

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

Advice Memorandum

DATE: January 24, 2011

TO: James Small, Regional Director
Region 21

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

SUBJECT: EMI, Inc. 506-2017-8300
Case 21-CA-38846 506-4033-4900
512-7587
775-8740

The Region submitted this case for advice as to whether to defer to an arbitrator's decision that upheld the discharge of two union stewards for conduct that was arguably protected concerted activity.

We conclude that the stewards were engaged in protected concerted activity, but the Union had clearly and unmistakably waived their right to engage in that activity, and therefore, the discharges did not violate the Act.

FACTS

Background

Environmental Management, Inc. ("Employer") is a subcontractor of Satellite Services, Inc. ("SSI"), which is a contractor for the Air Force at March Air Force Base in Moreno Valley, California. SSI provides facility management services and, since 2005, has contracted with the Employer to provide supplies and fuel at the base.

In early 2008, the Machinists District Lodge 725 ("Union") initiated an organizing campaign to represent the Employer's employees. Steward #1 and Steward #2 were instrumental in that organizing campaign, and also attempted to organize SSI's employees. The unit employees elected Steward #2 as chief steward and Steward #1 as shop steward. As aggressive proponents for the Union, the two Stewards engaged in heated exchanges with supervisory personnel of the Employer, SSI, and the Air Force. On a few of these occasions, the Employer, SSI, and/or the Air Force threatened the Stewards with termination or other reprisals, interrogated them about their union and/or other protected activities, and committed miscellaneous other alleged violations of Section 8(a)(1).¹ The Board certified

¹ Section 10(b) of the Act would bar most of these allegations. SSI supervisors, rather than the Employer,

the Union as the representative of the Employer's employees on May 15, 2008.² The parties bargained for a first contract, with the Union Business Representative and International Representative, and the Stewards, serving on the Union's bargaining committee.

Bargaining History

During bargaining, the Union negotiated wage provisions with the Employer. The Stewards were not satisfied with the wage provisions under the collective-bargaining agreement because they believed that they should be reclassified under different job titles and paid more money under the Service Contract Act.³ The parties did agree, as a compromise, to change Steward #1's classification to a higher classification and rate of pay, but the reclassification was not as high as he had hoped.⁴ The Union representatives, including the Stewards, decided to recommend to Union members that the members ratify the collective-bargaining agreement. The parties ratified the agreement on October 27, with effective dates of October 27 through January 31, 2012. It contains a grievance-arbitration clause.

The collective-bargaining agreement contains the following provision:

Article 4, Section 8: Stewards are not permitted to discuss grievances or any other Union or Company matter with anyone other than representatives of the Company or representatives

were responsible for several of the violations that 10(b) would not bar.

² All dates are in 2008 until otherwise indicated.

³ The Service Contract Act (SCA) provides wage protection for "employees of contractors and subcontractors furnishing services to or performing maintenance services for Federal Agencies." S.Rep. No. 798, 89th Cong., 1st Sess. (1965). Under SCA Section 2(a)(1), the minimum wages to be paid by a service contractor are established in one of two ways, either through a wage determination issued by the DOL, or through a valid collective-bargaining agreement. See 29 CFR § 4.50.

⁴ Steward #1 and the Union Business Representative claim that after agreeing to this "deal," Steward #1 said he did not want to hold up the contract negotiations and that he would continue to pursue what he wanted by other means. The Employer, however, claims that Steward #1 made no such comment.

of the Union, except the Steward may always be permitted to discuss an individual grievance with the grievant(s) involved. Violation of this clause is a serious breach of Union-Company cooperation.

During negotiations, the Union had rejected the Employer's proposal to insert the following clause before the final period: "and may subject a steward to discipline up to and including discharge."

The Stewards' Attempt at Reclassification, and Their Discharge

Almost immediately after the parties completed contract negotiations, the Stewards decided to pursue together their desired reclassifications and wage increases. They agreed to first pursue Steward #1's reclassification and raise, and then pursue Steward #2's in a similar manner. Thereafter, the Stewards obtained and completed the Department of Labor Standard Form 1444 ("SF 1444") for reclassification. The form requires signatures indicating approval from the government contractor, here SSI, and the subcontractor, here the Employer, before the contracting officer submits it to the Department of Labor. Through this form, Steward #1 requested a reclassification effective April 16, 2008, and backpay for the time he was improperly classified. He attached a memorandum to the form that the Stewards signed as "Chief Union Steward," and "Union Steward," respectively. This memorandum stated as follows:

Attached is a conformance Procedure SF 1444 form with supporting documentation. Please be advised that you have until October 31, 2008 close of business to respond whether you agree or disagree before any other legal actions are taken.

