From:	(b) (6), (b) (7)(C)
To:	Sacks, Laura A.; Quigley, Thomas E.; Goldman, Emily G.; Duryea, Eric D.; SM-Region 1, Boston; SM-Region 34, Hartford
Cc:	Lussier, Richard; Dodds, Amy L.; Walters, Kimberly; Shorter, LaDonna
Subject:	Universal Automation & Mechanical Services, 01-CA-300935 (case-closing email)
Date:	Friday, May 30, 2025 4:36:00 PM

The Region resubmitted this case for consideration of an employment agreement pursuant to Memorandum GC 25-05, *Rescission of Certain General Counsel Memoranda*, dated February 14, 2025. The original submission sought advice on a compensation agreement that contains non-compete provisions, the lawfulness of the agreement and whether the Employer violated Section 8(a)(5) by unilaterally implementing the agreement and/or direct dealing, which in part depended on the employee's statutory and bargaining unit status at the time the agreement was signed and at the time of the employee's resignation. The Advice memorandum in this case issued on December 3, 2024 finding the following:

- The Employer failed to establish that the individual is a manager or supervisor at the relevant times;
- The non-compete provision is lawful;
- The non-solicitation of employees and customers provisions are overbroad;
- The Employer violated 8(a)(5) by failing to give the Union notice and opportunity to bargain over the Agreement;
- The Employer engaged in direct dealing with the individual over the Agreement; and
- The Employer's cease-and-desist letters to the individual violated 8(a)(1).

The Region was instructed to urge the Board to adopt as a standard remedy for overbroad rules and contract provisions a make-whole remedy for the individual and any similarly situated employees who may have been harmed by the unlawful non-solicitation of employees provision.

The Region has not yet issued complaint. Upon further review, we conclude that there is insufficient evidence that the individual at issue was a statutory employee in the bargaining unit at the time (b) (6) entered into the employment agreement with the Employer. Therefore, the agreement was not unlawfully obtained nor did the Employer's efforts to enforce the agreement violate the Act. The prior Advice memorandum is therefore rescinded and replaced by this email, and the Region should dismiss the charge in its entirety, absent withdrawal.

The Employer, Universal Automation & Mechanical Services, Inc., is an HVAC service business employing a variety of trades. It is a member of a multi-employer group that has a collective-bargaining agreement with the Union, Local 537 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, covering a unit of employees who perform instillation, repair, and maintenance work on all types of refrigeration and air conditioning equipment. The individual was (b) (6), (b) (7)(C) hired by the Employer in (b) (6), (b) (7) on the basis of a (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) (b) (6), was a dues paying member of the Union throughout (b) (6), employment with the Employer (as were other managerial employees, a practice to which the Union acquiesced). (b) (6), did

some work as a (b) (6), (b) (7)(C), but primarily did (b) (6), (b) (7)(C) management work under various titles, including (b) (6), (b) (7)(C). After working for the Employer for about (b) (6), (b) years, the individual asked for a raise to reflect the additional duties (b) (6) performed, and in 2010 directly negotiated with the Employer a compensation agreement that contained substantial additional compensation over the contract rate and Non-Compensation Non-Solicitation Agreement provisions (Article 3) which set forth the following:

> Paragraph A. subsection (b) states: While employed by [the Employer], and for a period of two (2) years following the termination of employment for any reason, Employee shall not, in any capacity, directly or indirectly, request, cause, solicit, induce, attempt to hire or hire any employee of, or consultant to, [the Employer], or any other person who may have been employed by [the Employer] during the last year of the term of employment with [the Employer], to perform work or services for any person or entity other than [the Employer], or assist in such hiring by any other person or business entity or encourage any such employee or consultant to terminate his or her employment or consulting relationship with [the Employer].
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> Paragraph A. subsection (c) states: While employed by [the Employer] and for a period of two (2) years following the termination of employment by [the Employer] for any reason, Employee shall not, in any capacity, directly or indirectly, on (b) (6), own behalf or on behalf of any other person or entity, solicit or accept business from, or provide products or services of any kind to, any customer, or other supplier with respect thereto with whom [the Employer] had business dealings at the time of such termination to the extent that any of such activities compete with [the Employer].

