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

Advice Memorandum

DATE: February 12, 2007

TO : Willie L. Clark, Regional Director
Region 11

FROM : Barry J. Kearney, Associate General Counsel 524-8372-0100
Division of Advice 524-8372-5083

SUBJECT: Giant Cement Company
11-CA-21101

The Region submitted this case for advice as to whether replacement employees became permanent replacements prior to the Union's unconditional offer to return to work, thereby lawfully displacing economic strikers.

We conclude that the Employer and the replacement employees had agreed that the replacements' employment would become permanent upon the countersignature of a Company official on a document previously executed by the replacement employees expressing their acceptance of a permanent position. Based on this mutual understanding, the Company's countersignature on the previously executed document commenced the replacements' permanent employment, notwithstanding that several replacement employees had not yet been notified of the countersignature prior to the Union's unconditional offer to return to work.

FACTS

On August 19, 2005,[1] all 137 of the Employer's bargaining unit employees commenced a strike. The Employer thereafter operated its Harleyville facility during the strike by using managerial and supervisory personnel, as well as temporary contract employees, whom it hired through employment agency MAU Workforce Solutions (MAU).

On September 19, the Employer issued, and 52 candidates signed, the following documents:

> Dear (name of person),
>
> This letter is notice of our intent to offer you permanent employment with Giant Cement Company for the position of (title of position).

[1] All dates hereinafter are 2005, unless otherwise noted.

This offer becomes a valid offer of employment once it is countersigned by Giant Cement Company.

Please sign this letter in the space provided. Your signature indicates your acceptance of this offer once it is validated by the company. You should also sign the attachment to this letter and return all documents to the company.

Sincerely,

John Von Tress
Vice President of Operations

I acknowledge receipt of this notice and am willing to accept the offer when validated by the Company.

Date: _____ Signature: _____

(name of replacement employee)

Acknowledgement:
GIANT CEMENT COMPANY

Date: _____ Signature: _____

Employee Name:

The second document stated:

September 19, 2005

To: Giant Cement Company
320-D Midland Parkway
Summerville, SC 29485
Attention: Mimi Hamilton

I understand that I am being assigned permanently to the job of (title of position).

While I understand that this assignment is permanent, I also understand that I could lose my job if: 1) I violate plant rules; 2) I am laid off due to lack of work; 3) there is a settlement with the union that requires my separation; or 4) there is an order from the National Labor Relations Board or a court with jurisdiction that requires my separation.

Date: _____ Signature:
_____

(Name of signer)

One day later, the Employer sent the Union a letter that stated, in part, "One of the options available to us is the hiring of permanent replacement workers, which we intend to proceed with very soon." The Union received a copy of this letter by facsimile, email, and Federal Express on September 21. The Employer continued to secure additional signatures on the letters described above, and by Friday, September 23, the Employer had secured signed letters from at least 75 individuals. In the early afternoon of September 23, Employer officials countersigned the letter reproduced above, and, beginning later that afternoon, the Employer, both directly and through MAU, began contacting employees to inform them that the offers had been validated. At 5:30 a.m. on Saturday morning, September 24, the Union hand-delivered a letter to the Employer in which it made an unconditional offer to return to work on behalf of all of the strikers.

The Employer concedes that, as of the time of the Union's offer, it had not spoken to every one of the employees for whom it had countersigned the September 19 letter.

ACTION

We conclude that all the replacement employees who executed the letter-offer and the acceptance of a permanent position document became permanent replacements on the afternoon of September 23, when the Company countersigned the letter-offer, and the Union's unconditional offer to return on behalf of the economic strikers on September 24 came too late to displace any of these permanent replacements. Accordingly, any allegation predicated on displacement of these permanent replacements should be dismissed, absent withdrawal.

An employer violates Section 8(a)(3) and (1) if it fails to reinstate strikers upon their unconditional offer to return to work, unless the employer can establish a "legitimate and substantial business justification" for failing to do so.[2] An employer's permanent replacement of

[2] See NLRB v. Fleetwood Trailer Co., 389 U.S. 375, 378 (1967).

economic strikers as a means of continuing its business operations during a strike is a legitimate and substantial business justification.[3] An employer has the burden of proving that it hired permanent replacements for its striking employees,[4] and this burden can be satisfied by evidence of a "mutual understanding" between the employer and the replacement that the replacement was being hired on a permanent basis.[5] The touchstone of whether there has been such a "mutual understanding" is that "[t]he Employer's hiring offer must include a commitment that the replacement position is permanent and not merely a temporary expedient subject to cancellation if the employer so chooses."[6] An employer may, however, leave open the possibility of immediate reinstatement of strikers pursuant to a settlement agreement with the union or a Board order.[7]

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[3] NLRB v. Mackay Radio & Telegraph Co., 304 U.S. 333, 345-346 (1938).

[4] See, e.g., Mars Sales and Equipment Co., 242 NLRB 1097, 1100-1101 (1979), enfd. in pertinent part 626 F.2d 567, 573 (7th Cir. 1980) ("[b]ecause this assertion [of permanent replacement] is based on matters within Respondent's peculiar knowledge, the burden of establishing its truth rests on Respondent").