On October 29, the Stewards attempted to obtain the necessary signatures on the form. They first took the request to the March Air Force Base Contracting Officer ("Contracting Officer"). They located her in a supply closet and handed her the form there. The Contracting Officer informed the Stewards that they had to give the form to their Employer, but they refused to take it back. The Contracting Officer states that the Stewards "cornered" her in a small supply closet, forced the form upon her, and then chuckled when they left. The Stewards deny acting inappropriately in presenting the request. They state that they simply handed her the form and then refused to take it back.

Thereafter, the Stewards went to deliver the request to the SSI Project Manager. An administrative assistant informed the Stewards that the SSI Project Manager was out of his office, and she instructed them to wait in his office for him to return. A second administrative assistant later stated that she saw the Stewards place a file on the SSI Project Manager's desk. She also stated that Steward #1 then walked out of the office and stood near the front of the office door, while Steward #2 stayed in the office for a little longer, took out his cell phone, and took at least two photographs of the office and desk with his cell phone.⁵ The administrative assistant immediately reported the Stewards' conduct to her supervisor. Soon thereafter, the SSI Project Manager contacted the Employer's Project Manager stating that he was very concerned about the Stewards entering his office, placing materials on his desk, taking pictures in his office, and threatening him with legal action. By the time the Stewards arrived at the Employer's Project Manager's office, he had already learned of the Stewards' conduct from the SSI Project Manager and Contracting Officer.

On October 31, the Employer suspended the Stewards, with pay, pending an investigation into their alleged misconduct. The Employer held investigatory meetings on November 3 and 6 with Union representatives present, and then discharged the Stewards on November 21. The termination letters stated that the Stewards had violated Article 4, Section 8 of the collective-bargaining agreement, because they had gone outside of the chain of command when they pressed a package upon the Contracting Officer. Additionally, in Steward #2's termination letter, the Employer noted that he had engaged in a serious invasion of privacy by using his cell phone to take photos in the SSI Project Manager's office.

On February 20, 2009,⁶ Steward #1 filed a charge in Case 21-CA-38725, alleging that the Employer had discharged the Stewards because of their Union and/or protected concerted activities in violation of Sections 8(a)(1) and (3) of the Act. The Region deferred that matter on March 12, pursuant to Collyer Insulated Wire,⁷ because the Union had already pursued a grievance over the Stewards' termination and the parties had scheduled a hearing date.⁸

⁵ The Stewards deny that Steward #1 took a photo.

⁶ All dates hereafter are in 2009 unless otherwise indicated.

⁷ 192 NLRB 837 (1971).

On May 12, the Union filed this charge alleging that the discharges violated Section 8(a)(1) of the Act.

Arbitrator's Decision

The parties presented the Stewards' case to an arbitrator on June 12 and November 16. During the hearing, the parties presented evidence regarding Article 4, Section 8. The Union Business Representative testified that the clause was only intended to prohibit stewards from discussing grievances once a formal grievance had been filed in a matter. The Union also argued that the clause was not intended to permit the Employer to discharge a steward, as evidenced by the fact that the parties did not agree to include the clause "and may subject a steward to discipline up to and including discharge," in the provision. Rather, the Union argued the clause was only intended to give the Employer a basis to file a grievance against the Union if it discussed any grievances with an outside entity – such as SSI or Air Force personnel. On the other hand, the Employer argued that the clause was intended to prohibit stewards from discussing Union or Company matters with any outside entity, regardless of whether the matter was reduced to a formal grievance.

On April 2, 2010, the Arbitrator issued a decision finding that the Employer did not violate the collective-bargaining agreement by terminating the Stewards. The Arbitrator found that Article 4, Section 8 of the collective-bargaining agreement clearly prohibited Union stewards from discussing grievances or any other Union or Company matter with anyone other than representatives of the Employer or the Union. Although the Arbitrator agreed with the Union that the request was not a grievance, she found that the Stewards made it a Union matter by threatening legal action and signing the letter as "Chief Steward" and "Steward." Accordingly, the Arbitrator reasoned that the Stewards had violated Article 4, Section 8, and that the termination was justified.

