

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

# Advice Memorandum

DATE: February 26, 2003

TO : Gary T. Kendellen, Regional Director  
J. Michael Lightner, Regional Attorney  
Edward Peterson, Assistant to the Regional Director  
Region 22

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

SUBJECT: East Coast Mechanical Contractors 512-5024-0100  
Case 22-CA-25324 512-5024-3900  
512-5024-9900

This case was submitted for advice as to whether the Employer violated Section 8(a)(1) of the Act by installing GPS vehicle-tracking units in the trucks of two of its employees during a union organizing campaign.

We agree with Region that the Employer violated Section 8(a)(1) of the Act, as the GPS units tend to interfere directly with the employees' Section 7 activity, as well as subjecting their work to greater scrutiny, without a legitimate business justification.

### **FACTS**

East Coast Mechanical Contractors (the Employer) is a non-union HVAC contractor with eight company trucks operated by individual mechanics. The employees are permitted to take the trucks home at the end of their workday. During the workday, employees communicate with supervisors by using cell phones. On-call employees can also be contacted by pagers.

On June 18, 2001, Dean Feasel began working for the Employer. On June 22, 2001, Feasel informed the Employer that he was an organizer for Local 9, United Association of Plumbers & Pipefitters (the Union) and that he intended to organize the Employer's employees. That day, the Employer terminated Feasel's employment. On February 26, 2002,<sup>1</sup> complaint issued in Case 22-CA-24904, alleging that the Employer violated Section 8(a)(3) of the Act by discharging

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<sup>1</sup> All dates hereinafter are in 2002, unless otherwise noted.

Feasel. Hearing was initially scheduled for April 23, but was postponed to June 18 at the Region's request.<sup>2</sup>

On March 19, the Employer received an unsolicited sales call from Fleetboss, a vendor of GPS vehicle-tracking units. These units provide constant information as to the location of an equipped vehicle. On March 25 and April 1, the Employer received follow-up sales calls from Fleetboss. The Employer did not purchase any units at this time.

On May 17, the Employer contacted the Region and requested a further postponement of the hearing in Case 22-CA-24904, stating that it was not prepared to go to hearing at that time. The Region agreed to postpone the hearing until July 15.

On May 29, the Employer contacted Fleetboss and arranged for a sales presentation, which was made on June 3.

On July 15, the Employer entered into a settlement agreement of Case 22-CA-24904, providing for Feasel's reinstatement, backpay, and appropriate notice posting. That same day, the Employer requested pricing details from Fleetboss for installation of GPS vehicle-tracking units in its trucks.

On July 19, the Employer installed a GPS unit in one of its trucks; on July 24, the Employer installed a unit in another one of its trucks. These two trucks, the only trucks so equipped, were assigned to Feasel, upon his reinstatement on July 25, and to Clark Norris, a former member of the Union.<sup>3</sup> Feasel and Norris are the only two of the Employer's ten employees with any Union affiliation.

On August 5, the Union filed the charge in the instant case, alleging that the Employer violated Section 8(a)(3) by discriminatorily assigning Feasel to a truck with a GPS vehicle-tracking unit.

The Employer asserts that it installed the GPS units in only two of its eight vehicles as a trial to determine whether the improved tracking of its vehicles when making service calls justified the additional expense of installing the units. The Employer has provided no

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<sup>2</sup> The initial postponement of the hearing occurred on April 4.

<sup>3</sup> Norris' previous Union affiliation was noted on his application.

evidence in support of this assertion. In contrast, the Employer told Feasel that the units would be installed in all eight trucks, and the Employer initially told Fleetboss that it wanted to install units in all of the trucks, but later said it could not because of unexplained financial reasons. In addition, while the Employer told a former supervisor that it installed the units because it believed that employees were performing unauthorized repair work on their own while on company time, the Employer now admits that it has no suspicions of any wrongdoing by any of its employees and did not base its decision to install the units on any such basis. There is no evidence that employees have used the trucks improperly. Finally, the Employer asserts that it was only a coincidence that the trucks were assigned to Feasel and Norris, the only two employees with Union affiliation.

