From: (b) (6), (b) (7)(C)
To: Lomax, Matthew S.; Scaffidi, Stephanie; Alam, Noor I.; Durkin, Julia M.
Cc: Compton, Kayce R.; Dodds, Amy L.; Lussier, Richard; Shorter, LaDonna
Subject: Swirlds Labs, Case 27-CA-325586 (case-closing email)
Date: Tuesday, November 18, 2025 8:43:42 AM

The Region submitted this case for advice on whether the maintenance of a non-solicitation of employees provision in two different employment agreements violates Section 8(a)(1). The Region determined that the allegations concerning the non-competition provision in those agreements do not have merit per Memorandum GC 25-05, *Rescission of Certain General Counsel Memoranda*, dated Feb. 14, 2025, and did not submit those allegations for advice. We conclude that it would not effectuate the Act to proceed on the maintenance of the non-solicitation provision allegation, and the Region should dismiss the charge, absent withdrawal.

The Charging Party signed an employment agreement (the Restriction Agreement) when [redacted] became employed as (b) (6), (b) (7)(C) in [redacted] and signed a non-qualified stock option agreement in [redacted] as part of [redacted] compensation package. Both agreements contained similar "non-solicitation or interference" provisions: the Restriction Agreement forbade soliciting employees to "cease doing business with, or providing services to [the Employer]," and the stock option agreement prohibited soliciting or encouraging any employee to "leave the employ or engagement of, or otherwise alter his, her, or its relationship with [the Employer]." Around December 2023, the Employer realized it had calculated the fair market value for the stock options improperly and offered all employees new stock option agreements (in which the value was more favorable to the employees). The Charging Party did not sign the new agreement, so [redacted] old agreement remained in effect until [redacted] voluntarily resigned [redacted] employment on [redacted] 2024.

We conclude that it would not effectuate the Act to issue complaint on the maintenance of the non-solicitation or interference provisions. 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); *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). (b) (7)(A) [redacted]

With respect to the Restriction Agreement, the prohibition on soliciting employees to "cease doing business with, or providing services to [the Employer]," as it applies during the term of employment, could target protected activity such as concerted work stoppages to leverage better working conditions and benefits vis-a-vis employees' current employer, and not just unprotected quitting. Similarly, to the extent that the provision in the Charging Party's stock option agreement prohibits an employee—during his or her employment with the Employer—from soliciting or encouraging a coworker to (b) (7)(A) [redacted] (b) (7)(A) [redacted] such a restriction may also implicate activity that the Board has found to be protected under the Act. (b) (7)(A) However, despite the Acting General Counsel's position that non-solicitation provisions effective after termination do not generally restrict Section 7 rights, see (b) (7)(A) [redacted], the four-month restriction period in the

Charging Party's Restriction Agreement and the six-month restriction period in the Charging Party's stock option agreement have nevertheless lapsed since [redacted] voluntary resignation. Additionally, we have no evidence as to whether the former stock option agreements are still being maintained, since the Employer offered replacement stock option agreements to all employees, which they likely accepted due to favorable financial terms. Finally, there is no evidence that either of these non-solicitation or interference provisions have ever been invoked or enforced, that any employee has engaged in protected concerted activity, or that any employee has even considered engaging in the type of activity that may be implicated in these provisions. Therefore, it would not be a good use of Agency resources and would not effectuate the Act to litigate the maintenance of these provisions for the limited period they were effective during the Charging Party's employment.

Accordingly, the Region should dismiss the entire charge, absent withdrawal. Please contact us with any questions or concerns.

(b) (6), (b) (7)(C)
Division of Advice
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