ACTION

We conclude that the stewards were engaged in protected concerted activity, but the Union had clearly and unmistakably waived their right to engage in that activity, and therefore, the discharges did not violate the Act. The

⁸ On May 17, 2010, the Region dismissed that charge, finding that the Arbitrator's award complied with the standards for post-arbitral deferral. The Stewards appealed the Region's decision to the Office of Appeals, which is holding it in abeyance pending our determination in this matter.

Region should therefore dismiss the charge, absent withdrawal.

First, we conclude that the Stewards were engaged in protected concerted activity. There is no dispute that the Stewards were acting in concert, as they were working together to obtain a reclassification and accompanying pay raise for one of the Stewards. And normally, the failure of employees to follow a "chain of command" in reporting workplace concerns would not be a lawful basis for their discharge.⁹ Rather, the issue is whether their activity lost the protection of the Act because of the manner in which the Stewards presented the request to the Contracting Officer while she was in the supply closet, or because Steward #2 allegedly took photos in the SSI Project Manager's office.

We also conclude that the Stewards' conduct was not sufficiently egregious to remove it from the protection of the Act.¹⁰ Although the Contracting Officer asserts that they were attempting to "corner her," the Stewards assert that they were merely looking for her and that is where they happened to find her. And, other than the fact that they found her in this small space, the Contracting Officer did not report that they said or did anything in an aggressive or threatening manner. In any event, even if they had been aggressive in their attempt to give her the form and memo, there is no evidence to show that their conduct rose to the level of being "sufficiently egregious to remove it from the protection of the Act." The subject matter of the discussion — the Stewards' wages and job classification — was entirely protected in nature, and the fact that the Stewards' memo mentioned the possibility of "further legal action" could not be considered an unprotected threat, since such further legal action, in itself, would probably also be protected.

⁹ See Kinder Care Learning Centers, 299 NLRB 1171, 1171 (1990) (employer's rule requiring employees to first bring their work-related complaints to the attention of the employer's director unlawful under Section 8(a)(1) because the rule precludes employees from bringing such complaints to the attention of other persons, organizations, or agencies).

¹⁰ Kentucky River Medical Center, 355 NLRB No. 129, slip op. at 3 and 29-30 (2010); Stanford Hotel, 344 NLRB 558, 558 (2005), citing Aluminum Co. of America, 338 NLRB 20, 20 (2002). See also Consumer Power Co., 282 NLRB 130, 132 (1986).

The fact that Steward #2 may have taken photographs in the SSI Manager's office also should not remove his activity from the protection of the Act. In this respect, assuming Steward #2 did take photos, he did so to document his protected activity, i.e., submission of the forms to the proper authorities, and therefore it was intertwined with his protected activity. Moreover, taking photos of the papers on the SSI Manager's desk would not violate any of the Employer's work rules, as this was not an area of the base where cell phones, camera phones, or taking photos was restricted, and there is no evidence that Steward #2 was seeking or obtained photographs of any confidential or proprietary information. Finally, although the SSI Manager may have been upset that the Stewards were in his office, they only entered his office upon the instruction of his administrative assistant. In sum, the Employer has failed to prove that the manner in which the Stewards presented their claim caused them to lose the protection of the Act.

However, we further conclude that Article 4, Section 8 of the collective-bargaining agreement is a waiver of the Stewards' right to present their wage demand to SSI and the Contracting Officer; the Stewards' conduct violated that provision of the contract; and therefore the Employer was privileged to terminate them for violating the contract. In Metropolitan Edison Company v. NLRB, the Supreme Court held that it would "not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is 'explicitly stated.'"¹¹ The Board will interpret the parties' agreement to determine whether it contains a clear and unmistakable waiver when a contract does not specifically mention the action at issue.¹² Furthermore, the Board has held that any such waiver of statutory rights is "not to be lightly inferred."¹³ In interpreting the parties' agreement, the Board will consider: (1) the wording of the proffered sections of the agreement at issue; (2) the parties' past practices; (3) the relevant bargaining history; and (4) any

¹¹ 460 U.S. 693, 708 (1983). See also Provena St. Joseph Medical Center, 350 NLRB 808, 812 (2007).

¹² Provena St. Joseph Medical Center, 350 NLRB at 810-813 Board based its waiver conclusions on such factors as contractual language, the parties' bargaining history, and the reading of several contractual provisions "taken together").

