

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

Advice Memorandum

DATE: September 18, 2009

TO : Ralph R. Tremain, Regional Director
Region 14

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice 512-7550-0133
512-7550-6000

SUBJECT: The Pantagraph 524-8387-0300
Case 33-CA-15798

This case was submitted for advice as to whether the Employer violated Section 8(a)(1) and (3) of the Act when it disciplined employees who had attended a Union meeting for coming to work late without permission. We conclude that the Employer did not violate the Act, as the evidence does not establish that the employees were engaged in a strike or were otherwise withholding their labor to protest employment terms and conditions.

FACTS

Local 568-M, Graphic Communications Conference, International Brotherhood of Teamsters (the Union) has long represented a unit of 10 newspaper pressroom employees of The Pantagraph (the Employer). The parties' most recent collective-bargaining agreement expired February 10, 2008.¹

On October 31, the Employer announced to employees that it would be suspending its contributions to employees' profit sharing plans and reducing its matching contributions to their retirement plans. The Union immediately objected to the Employer's decision, demanded the rescission of the announced changes, and requested bargaining. On December 1, the Employer unilaterally implemented the changes.²

The Union scheduled a meeting to discuss the unilateral changes with pressroom employees on December 10 at 8:00 p.m., at a union hall away from the Employer's facility. Pressroom employees were scheduled to begin their shift at 8:30 p.m. Thus, any employee who attended

¹ All dates are in 2008, unless otherwise noted.

² The Region has determined that these unilateral changes, as well as other unilateral changes in employees' retirement and health insurance plans, violated Section 8(a)(5). These allegations were not submitted for advice.

the meeting and was scheduled to work that night would likely arrive late to work.³ Prior to December 10, no one gave notice to the Employer that any employees would be arriving late to work.

At 8:26 p.m. on December 10, the Union sent a fax to the Employer's business office notifying the Employer of the meeting:

This letter serves as notice of the unions [sic] plan to meet with our members to discuss the Publishers decision to change our 401K.

The meeting will be held on Wednesday December 10, 2008. We will begin the meeting at 8:00 PM, unless weather is bad. In that case, we will allow for extra travel time and may begin later.

Thank you for your attention to this matter.

At 8:30 p.m., the Union sent the same fax message to the Employer's bargaining representative at the motel where he was staying. Five pressroom employees scheduled to work that night attended the meeting and failed to report for work on time.⁴

At 11:26 p.m. that same night, the Union sent a second fax to the Employer's business office when the meeting ended:

This letter serves as notice that the unions plan to meeting [sic] with our members to discuss the Publishers decision to change our 401K has ended.

After meeting the members have decided to immediately and unconditionally return to work.

Thank you for your attention to this matter.

³ It appears that Union officials believed that employees' missing work to attend the Union meeting would be protected against Employer discipline, regardless of whether it was intended as a protest or not.

⁴ Another pressroom employee scheduled to work that night briefly attended the meeting before leaving to go to work on time. One other pressroom employee also attended the meeting, but was not scheduled to work that night.

At 11:28 p.m., the Union sent the same fax to the interjected that the unions Employer's bargaining representative at his motel.

At approximately 11:30 p.m., the five pressroom employees who had been scheduled to work at 8:30 p.m. but who attended the meeting instead arrived at the pressroom and began to work. At the end of the shift, the Employer met with each of these employees and discussed their tardiness. On December 12, the Employer suspended the five employees for one day without pay for arriving at work late on December 10 without permission.⁵

On April 30, 2009, the Union filed the charge in the instant case alleging, inter alia, that the Employer violated Section 8(a)(1) and (3) of the Act by suspending the five employees. The Region's investigation has adduced no evidence demonstrating that the Employer disparately enforced its attendance policies or that the Employer's asserted reason for the suspensions was pretextual.

ACTION

We conclude that the Employer did not violate the Act, as the evidence does not establish that the employees were engaged in a strike or were otherwise withholding their labor to protest employment terms or conditions.

It is well established that employees are not entitled to engage in union or protected activities on work time in violation of employer attendance policies or other rules, unless they are engaged in strikes or other concerted work stoppages to protest terms and conditions of employment.⁶

⁵ Neither the employee who briefly attended the meeting before arriving at work on time nor the other pressroom employee who attended the meeting but was not scheduled to work that night was disciplined.

⁶ See, e.g., GK Trucking Corporation, 262 NLRB 570, 572 (1982); Quantum Electric, Inc., 341 NLRB 1270, 1279 (2004) ("[l]eaving work early is not protected activity even when the object of leaving is to engage in protected activity," where employees are not withholding work to protest working conditions). See also, e.g., Applebee's Neighborhood Bar & Grill, Case 30-CA-17444, Advice Memorandum dated October 17, 2006 ("[s]imply walking of the job, unlike a protected protest, is not protected activity"). Compare, e.g., NLRB v. Washington Aluminum Co., 370 U.S. 9, 15 (1962) (employer unlawfully discharged employees who "walked out together in the hope that this action might spotlight their complaint

