

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

Advice Memorandum

DATE: September 8, 2010

TO: Alan B. Reichard, Regional Director
Region 32

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice 524-8387-4700
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SUBJECT: Eagle Marine 524-8387-7400
Case 32-CA-25069

The Region submitted this Section 8(a)(1) and (3) case for advice as to whether to defer to an arbitrator's decision that the Employer terminated the Charging Party for insubordination and not because of his activity as shop steward. We conclude that the instant charge should be dismissed on the merits because the Employer lawfully discharged the Charging Party for insubordination and not based upon his protected activity.

FACTS

Eagle Marine Services, Ltd. (the Employer) is a stevedoring company in Oakland, California. The Employer has an established collective-bargaining relationship with International Longshore and Warehouse Union Local 10 (the Union), covering a unit of approximately 50 mechanics who maintain and repair its vehicles and equipment.

Charging Party Michael Dwyer began work with the Employer as a trainee in November 2005 and became a full mechanic the following year. In 2007, he started serving as shop steward for the Employer's five mechanic shops. As steward, he had a significant role in shift rotations, which occurred every ninety days. In advance of a rotation, he would solicit employees' first, second, and third choices and then assign them shifts based upon their preferences and seniority. The foreman, a non-unit employee, typically acquiesced to his assignments.

Section 10.3.1 of the parties' most recent collective-bargaining agreement, effective July 1, 2008 to July 1, 2014, contains the following provision regarding shift rotations:

The Employer reserves the right to determine which employees will perform what type of work on what shift, as well as the number of employees to be employed on a shift except that every ninety (90) days the employer shall provide the opportunity to rotate shifts by seniority (so

long as the employee electing to so rotate is qualified for the work to be performed.) ... The shift rotation schedule will be maintained by the foreman.

In addition, Section 14.1 establishes a Joint Job Evaluation Committee (JJEC), comprised of two management representatives and two Union representatives, "empowered to act in the areas of job evaluating, leave of absence, and any other area mutually agreed by the parties[.]"

In October 2009, the JJEC agreed that the Employer would no longer follow seniority for shift rotations because of the Employer's need for Class "A" registered mechanics, who are more experienced employees, on the second shift. In protest, the Charging Party refused thereafter to perform his shop steward duties regarding shift rotations. The Charging Party also voiced his opposition to this change at Union meetings held in January 2010.¹ In February, he lost an election to continue to serve as shop steward and was elected alternate steward instead.

On March 29, the foreman met with the new steward, the Charging Party, and the JJEC Union representatives. The foreman said that the Employer was going to need employees with more skill on the second shift. The steward, a Class "A" registered mechanic, was concerned that he was going to be assigned to the second shift even though he was a senior employee. The Charging Party indicated that no one was going to make him go on the second shift and, in his view, violate the contract. At the end of the meeting, the foreman assured the steward and the Charging Party that both of them could stay on the first shift.

Three days later, the schedule for the new rotation was posted, listing the Charging Party on the second shift as of April 5. The Charging Party objected on the grounds that the assignment was not based on seniority as provided by the contract, violated a two-week notice requirement, and did not coordinate with the start of a pay period. He met again with the foreman, steward, and JJEC Union representatives the following day to discuss his objections. A new schedule was posted on April 5 again assigning the Charging Party to the second shift. On April 7, he filed a grievance over this assignment.

The Charging Party and his Union representatives met with the foreman to discuss his grievance two days later. The foreman asserted that he could assign the Charging Party wherever he wanted under Section 10.3.1 of the contract, as

¹ All dates are in 2010 unless otherwise noted.

well as Section 9.32. Section 9.32 sets forth the foreman's duties, which include "[d]etermin[ing] allocation of manpower needs to meet terminal operating requirements" within the constraints set by management. The business agent later convinced the foreman to postpone the shift rotation for a week to give employees proper notice.

The Charging Party, on his own initiative, thereafter set up a meeting with the Employer's manager of labor relations. At that meeting, held April 13, the Employer's labor-relations manager agreed to leave the Charging Party's first-shift assignment in place until his grievance was resolved. He then wrote a letter to the foreman instructing him to allow the Charging Party to remain on the first shift until "his complaint has been heard in accordance with the grievance procedure as contained in section 10.7 of the agreement." Section 10.7 provides for binding arbitration of contractual disputes that cannot be resolved by the parties.