¹³ Charles S. Wilson Memorial Hospital, 331 NLRB 1529, 1530 (2000) (quotations omitted), citing Metropolitan Edison, 460 U.S. at 708; Georgia Power Co., 325 NLRB 420, 420-21 (1998), enf'd mem. 176 F.3d 494 (11th Cir. 1999).

other provisions of the collective-bargaining agreement that may shed light on the parties' intent concerning bargaining over the change at issue.¹⁴ Although the cases cited in the preceding footnote deal with waiver of statutory bargaining rights, the Board will also apply the clear and unmistakable test in Section 8(a)(1) and (3) cases.¹⁵

Applying those factors here, we conclude that the Union clearly and unmistakably waived the Stewards' right, as stewards, to present their wage conformance request. Article 4, Section 8 is not a "general contractual provision" of the sort discussed in Metropolitan Edison.¹⁶ Rather, it contains the specific prohibition that *stewards are not permitted to discuss grievances or any other Union or Company matter with anyone other than representatives of the Company or representatives of the Union*. This language specifically addresses the Stewards' conduct here: they are stewards, and they involved third parties in their effort to obtain a wage reclassification. Although the Union argues that they were acting on behalf of themselves as employees, and not as stewards, the fact is that they used their steward titles in the memorandum they attached to the Form 1444 requesting the wage reclassification. And, regardless of whether the attempt to obtain a wage reclassification is considered a "grievance," there can be no question that it is at least "a company matter," as it involved the terms and conditions of employment that the Stewards were seeking from their Employer.

Because this was the parties' first collective-bargaining agreement, there is no relevant past practice to shed light on the waiver issue. And, we reject the Union's contention that there could be no waiver because it refused to agree to language that would allow the Employer to discharge a steward for a violation of the prohibitions of Article 4, Section 8. Though that may be true, the waiver under consideration is whether the stewards could exercise their Section 7 right to *discuss grievances or any other Union or Company matter with anyone other than representatives of the Company or representatives of the*

¹⁴ See generally American Diamond Tool, 306 NLRB 570, 570 (1992); Johnson-Bateman, 295 NLRB at 184-187.

¹⁵ See Energy Cooperative, 290 NLRB 635, 636-637 (1988) (union clearly and unmistakably waived right of sick and disabled employees to receive benefits during a strike); Engelhard Corp., 342 NLRB 46, 48 (2004).

¹⁶ 460 U.S. at 708. See, also Johnson-Bateman Co., 295 NLRB at 184; Suffolk Child Development Center, 277 NLRB 1345, 1350 (1985)

Union. Once we have determined that the contractual provision is a clear and unmistakable waiver of a statutory right, the Employer's choice of consequence for violating that provision is no longer a statutory question.

No other provisions of the collective-bargaining agreement shed light on the parties' intent. Therefore, because both the wording of Article 4, Section 8 specifically prohibits the Stewards' conduct, and there is neither bargaining history, past practice, or other contractual provisions that indicate the parties intended otherwise, we conclude that the Union clearly and unmistakably waived the Stewards' Section 7 right, to present their wage conformance request to SSI and the Contracting Officer.

Finally, we reject the claim that, under NLRB v. Magnavox Co.,¹⁷ the Union could not waive the right of the Stewards to discuss grievances, or any other Union or Employer matter, with third parties. Article 4, Section 8 would not restrict *employees* from distributing literature or speaking out against the Union. Instead, the provision restricts *stewards* from pursuing grievances, or other matters they pursue *as stewards*, outside the negotiated grievance procedures.¹⁸

Accordingly, because the Union waived the Stewards' statutory right to engage in the conduct prohibited by Article 4, Section 8 of the parties' collective-bargaining agreement, there is no merit to the claim that the Employer violated Section 8(a)(3) of the Act by discharging them. The Region should therefore dismiss the charge, absent withdrawal.

B.J.K.

¹⁷ 415 U.S. 322 (1974).

¹⁸ See NLRB v. Wilson Freight Company, 604 F.2d 712, 726-728 (1st Cir. 1979) ("We see nothing contrary to sound collective bargaining principles in a provision" restricting stewards from pursuing complaints outside contractually defined channels. "An individual employee's normal right, derived from Section 7, to complain to officials and legislators does not prevent the parties to a collective bargaining relationship from placing limits upon the powers of particular union officials in order to lessen the danger of wildcat strikes and work stoppages and smooth the process of collective bargaining."). See, also Crucible Steel Castings Co., 101 NLRB 494, 494 (1952).