

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

Advice Memorandum

DATE: March 31, 2009

TO : Michael Josserand, Regional Director
Region 27

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

SUBJECT: Headwaters Resources, Inc.
Case 27-CA-20922

506-2017-3300
524-0387-2300
512-5030-4060

This case was submitted for advice on the issues of whether: (1) a meeting conducted by Union organizers on the Employer's Delta job site constituted protected activity; and (2) the Employer's interrogation of employees regarding the meeting, and the subsequent suspension and termination of five employees based on the interrogations, violated the Act.

We conclude that permitting Union organizers on the Employer's Delta job site to conduct a meeting with employees was not protected activity, and therefore the Employer's interrogation of the employees, and the resulting suspension and termination of the employees, did not violate the Act.

FACTS

Headwaters Resources, Inc. (the Employer) is a Utah corporation with a principle place of business in South Jordan, Utah. Among other services provided nationwide, the Employer performs fly ash removal and disposal services on behalf of its customer, Intermountain Power Services Corporation (Intermountain), on site at the Intermountain facility located in Delta, Utah.

To gain access to the Delta site, employees, vendors, and other personnel must enter through one of three gates or "Posts" which are secured by security guards.¹ Employees

¹ Intermountain's security services are provided by another subcontractor - Securitas Security Services, USA.

of Intermountain and the Employer are directed to utilize Post 4, otherwise known as the Main Gate, which is also designated as the general visitor entrance. Post 3 is designated as the Delivery Gate and is used primarily in connection with heavy equipment, contractor vehicles, and large deliveries.² Certain vehicles entering the site are listed on an "Open Authorization" list and given free access for deliveries. Although these vehicles do not require authorization to enter the site, the officer at the post nevertheless contacts a company representative to advise that a delivery vehicle is on its way. All other visitors must be authorized before being permitted entry onto the site. Visitors associated with the Employer must be authorized by its Operations Manager, Rod Hansen. If Hansen is not available authorization must be obtained from Intermountain personnel.

In March 2008,³ the Employer's production employees became interested in obtaining union representation. As a result, they contacted the Operating Engineers, Local 3 (the Union), and arranged to meet with organizers Paul Lundell and Gerald Searle at Intermountain's Delta facility.

On April 16, Lundell and Searle drove to Delta from Salt Lake City. As they approached the facility, they spoke by cell phone with one of the Employer's employees who instructed them to drive to Post 3, the designated Delivery Gate. Upon their arrival, Searle advised the security guard that he and Lundell were there to meet with the Employer's employees. The guard then telephoned the Employer's job site, spoke with someone who authorized entry, logged the organizers in at 1:30p.m., and provided them with visitor passes. An employee then drove to the gate and escorted the organizers to the Employer's jobsite. Hansen was not on site that day. Although it is not clear who actually gave the authorization, the guard wrote "Hansen" on the security log.

Lundell and Searle held an informational meeting with six of the seven production employees in the "load out" area - an area customarily used for breaks. The meeting

² A third gate is used primarily for walk-in personnel during plant overhaul projects.

³ All dates are in 2008.

was scheduled to be held during the change between the morning and afternoon shifts.⁴ At the end of the meeting, Lundell and Searle received a signed authorization card from each of the six employees. They were then escorted back to the lot where they had parked their car, at which point they drove to Post 3 and returned their visitor passes. The security log shows that the organizers exited the site at 3:27p.m.

Although the Union sought to obtain recognition of the employees based on having obtained a majority of authorization cards, the Employer refused to grant it. As a result, the Union filed a representation petition on April 21 and won an election on May 30 by a vote of five to two. Three days later, Steve Williams, one of the unit employees, informed Hansen that Union organizers had held a meeting on site and that he had previously lied to Hansen when Hansen had asked him about meeting with Union officials. Based on the limited information that Williams provided, Hansen decided to conduct an investigation. At the outset, he obtained access to the security gate logs which indicated that on April 16 two men had been authorized to enter the site to meet with the Employer's representatives. The logs further indicated that Hansen was the individual who had authorized their entry, notwithstanding the fact that he had been away on business that day. Based on this information, Hansen informed several of the Employer's managers that Union officials had previously accessed the site without proper authorization. They, in turn, decided to inform Intermountain. They also decided to further investigate the incident by conducting individual interviews with each unit employee.

