

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

Advice Memorandum

DATE: April 4, 2003

TO : Elizabeth Kinney, Regional Director
Harvey Roth, Regional Attorney
Gail Moran, Assistant to the Regional Director
Region 13

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

SUBJECT: Tidy International
Case 13-CA-40773-1

This Section 8(a)(3) case was submitted for advice as to whether the Employer unlawfully terminated employee Munoz for asserting that he should be paid the wage rate under a contract the Employer had with one union, when the Employer assigned Munoz to a job which, in fact, came under the coverage of a contract the Employer had with another union. We agree that complaint should issue, absent settlement, because Munoz reasonably and honestly asserted that he should continue to be paid at the same wage rate.

Briefly, the Employer, a janitorial service, has contracts with two unions: one with SEIU for work at existing buildings, providing for an hourly wage rate of \$12.50 within the city and \$8.00 for suburban buildings; and one with Laborers for work at buildings under construction, providing for an hourly wage rate of \$16.80. During the first seven months employee Munoz worked for the Employer, he worked at existing suburban buildings and was paid \$8.00 per hour. When he began working at a construction jobsite in September 2002, he signed a Laborers' dues checkoff card and was told by Laborers' business agent Gomez that he would be paid \$16.80 an hour. Until December, Munoz was paid at that rate except for 5 hours when he was paid \$12.50 an hour for working at an existing city building, about which he complained to Gomez.

In late December 2002, Munoz was reassigned from the construction site to an existing suburban building. He informed Laborers agent Gomez of the jobsite switch and a reduction in pay to \$8.00 an hour. In that telephone conversation and in a later meeting, Gomez told Munoz he would take care of the matter. Gomez exchanged telephone messages with the Employer. On January 10, 2003, Employer supervisor Hernandez told Munoz he wanted to reach an agreement and offered Munoz \$10.00 an hour, a rate not

contained in any contract. In a meeting with Hernandez on January 13, Munoz told Hernandez that he was supposed to be making \$16.80 an hour per the contract. Hernandez responded that he was going to be nice and pay Munoz \$10.00 an hour, but that Munoz should not tell anyone of the arrangement. Munoz told Hernandez to speak to his union representative.

On January 13, Hernandez attempted to call Laborers agent Gomez, but instead spoke with Laborers business manager Masters. Masters stated that it was unfair that Munoz had been taken off the construction job and given an \$8.00 an hour job, when another worker had taken Munoz' place on the construction site cleaning crew. Hernandez stated that the Employer would do what they were going to do. The next day, Hernandez told Munoz that the Employer did not have any work under the Laborers' contract, that another worker was taking Munoz' place on the jobsite, and took Employer property from Munoz. Munoz has not worked for the Employer since.

We agree that Munoz was terminated for the protected and concerted activity of complaining to the Union that he was taken off of the construction site cleaning crew and having his pay reduced on the new job. Accordingly, complaint should issue, absent settlement.

In NLRB v. City Disposal Systems, 465 U.S. 822 (1984), the Supreme Court reaffirmed the doctrine set forth in Interboro Contractors, Inc., 157 NLRB 1295, 1298, fn. 7 (1966), enfd. 388 F.2d 495 (2nd Cir. 1967), in holding that an employee is engaged in protected concerted activity when he takes an action or makes a statement reasonably directed toward the enforcement of a collectively bargained right. The employee need not be correct in his interpretation and application of the contract. Thus, the Supreme Court stated in City Disposal, 465 U.S. at 840, that:

The rationale of the Interboro doctrine compels the conclusion that an honest and reasonable invocation of collectively bargained right constitutes concerted activity, regardless of whether the employee turns out to have been correct in his belief that his right was violated.

Here, Munoz obviously believed that once he had signed a Laborers' card and had begun to be paid at that contractual wage rate, he should continue to be paid at that rate, as evidenced by his complaints to Laborers' agent Gomez concerning both the 5 hours' work at the \$12.50 rate as well as the December reassignment to the \$8.00

jobsite. The reasonableness of that belief was reinforced both by the Employer's attempt to "settle" the matter by offering Munoz \$10.00 an hour, more than the applicable SEIU contractual rate, as well as by the Laborers' complaints to the Employer about the job reassignment and the applicable rate. Crediting Munoz' version of events, there is no evidence that the Employer explained to Munoz that the new jobsite was covered by the SEIU contractual rate, not the Laborers contractual rate. Also implicit in Munoz' complaint was that he should not have been taken off of the construction site cleaning crew. In fact, this is how the complaint was presented to the Employer by the Union. In these circumstances, we conclude that Munoz was terminated for the protected concerted activity of complaining to the Union that he was removed from his job and had his pay reduced.

B.J.K.