

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

Advice Memorandum

DATE: November 14, 2008

TO : James J. McDermott
Regional Director, Region 31

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

SUBJECT: Rite Aid 530-8072-2800
Case 31-CA-28760 530-8072-6300

This case was submitted for advice as to whether the Employer violated Section 8(a)(1) and (5) of the Act by refusing to discharge bargaining unit employees in compliance with the parties' union security agreement, after a decertification petition had been filed under Dana Corp.¹ We agree with the Region that the Employer violated Section 8(a)(1) and (5) of the Act by refusing to discharge the employees.

FACTS

In November 2007, United Food and Commercial Workers, Local 1167 (the Union) presented Rite Aid (the Employer) with Union authorization cards signed by a majority of a bargaining unit of employees at the Employer's store in Victorville, California. In December 2007, pursuant to a long-standing after-acquired store agreement, the Employer recognized the Union, and the Victorville employees became part of a multi-location collective bargaining unit covered by the parties' Retail Drug Agreement, which was effective through July 13, 2008.² The Retail Drug Agreement contained a union security clause.

On January 22, employee Mathew Silcox filed a decertification petition (Case 31-RD-1578). This petition was dismissed by the Regional Director on February 15, based on his conclusions that it was not timely filed,

¹ 351 NLRB No. 28 (2007).

² All dates hereinafter are in 2008, unless otherwise noted.

given the term of the Retail Drug Agreement, and that the petitioned-for unit was inappropriate, as it only included the Victorville employees and not the other multi-location unit employees. On March 10, the Employer filed a request for review. The Employer's request for review is currently pending before the Board.³

On March 10, the Union requested that the Employer discharge Silcox and another employee, Alejandra Castillo, for their failure to comply with their dues obligations under the Retail Drug Agreement's union security clause.⁴ By letter dated May 9, the Employer notified the Union that the employees would not be discharged until the decertification petition in Case 31-RD-1578 was reviewed by the Board. Since that time, Silcox has voluntarily ceased his employment with the Employer, and Castillo has indicated that she would comply with her dues obligation, if permitted to do so now.

On May 20, the Union filed the charge in the instant case, alleging that the Employer violated Sections 8(a)(1) and (5) of the Act by refusing to comply with the union security clause of the parties' collective bargaining agreement.

³ Dana notices were posted, upon the Employer's request, from February 25 through April 10. On March 20, Silcox filed another decertification petition (Case 31-RD-1584). That petition was also dismissed by the Regional Director, and no request for review was filed.

⁴ Although these issues were not raised by any party, we note [*FOIA Exemptions 2 and 5*] that the Union has met its Philadelphia Sheraton obligation to notify the employees of their dues obligations prior to seeking the employees' discharges, its General Motors obligation to notify the employees of their right to be and remain non-members, and its Beck obligation to notify the employees of their right to object to paying the Union's nonrepresentational expenses and to provide the employees with sufficient information to allow them to intelligently decide whether to make a Beck objection. Philadelphia Sheraton Corp., 136 NLRB 888, 896 (1962), *enfd.* 320 F.2d 254 (3d Cir. 1963); NLRB v. General Motors Corp., 373 US 734 (1963); Communications Workers v. Beck, 487 U.S. 735 (1988); California Saw & Knife, 320 NLRB 224, 233 (1995).

ACTION

We agree with the Region that the Employer violated Section 8(a)(1) and (5) of the Act by refusing to discharge the employees for their failure to meet their union security obligations.

It is well established that an employer violates Section 8(a)(1) and (5) of the Act by refusing to discharge employees whose discharges are sought pursuant to an effective union security agreement.⁵ Moreover, the Board has made it clear that the mere pendency of a decertification petition does not relieve an employer of its obligation to abide by a collective-bargaining agreement.⁶ This long-standing rule was not altered by the Board's decision in Dana, in which the Board modified the recognition-bar and contract-bar doctrines to allow a Board representation election to go forward during a 45-day window period after card-based recognition, notwithstanding the voluntary recognition or any collective bargaining agreement executed during the window period. Indeed, in Dana, the Board expressly stated that a decertification petition filed during the window period would not "permit the employer to withdraw from bargaining or from executing a contract with the incumbent union."⁷

In the instant case, the Employer does not dispute the lawfulness of its recognition of the Union, the application of the parties' after-acquired store agreement and Retail Drug Agreement to the Victorville employees, the effectiveness of the Retail Drug Agreement's union security clause, or that the Union lawfully requested that the Employer no longer employ the two employees until they complied with their dues obligations under the Retail Drug

⁵ See, e.g., St. John's Mercy Medical Center, 344 NLRB 391 (2005), and cases cited therein ("a union-security provision is as much a condition of employment as wages, and an employer can no more alter legally the union-security provision by unilateral action than it could, for example make unilaterally a mid-term contract modification by reducing contract wage rates").

⁶ Dresser Industries, 264 NLRB 1088, 1088-1089 (1982).

⁷ 351 NLRB No. 28, slip op. at 9.

Agreement's union security clause. Rather, the Employer's sole asserted basis for refusing to comply with the Union's request is its belief that the Victorville employees should not be required to meet their union security obligations until a decertification election is held or the Board declines to review the Regional Director's dismissal of the decertification petition in Case 31-RD-1578. As noted above, however, an employer may not refuse to comply with a valid union security clause without violating Section 8(a)(1) and (5), and the pendency of a decertification petition does not relieve an employer of its obligation to abide by a collective-bargaining agreement. Thus, "an employer may not unilaterally modify or cancel a collective-bargaining agreement on the ground that, during its pendency, the question of future employee representation is about to be decided through the medium of the machinery established by the Act to resolve such questions."⁸ Therefore, we agree with the Region that the Employer violated Section 8(a)(1) and (5) of the Act by refusing to discharge employees who had failed to meet their union security obligations.

Ordinarily, the settlement of such allegations would include a requirement that the Employer discharge the employees at issue. Here, however, Silcox has voluntarily ceased his employment with the Employer, and Castillo has indicated that she would comply with her dues obligation if permitted to do so now. In the particular circumstances of this case, therefore, if Castillo meets her dues obligation in full, we would not require that a settlement of this case include her discharge.

Accordingly, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(1) and (5) of the Act.

B.J.K.

⁸ Tinton Falls Conva Center, 301 NLRB 937, 939 (1991), quoting VM Industries, 291 NLRB 5, 6 (1988).