For example, in Terri Lee, Inc.,⁷ the Board found that an employer lawfully discharged employees who took a day off from work to meet with a union about a reduction in their wages. In Terri Lee, the employer was aware of the reason for the employees' absence beforehand and had denied permission for the absence, telling one employee that she would have to go on her own time.⁸ The Board emphasized that the employees "merely intended to take the day off to obtain information from the [u]nion, without any purpose thereby of protesting the cut in piece rates or of seeking any concession from the [r]espondents."⁹ Similarly, in GK Trucking, supra, the Board found that an employer lawfully discharged two employees for being absent from work in order to attend a union meeting at which they hoped to inquire about possible union representation.¹⁰ The employer was aware of the reason for the employees' absence soon after the start of their shift, but nonetheless lawfully discharged the employees.¹¹ In Gulf Coast Oil Company,¹² the Board found that an employer lawfully discharged employees who failed to report for work one day and instead went to a union hall to discuss membership and organization, where the employees had no intent thereby to protest their employment terms and conditions. The Board noted the absence of independent evidence of antiunion motivation, and stated that the employees' activity "amounted to an unwarranted usurpation of company time by the employees to engage in a sort of union activity customarily done during nonworking time."¹³

More recently, in Northeast Beverage Corp.,¹⁴ the Board reiterated these principles while finding that the employer

and bring about some improvement in what they considered to be the 'miserable' conditions of their employment").

⁷ 107 NLRB 560 (1953).

⁸ Id. at 562.

⁹ Ibid.

¹⁰ 262 NLRB at 572-573

¹¹ Id. at 571.

¹² 97 NLRB 1513 (1952).

¹³ Id. at 1516.

¹⁴ 349 NLRB 1166 (2007), enf. denied in pertinent part, 554 F.3d 133 (D.C. Cir. 2009).

there violated the Act by disciplining delivery drivers who left work for three hours to attend a bargaining session between their union and the employer about a future employer merger. They wanted "to demonstrate their anxiety about these matters, and to seek answers to their questions" that they had unsuccessfully sought to obtain from the employer and the union previously. The Board reaffirmed but distinguished Terri Lee, GK Trucking, and Gulf Coast Oil.¹⁵ The Board reasoned that, unlike in those cases, where employees engaged in union activity "customarily" done on nonwork time, the employees in Northeast Beverage had no "customary" way to ascertain the progress of negotiations, they were "seeking information directly from the [employer]," they were attempting to influence the employer to retain them after the merger, and the employer's "delivery requirements were highly flexible, permitting drivers to make deliveries hours after scheduled delivery times and even a day later."¹⁶ Thus, while it found a violation in those particular circumstances, the Board noted the continuing vitality of the earlier cases cited above.¹⁷

In the instant case, the Region's investigation has adduced no evidence demonstrating disparate treatment by the Employer in the enforcement of its attendance policies or indicating that the Employer's asserted reason for the suspensions was pretextual. And it is undisputed that the employees did not request or receive permission to be late for work on December 10. Therefore, the Employer's imposition of one-day suspensions for tardiness was lawful, unless the employees arrived late to work to protest the Employer's policies.

We conclude that the evidence does not establish that the employees' tardiness itself constituted a protest. The Union had already objected to the unilateral changes to the Employer, and neither the Union nor any of the employees gave any notice to the Employer that the employees' attendance at the Union meeting on December 10 was itself meant to pressure the Employer to rescind its 401(k) changes or alter any other policy. Significantly, there is nothing indicating such an intent in either the fax message

¹⁵ Id. at 1167.

¹⁶ Id. at 1168.

¹⁷ The D.C. Circuit denied enforcement of the Board's order as to the discharges, stating that "the Board's attempts to distinguish Gulf Coast Oil and Terri Lee are unconvincing." 554 F.3d at 140.

giving notice to the Employer of the employees' absence, which merely stated the unions' plan to meet with the employees to discuss the unilateral changes, or the fax message at the end of the meeting, which announced that the meeting had ended and that the employees "have decided to immediately and unconditionally return to work." While the language in the second fax may be the type of language employees use to end a work stoppage, the language, in and of itself, is insufficient to establish a protest intent. Indeed, Union officials believed that employees' missing work to attend the Union meeting would be protected against Employer discipline regardless of whether it was intended as a protest or not. However, as discussed above, the mere fact that the employees were absent from work together does not make their conduct a protest, or protect them against the Employer's reasonable enforcement of its attendance policies. Therefore, in the absence of evidence demonstrating that the employees intended that the meeting itself was a protest to the Employer,¹⁸ or that such an intent was communicated to the Employer, we conclude that circumstances of the instant case are governed by Terri Lee, Gulf Coast Oil, and GK Trucking, and that the Employer did not violate the Act by disciplining the employees for their tardiness.

Accordingly, the Region should dismiss the charge in the instant case, absent withdrawal.

B.J.K.

¹⁸ We recognize that at least one employee has subsequently stated that a purpose of the meeting was to protest the Employer's unilateral changes, without further explanation. In the absence of any other indicia of such an intent, however, and given the complete lack of any communication of such an intent to the Employer, we conclude that the evidence is not sufficient to demonstrate that the employees' tardiness was intended as a protest.