The Region has determined to issue an 8(a)(3) complaint over the assignment of the GPS-equipped trucks to Feasel and Norris, and has not submitted that issue to the Division of Advice. The only issue submitted for advice is whether the complaint should include an independent 8(a)(1) allegation as to the installation of the GPS units.

#### **ACTION**

We agree with Region that the Employer violated Section 8(a)(1) of the Act by installing the GPS units in Feasel and Norris' trucks, as the devices tend to interfere directly with the employees' Section 7 activity, as well as subjecting their work to greater scrutiny, without a legitimate business justification.

It is well established that increased employer surveillance of employees does not violate the Act if instituted for, and justified by, legitimate employer concerns, even where such increased surveillance occurs during a union organizing drive.<sup>4</sup> In contrast, where such increased surveillance, or the impression of increased surveillance, is not justified by legitimate business concerns and company officials "do something out of the ordinary" by increasing surveillance of employees during an organizing drive, the employer violates Section 8(a)(1).<sup>5</sup>

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<sup>4</sup> See, e.g., Lechmere, Inc., 295 NLRB 92, 99-100 (1989), enfd. 914 F.2d 313 (1st Cir. 1990), rev'd. on other grounds 502 U.S. 527 (1992) (installation of rooftop security cameras, as in employer's other stores, lawful).

<sup>5</sup> Parsippany Hotel Management Co., 319 NLRB 114, 126 (1995), enfd. 99 F.3d 413 (D.C. Cir. 1996). See also, e.g., Labor

In the instant case, we agree with the Region that the installation of the GPS vehicle-tracking units tended to interfere with Feasel and Norris in the exercise of their Section 7 rights. These units allow the Employer to directly surveil and interfere with any organizing activities undertaken by the employees as they constantly track the employees' movements, even during non-working time. The Employer can therefore determine whether Feasel or Norris go to a common location, or make home visits to other employees, at any time the employees are permitted to use the company trucks, including during breaks or on the way to or from work. Moreover, the installation of the GPS units subjects these employees to greater scrutiny of their work than did the previous cell phone and pager system, by constantly monitoring the employees' movements. This increased surveillance and impression of increased surveillance during a union organizing campaign thus violates Section 8(a)(1) unless the Employer had a legitimate business justification for installing the GPS units in Feasel and Norris' trucks.

We further agree with the Region that the Employer has failed to offer any legitimate business justification. The Employer asserts that it installed the GPS units on only two of its eight vehicles as a trial to determine whether the improved tracking of its vehicles when making service calls justified the additional expense of installing the units, but has provided no evidence in support of this assertion. Moreover, this assertion is contradicted by the Employer's shifting explanations for the decision, telling Feasel that the units would be installed in all eight trucks, and initially telling Fleetboss that it wanted to install the units in all of the trucks, but later saying that it couldn't because of unexplained financial reasons. Significantly, while the Employer told a former supervisor that it installed the units because it believed that employees were performing unauthorized repair work on their own while on company time, the Employer now admits that it has no suspicions of any wrongdoing by any of its employees and did not base its decision to install the units on any such basis; there is no evidence that employees have used the trucks improperly.

Finally, any argument for a legitimate business justification that might be made even in the face of the Employer's shifting and unsupported claims is clearly belied by the Employer's discriminatory selection of the only two employees with Union affiliation for the increased

surveillance, for which the Region has already determined to issue complaint, and the timing of the installation of the GPS units. Thus, after waiting more than two months after being contacted by Fleetboss, the Employer arranged a sales presentation less than two weeks after it requested a postponement of the unfair labor practice hearing over Feasel's termination because the Employer said it was not prepared to go to hearing. The Employer requested pricing details from Fleetboss on the very day it entered into the settlement agreement in Case 22-CA-24904, providing for Feasel's reinstatement, and installed the GPS units by the time Feasel returned to work ten days later. Under these circumstances, the most reasonable explanation for the Employer's decision is that it realized that it would have to re-employ Feasel, and it wanted to be able to monitor his and Norris' movements. Therefore, we agree with the Region that the Employer violated Section 8(a)(1) by installing the GPS units in Feasel and Norris' trucks.

Accordingly, the Region should issue complaint, absent settlement, alleging an independent 8(a)(1) violation in addition to the 8(a)(3) allegation already determined by the Region.

B.J.K.