On Tuesday, April 20, the JJEC met in an attempt to resolve the Charging Party's grievance. The Employer's maintenance and labor-relations managers were present, as well as various Union representatives. The Charging Party reiterated that he wanted the shift assignments to be based on seniority and employee preferences as the contract required and stated that he had not been assigned his first, second, or third choice. The maintenance manager asked the Charging Party why he would not go to the second shift. The Charging Party said that he had a lot of personal problems with working the second shift but refused to state what those were. He asserted that his personal reasons were irrelevant to the contractual requirements. The meeting broke up without an agreement. After that, there was a disruption on the shop floor. Shortly thereafter, the foreman called the Union representatives and the Charging Party to his office. He told the Charging Party that the Employer's position was that he could take the remainder of the week off with pay, in order to prepare for working the second shift, and then report to the second shift on Saturday, April 24 or go back to the hiring hall as a non-steady dispatched employee. In effect, the Employer was giving the Charging Party an ultimatum -- report to duty on the second shift or face discharge. The Charging Party asked that this be put in writing. Instead, at the end of his shift, the Employer handed him a letter terminating him for violation of Section 10.6 of the contract based on his insubordination and failure to work as directed by the foreman. Under Section 10.6, the Employer expressly retains the right to terminate employees for, among other things, "insubordination" and "refusal to work as directed."

The Charging Party filed the instant charge on April 22, alleging that the Employer discriminated against him because of

his Union and protected, concerted activities. The Union filed a grievance over his discharge on April 26. Arbitrator Terry Lane held a hearing on the grievance on May 20. The Region deferred the instant charge pending the arbitration.

On July 2, the Arbitrator issued his decision holding that the Charging Party was properly discharged. He found that the Employer had the right under Section 10.3.1 to determine which employees would perform what type of work on each shift and had not given up this right. He also found that the Employer had a legitimate reason for assigning the Charging Party to the second shift because of his experience as a qualified mechanic on certain equipment. He considered and rejected the Union's argument that the Employer singled out the Charging Party by assigning him to the second shift and then discharging him for exerting his right not to rotate to the second shift because he was an aggressive advocate when he served as shop steward. He noted that there were other employees who were not Union activists who were assigned to the second shift even though they also did not choose that shift. He also noted that the Charging Party's refusal to accept the assignment to the second shift and the disruption on the shop floor following the April 20 JJEC meeting supported the Employer's position. The Arbitrator concluded that the Charging Party was terminated because he was insubordinate and refused to work as directed.

ACTION

We conclude that the Region should dismiss the instant charge, absent withdrawal, because the Employer lawfully discharged the Charging Party for his insubordination and not because he engaged in protected activity.

The Board has long held that employees faced with an order that they believe violates the collective-bargaining agreement must "obey now [and] grieve later" absent an urgent health or safety issue.² In Jos. Schlitz Brewing Company, on facts very similar to those here, the Board adopted the Administrative Law Judge's decision that an employer did not unlawfully discharge a shop steward who refused to work an assigned shift.³ The

² See, e.g., Mead Corp., 311 NLRB 509, 513 (2000) (finding no violation where employer threatened to discipline steward for advising employee to disobey management's directives); Specialized Distribution Management, 318 NLRB 158, 161 (1995) (deferring to arbitrator's decision that employees' failure to follow manager's order constituted insubordination).

³ See 240 NLRB 710, 713-14 (1978).

Judge found that the steward's action was "an open and deliberate defiance of supervision" and his discharge was not motivated by antiunion considerations.⁴

Here, although the Charging Party filed a grievance over his assignment to the second shift, he did not "obey now." Instead, he repeatedly and adamantly made it clear that he would not work the assigned shift. During the April 20 meetings with the Employer regarding his grievance, the Charging Party did not waive on his refusal to work the second shift or indicate that he would reconsider his position. The Employer therefore reasonably interpreted his demand that the Employer put its April 20 offer in writing as a refusal to report to work on the second shift on April 24 as ordered.

Moreover, there is no evidence that the Employer singled out the Charging Party for assignment to the second shift or for discipline because of his activities as steward. The Employer made a convincing case at the arbitration that it had a legitimate need for his skills on the second shift. Further, the Employer met with the Charging Party, even outside the usual grievance procedure, in an effort to understand his opposition to working the second shift. Despite those efforts, the Charging Party absolutely refused to consider working the second shift and refused to provide any reason why he was unable to do so.

On these facts, we conclude that the Employer lawfully discharged the Charging Party. Accordingly, the Region should dismiss the instant charge, absent withdrawal.

B.J.K.

⁴ Id. at 713. See also GATX Logistics, 330 NLRB 481, 489-90 (2000) (dismissing Section 8(a)(3) allegation where active Union supporter was discharged for refusing to drive an assigned run without giving the employer any reason for rejecting the assignment).