On June 23, Curtis Brown, the Employer's in-house counsel, and Barbara Green, a human resources manager, drove to the Delta facility to conduct the interviews. Before being questioned, each employee was asked to sign a statement indicating that the interviews were being conducted only to investigate an allegation of unauthorized access by certain Union officials on the property of its customer, Intermountain. The statement also indicated that the Employer was not interested in finding out whether the employee being interviewed, or any other employee, was for

⁴ The morning shift was from 6:00a.m. - 4:30p.m. and the afternoon shift was from 2:00p.m. - 10:30p.m.

or against the Union and that employees "[would] not be asked any questions about that."

Brown and Green first interviewed Steve Williams, who told them every detail of the Union meeting except who escorted the Union representatives to and from the Employer's jobsite. Brown and Green questioned the other employees - Sam Baker, Cody Lake, Casie Stanworth, and Bryan Viers - only as to whether they had authorized any visitors to access the site on April 16 or if they knew who had.⁵ Each employee answered "no" to the questions.

Following the interviews conducted on June 23, Brown and Green concluded that several of the employees were not being truthful or were failing to cooperate. They decided to conduct a second set of interviews to give the employees an opportunity to provide "truthful" information regarding the April 16 incident. On June 26, Brown and Green returned to the Delta facility, accompanied by Gary England, the Employer's Vice President. England conducted the second set of interviews and asked employees whether they had authorized anyone to enter the site, whether they knew who had, and whether they knew who had escorted the visitors while they were on site that day. The employees again offered no information. At the end of their interviews, England informed Baker, Gallardo, Stanworth, and Viers that they were being indefinitely suspended pending the conclusion of the investigation based on the Employer's belief that they were not being truthful and not cooperating in the investigation.

Because Kirk Alldredge had been vacationing during the June interviews, Brown and Green returned to Delta on July 7 to meet with him. During that interview, Alldredge acknowledged that two visitors had gained access to the site on April 16 but stated that he could not recall who authorized the visitors to enter the site.⁶ Brown then advised Alldredge that since he had been the acting supervisor on April 16, he was responsible for permitting

⁵ Kirk Alldredge and Dan Gallardo were not available for the June 23 interviews.

⁶ The Region's investigation revealed that Alldredge was likely the employee who authorized entry onto the site.

the visitors to enter the site without authorization, and he was discharged.

Based on its investigation, the Employer determined that the Union organizers had entered the site with the assistance and/or knowledge of several of its employees and that this constituted a serious breach of security. The Employer further determined that several of the employees had deliberately refused to cooperate in the investigation of this breach and had lied during the investigatory interviews. Accordingly, by letter dated July 7, the Employer discharged Baker, Gallardo, Stanworth, and Viers for violating company policy, including failing to cooperate with a formal investigation.

The Region's investigation disclosed that, while Intermountain viewed the matter as a concern, they considered the security company, Securitas, primarily responsible. The focus of their concern was the authorized entry of the visitors through the wrong gate. Securitas, in turn, issued a verbal warning to the guard who permitted the Union representatives to enter the gate.

ACTION

We conclude that permitting Union organizers on the Employer's Delta job site to conduct a meeting with employees was not protected activity, both because the employees should not have brought the organizers onto the secured property without proper authorization and, further, the meeting occurred during working time. We further conclude that, because the employees' actions were not protected, the interrogation, subsequent suspension, and termination of the employees did not violate the Act. Accordingly, these allegations of the charge should be dismissed, absent withdrawal.

I. Permitting Union organizers on the secured job site during working time to conduct a meeting with employees was not protected activity.

