Anderson was hired and terminated before he ever performed any work for his employer.[9] And, as in the instant case, Weil had no contractual obligation to use the respondent's hiring hall, either at the time Anderson was hired or at the time he was terminated. Accordingly, we find that Hicks was an employee despite the fact that he did not perform any unit work for the Employer between his date of hire and the date he was terminated. Applying the principles of International Photographers to this case, we conclude that the Union and Employer each violated the Act by their conduct, set forth above. Therefore, absent settlement, the Region should issue complaint alleging that the Union violated Section 8(b)(1)(A) and (2) and that the Employer violated Section 8(a)(3) and (1) with regard to Hicks' discharge.

B. The Unlawful Agreement

We further conclude that the Employer violated Section 8(a)(1) and (2) by executing an illegal prehire contract with the Union on September 1, and also by entering into an oral agreement on August 31, at which times the Union did not represent a majority of employees.[10] In The Crosset Co., the Board stated,

> [We] and the courts have long held that a collective-bargaining agreement, entered into between an employer and a labor organization which does not represent a majority of employees employed in an appropriate collective-bargaining unit, provides illegal assistance to the labor organization in violation of Section 8(a)(1) and (2) of the Act, and restrains and coerces

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[9] Inasmuch as Hicks signed an employment contract with the Employer and the Union acknowledged that on September 1 Kirr told Carpenter that Hicks had been hired, while in International Photographers Anderson had only orally agreed to work for Weil, Hicks' employee status is arguably more certain than was Anderson's.

[10] In addition, the Union's premature acceptance of recognition constitutes a Section 8(b)(1)(A) violation. See, e.g., International Ladies' Garment Workers Union v. NLRB (Bernhard-Altmann Texas Corp.), 366 U.S. 731, 733 (1961). Since the Section 8(b)(1)(A) charge does not attack this conduct, the Region should seek an amendment to include this violation in its complaint.

employees in violation of Section 8(b)(1)(A) of the Act.[11]

Thus, late in the day on September 1, the Employer and the Union executed a contract, at which time the Employer employed no employees. Hicks had been discharged earlier that afternoon, and Roycroft had not yet been hired, despite the fact that Carpenter had mentioned him on various occasions as the first driver who would be employed. Accordingly, the parties executed an illegal prehire agreement because the Employer had no employees at the time they entered into the contract.[12]

In the alternative, we conclude that to the extent that the parties had reached a meeting of the minds on August 31 with respect to the number of drivers required,[13] this oral agreement, entered into at a time when Hicks was the only unit employee (and, in any event, apparently did not support the Union), also constituted an unlawful contract.[14] Moreover, this theory provides an additional basis on which to allege that Hicks' discharge violated Section 8(a)(3) and (1), because the Employer terminated Hicks pursuant to its unlawful grant of recognition to the Union.

Accordingly, absent settlement, the Region should issue complaint alleging that the Employer violated Section 8(a)(1) and (2), and that the Union violated Section 8(b)(1)(A), because they entered into an unlawful prehire agreement on September 1. The Region should alternatively allege that the Employer violated Section 8(a)(1) and (2) and the Union violated Section 8(b)(1)(A) on August 31, because they entered into a contract when the Employer had

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[11] 140 NLRB 667, 669 (1963). (Citations omitted.)

[12] See also Ned West, Inc., 276 NLRB 32, 42 (1985) (employer granted, and union accepted, recognition prior to time any employees employed in bargaining unit, in violation of Sections 8(a)(2) and 8(b)(1)(A).

[13] The Employer contends that the parties had agreed upon the number of drivers required in the parties' conference call that evening.

[14] See, e.g., Bernhard-Altmann, 366 U.S. at 732-33 (employer's grant of exclusive recognition to a minority union violated Section 8(a)(1) and (2), and union's acceptance thereof violated Section 8(b)(1)(A)).

only one employee, who in any event did not support the Union. Under this latter theory, the Region should also allege that the Employer violated Section 8(a)(3) and (1) because Hicks' discharge was derivative of the parties' unlawful August 31 agreement.

B.J.K.