The available evidence shows that for much of (b) (6), employment, the individual performed primarily non-unit work such as making (b) (6), (b) (7)(C), (b) (6), (b) (7)(C), and managing (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) (b) (6), was also listed as part of the management team on the Employer's website. The individual has been inconsistent in describing the extent of how much non-unit work (b) (6) performed. Beginning in 2020, at the outset of the Covid pandemic, the individual's bargaining unit work greatly increased to approximately 50 percent of (b) (6), work hours as the Employer changed its operation. The individual was no longer listed as part of the management team as of (b) (6), (b) (7)(C) 2021.

In (b) (6), (b) (2022, the individual resigned from the Employer. Shortly thereafter, the Employer sent a cease-and-desist letter to the individual alleging that (b) (6) had solicited business from an Employer customer in violation of the agreement. The individual then contacted the Union, which was the first time the Union learned about the compensation agreement. The Employer then issued a cease-and-desist letter to the individual's new employer advising the company of the non-solicitation agreement and providing a list of customers that the individual had worked with at the Employer. In November 2022, the Employer sent another cease-and-desist letter to the individual alleging that the individual had solicited additional Employer customers. The Employer has not taken any further legal action.

Upon reconsideration, we find that the Employer will likely be able to establish that, at the time the individual entered the agreement with the Employer in 2010, [redacted] was not in the bargaining unit but was instead employed in a [redacted] managerial capacity. Given that the sparse evidence for that period in 2010 includes the individual's own inconsistent descriptions of [redacted] work during that time, the evidence demonstrates that the individual was performing the work of a [redacted] manager, such as [redacted] and therefore was not a statutory employee. *See Republican Co.*, 361 NLRB 93 (2014) (managerial employees defined as "those who formulate and effectuate high-level employer policies" and have discretion in representing management interests). As a manager, [redacted] was not part of the bargaining unit, and the Employer had no obligation to bargain with the Union over any changes to [redacted] working terms and conditions. Therefore, there were no 8(a)(1) and (5) violations when the Employer entered into the compensation agreement with the individual.

Even assuming the individual was a statutory employee in the bargaining unit at the time [redacted] resigned in 2022, the Employer's efforts to enforce the agreement thereafter do not violate the Act. Based on the cease-and-desist letters, the Employer was just seeking to enforce the lawful non-solicitation of customers provision (Article 3, A(c)). And, since the individual was not a statutory employee when [redacted] entered into the agreement with the Employer in 2010, there is no argument that the Employer was seeking to enforce an unlawfully obtained agreement. *Cf. Nat'l Licorice Co. v. NLRB*, 309 U.S. 350, 361, 365 (1940) (upholding affirmative relief of releasing employees from contracts negotiated by company-dominated labor organization and requiring employer to cease enforcing those contracts since they were "fruits of unfair labor practices"). Accordingly, the cease-and-desist letters seeking to enforce the agreement do not violate the Act.

Finally, we find that it would not effectuate the Act to issue complaint on the non-solicitation of employees provision in the agreement. The Board has long distinguished the act of abandoning employment, i.e., voluntarily resigning from an employer, from a conditional threat to resign in the future if certain conditions are not met by the employer. *See Crescent Wharf and Warehouse Company,* 104 NLRB 860, 861-62 & n.4 (1953) (the act of resigning is unprotected whereas the threat to quit could be protected). *See also Technicolor Services,* 276 NLRB 383, 385-89 (1985) (union steward's efforts to have his coworkers fill out applications for other companies was protected as it was in the interest of better job security for the employees and not intended to undermine or harm the employer), *enforced*, 795 F.2d 916 (11th Cir. 1986). This case does not present those considerations. The Region should therefore dismiss the entire charge, absent withdrawal.

Please contact us with any questions.

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