The Union contends that the employees were discharged in retaliation for engaging in the protected, concerted activity of attending a Union meeting. The Employer does not dispute the concerted nature of the Union meeting. Rather, it contends that permitting Union organizers on the property to conduct an employee meeting was not protected

because the Union organizers were not authorized to access the Delta site but were only able to do so by virtue of a security breach.

We conclude, first, that the employee actions were not protected because the employees should not have brought the Union organizers onto the secured property without proper authorization. The Employer operates its business on the premises of an electric generating plant that is protected by a security company. Employees, vendors and other personnel must follow specific procedures to gain access to the site, including entering through the appropriate gate. All individuals employed by the Employer, as well as those having business with the Employer, are instructed to utilize the Main Gate. After reporting to that gate, the Employer's visitors must be authorized by Rod Hansen before accessing the site. In the event that Hansen is absent or unavailable, individuals may not enter the site without Intermountain's approval.

On April 16, the date the employees arranged to meet with the Union organizers, Hansen was away on business. As the organizers neared the facility, they spoke by cell phone with one of the employees who directed them to access the site through Post 3, the Delivery Gate, rather than through Post 4, the Main Gate for general visitors. Upon their arrival, the security guard called the Employer's jobsite and spoke with an employee to obtain authorization for the organizers to enter the site. Although the Union organizers had been directed to the wrong gate, and were not on the "Open Authorization" list for entry to that gate, and Hansen was not present to authorize them to enter, the employee nevertheless authorized the entry. In these circumstances, where the Union organizers would not have been permitted entry to the Intermountain facility without Hansen's authorization or an Intermountain official in his absence, and were only able to do so because the employees improperly granted that authorization, the employee actions were not protected activity.⁷

⁷ The fact that Intermountain did not attribute responsibility for the breach to the Employer is immaterial. There is no question that the employees bore some responsibility for the breach and it was not unreasonable for the Employer to be concerned.

Second, in addition to the security breach, the employees' attendance at the Union meeting was not protected because it occurred during working time. There is no question that attending a union meeting constitutes protected concerted activity under the Act.⁸ However, the Board has long held that missing work without permission to participate in Section 7 activities is not protected. For example, in Gulf Coast Oil Company,⁹ instead of reporting for work on time, employees attended a union meeting to learn about the benefits of union organization. They signed authorization cards at the meeting and reported for work three hours late. In upholding the termination of three of the employees, the Board found that the employees' activity was not protected but rather amounted to an "unwarranted usurpation of company time . . . to engage in a sort of union activity customarily done during nonworking time."¹⁰

In Michigan Lumber Fabricators, Inc.,¹¹ employees stopped working in the middle of a shift and left the premises to attend a union meeting addressing the employer's latest offer regarding the settlement of a grievance. Applying its decision in Gulf Coast Oil, the Board found that the meeting was unprotected because it involved activities that are normally conducted during non-working hours. It therefore concluded that the employer's termination of the employee who initiated the work stoppage was not unlawful.¹² More recently, in Quantum Electric, the Board, in affirming the ALJ, reiterated its position that leaving work early without permission, even to participate in Section 7 activity, is not protected.¹³

⁸ See Quantum Electric, Inc., 341 NLRB 1270, 1279 (2004).

⁹ 97 NLRB 1513 (1945).

¹⁰ Id. at 1516.

¹¹ 111 NLRB 579 (1955).

¹² Id. at 580.

¹³ Quantum Electric, 341 NLRB at 1279. Cf. Northeast Beverage Corp., 349 NLRB 1166 (2007) (Board finds employees' unauthorized absence from work to attend union/employer meeting protected because it was an urgent attempt to

In this case, although the Union organizers apparently understood that the meeting was scheduled for the "shift change," it is clear that the meeting occurred during working time, as the April 16 security log reflects the Union organizers were at the Employer's job site for almost two hours.¹⁴ Although it is not clear how much time employees were allowed for breaks, it is reasonable to assume that the meeting significantly intruded into the Employer's working time. Indeed, it is undisputed that all of the employees who attended the meeting, with the exception of Gallardo, were "on the clock" at the time. The fact that the employees did not leave the Employer's job site to participate in the meeting is of no consequence. Rather, their attendance at the meeting during the period in which they should have been working amounted to an "unwarranted usurpation of company time."