[5] See, e.g., Hansen Brothers Enterprises, 279 NLRB 741 (1988), enfd. mem. 812 F.2d 1443, (D.C. Cir. 1987), cert. denied 484 U.S. 845 (1987); Georgia Highway Express, 165 NLRB 514 (1967).

[6] Covington Furniture Mfg. Corp., 212 NLRB 214, 220 (1974), enfd. 514 F.2d 995 (6th Cir. 1975).

[7] See Belknap, Inc. v. Hale, 463 U.S. 491 (1983)(if an employer unconditionally offers replacements permanent jobs, and then displaces them and reinstates strikers pursuant to either a settlement agreement with the union or a Board order, the replacements may sue the employer for misrepresentation and breach of contract; an employer may protect itself from such suits by promising replacements permanent employment subject to those specific conditions - "settlement with its employees' union" or a "Board unfair labor practice order directing reinstatement of strikers . . . .").

Here, by issuing the relevant documents to the replacements, the Employer made an unambiguous "offer"[8] of a permanent position to those replacements and, by executing these documents, the replacements accepted permanent positions, contingent on a subsequent countersignature by the Company.[9] The document was subsequently countersigned, in accordance with the parties' mutual understanding, a day before the Union made its unconditional offer to return to work. There is no contention that the Employer made any statements or engaged in any conduct indicating that the replacements had been hired on a temporary basis. Rather, the Employer's letter-offer stated that the assignments were permanent; the Employer's letter to the Union stated that one of the options it had was to hire permanent replacements; and there were no statements, such as in job ads or applications, that contradicted the message of permanent status.[10] Accordingly, there was a mutual understanding between the Employer and the replacements that they were permanent. In these circumstances, we conclude that the replacements, who executed the relevant documents prior to the Union's September 24 unconditional

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[8] We use the terms offer and acceptance here in their generic sense, i.e., presenting a proposal for acceptance, and not as contract law terms of art, discussed infra.

[9] While it could be argued that the prospective language in the Employer's letter-offer of employment, i.e., that the employment offer and the replacements' acceptance of that offer will only become effective when subsequently validated by the Company's countersignature, means that no valid offer and acceptance of permanent employment could happen until the replacements were subsequently notified of their permanent status after the Company countersigned the letter-offer of employment; that view of the matter ignores the parties' mutual understanding that the replacements' permanent status would commence once the documents were countersigned by the Company.

[10] Compare, e.g., Harvey Mfg., Inc., 309 NLRB at 467-468 (replacements required to sign documents describing their status as temporary); Target Rock, 324 NLRB at 373-374 (ads provided that "[a]ll positions could lead to permanent full-time after the strike"); Cyr Bottle Gas Co., 204 NLRB 527 (employer told replacements that their jobs might be for a day, a week, a month, or a year, but that much depended on "how the strike was resolved").

offer to return to work, became permanent employees on September 23 when the Company countersigned the letter-offer.

This result is consistent with general contract law principles of offer and acceptance.[11] In that regard, the Employer's prospective employment offer would be considered an invitation to the replacements to make the Employer an offer, i.e., to offer their services for a permanent position with the Employer at the current terms and conditions.[12] Each replacements' execution of the relevant documents constituted such an offer, which the Employer accepted by its subsequent countersignature. This acceptance by the Employer-offeree completed the manifestation of mutual assent, and a contract was formed regardless of whether the replacements-offerors received notification,[13] so long as the Employer-offeree exercised reasonable diligence to notify the replacements-offerors of

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[11] Cf. Pittsburgh-Des Moines Steel Co., 202 NLRB 880, 888 (1973) ("Though technical rules of contract law do not necessarily control decisions in labor-management cases, normal "offer and acceptance" rules are generally considered determinative with respect to the existence of collective-bargaining contracts."); Bennett Packaging Co., 285 NLRB 602, 698 (1987) (Same).

[12] *Restatement(Second) of Contracts Sec. 26 (d), Preliminary Negotiations, Invitation of bids or other offers.*

[13] *Restatement(Second) of Contracts Sec. 63, Time When Acceptance Takes Effect.* See, e.g., Edens v. Goodyear Tire Company, 858 F.2d 198 (4th Cir. 1988) ("where the offer specifically provides that it is contingent upon a subsequent approval, like the countersignatures here, a binding agreement is established when that approval is given, not when the other party is given notice of that approval.") The Region's distinction of this case from the instant matter is based on its view that the Employer here made an offer when it countersigned the letters, which had to be accepted again by the replacement employees. As noted above, it is appropriate in this type of circumstance to construe submission of the signed letters as "offers" and the Employer's countersignature as acceptance of these offers.

its acceptance.[14] Here, there is no question that the Employer exercised reasonable diligence in attempting to notify the replacements about their permanent status. In these circumstances, under general principles of contract law, the replacements would be considered to have offered their services as permanent employees and the Employer would be considered to have accepted these offers at the moment of its countersignature on the letter-offers.

Accordingly, the Region should dismiss this allegation, absent withdrawal.

B.J.K.

[14] *Restatement(Second) of Contracts Sec. 56, Acceptance by Promise, Necessity of Notification to Offeror.*