Accordingly, for the foregoing reasons, we conclude that the employee actions surrounding the meeting were not protected.

II. The Employer's interrogation of employees regarding their unprotected activity, and the subsequent suspension and termination of five employees based on the interrogations, did not violate the Act.

The Employer additionally contends that the employees were not disciplined in retaliation for attending the Union meeting but were lawfully suspended and discharged because they lied and failed to cooperate during its investigation into the April 16 security breach.

It is well established that employees are under no obligation to respond to questions that seek to uncover

"influence their employer" and, unlike a union meeting, there was no "customary alternative"), denied enf. in rel. part, 554 F.3d 133 (D.C. Cir. January 30, 2009); Empire Steel Manufacturing, 234 NLRB 530, 532 (1978) (union meeting called at the end of a lunch shift did not lose its protection where it only interrupted the employer's production time for about 10 minutes).

¹⁴ Estimates of the length of the meeting by the employees and Union organizers range from half an hour to two and a half hours.

their protected activities and that lying, misleading, or remaining silent is not a lawful basis for imposing discipline.¹⁵ Conversely, it is not unlawful to discipline employees for failing to cooperate in an investigation into matters unrelated to their Section 7 activities.¹⁶

As discussed above, the employees were not engaged in protected activity when they met with Union organizers at the Employer's job site to discuss representation. Moreover, the evidence reflects that the Employer initiated the investigation to discover who allowed the organizers onto the property when it legitimately suspected a security breach. Indeed, before the interviews, the Employer gave employees a written statement assuring them that the Employer was only interested in discovering who authorized the Union organizers to enter the facility, and the scope of the questions was related solely to that purpose. When the employees refused to cooperate with the investigation, they were suspended and thereafter discharged.

¹⁵ See St. Louis Car Company, 108 NLRB 1523, 1524-25 (1954) (employer unlawfully discharged employee for being untruthful when asked about her union activities; employee's single untruth related not to employer's business but to personal rights guaranteed employees by statute which employee desired not to disclose); Stoner Lumber, Inc., 187 NLRB 923, 930 (1971) (employees had the right to remain silent to protect the secrecy of their Section 7 activities where employer interrogated them in an attempt to discover the identity of the individual responsible for attempting to organize a union); United States Auto Association, 340 NLRB 784, 785 (2003) (employee's entry into employer's offices after hours to distribute fliers constituted protected activity and employer was not permitted to interrogate her about it).

¹⁶ See ATC/Forsythe & Associates, Inc., 341 NLRB 501 (2004) (employee was lawfully discharged because he refused to cooperate with the employer's investigation into his efforts to obtain its business and not because he engaged in protected activities); W.R. Grace Company, 240 NLRB 813, 820-21 (1979) (employer did not violate the Act by discharging employee who refused to cooperate in investigation of improper disclosure of confidential salary information).

In these circumstances, we conclude that the employees were discharged because they refused to cooperate with the Employer's investigation into the security breach and not because the Employer sought to uncover information regarding their protected activities. Further, because the employees' conduct was unprotected, they enjoyed no right to refuse to cooperate with the Employer's investigation.

As a result, we conclude that the interrogation and resulting suspensions and discharges did not violate the Act.¹⁷ These allegations of the charge should therefore be dismissed, absent withdrawal.

B.J.K.

¹⁷ We also considered whether the Employer's investigation was motivated by union animus rather than a legitimate security concern, in which case the interrogations and resulting discipline would have been unlawful regardless of the protected nature of the underlying activity. See Supershuttle of Orange County, Inc., 339 NLRB 1 (2003) and Kidde, Inc., 294 NLRB 840 n.3 (1989). However, we concluded that the evidence is insufficient to establish that the Employer's motive in questioning the employees was unlawful, and that it would have done the same thing regardless of the purpose of the meeting.