

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

Advice Memorandum

DATE: December 3, 2001

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Ruth Small, Regional Attorney
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Region 26

FROM : Barry J. Kearney, Associate General Counsel
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SUBJECT: Fineberg Packing Co. 524-8351-0114
Case 26-CA-20287 625-3350-1133-1200

This Section 8(a)(1) and (3) case was submitted for advice on whether the Employer condoned a strike in breach of a no-strike clause.

FACTS

The Employer and the Union are signatory to a collective-bargaining agreement which contains a no-strike clause and a clause that guarantees unit employees 35 hours of work per week. In early February 2001,¹ the Employer asked the Union for 60 days of relief from the 35 hour guarantee. On February 13, the Union steward informed the employees that the Union had granted the Employer the relief sought.

On Wednesday, February 14, unit employees arrived at work at 6 a.m. Sometime thereafter, 35-40 employees struck, left the premises, and stood outside the plant. At about 7:45 a.m., the plant manager arrived. Employee Exum asked the plant manager about the reduction in hours. The manager said he would only speak to employees individually, and asked Exum to make the others return to work. Exum said that the employees had no problem going back to work but still wanted to resolve the reduction in hours. The plant manager said that if the employees were not going to return to work, they should leave and return the next day. The manager added that if they did not leave, he would summon the police.

The strikers returned to the plant's locker room to dress in their street clothes. The plant manager again

¹ All dates are in 2001 unless otherwise noted.

told them to leave and to return tomorrow. Exum asked whether the strikers were fired. The plant manager said no, the employees should return the next day. Exum dropped a pen on the floor. The plant manager said you might need to get your pen to fill out an application for another job. Again Exum asked whether he was fired, and again the manager said no. The manager followed the employees out, again ordered them off the premises, and then locked the gate.

Sometime between noon and 2:00 p.m., Union agents came to the plant and spoke with the plant manager. According to the manager, he told the Union both then and at a second meeting that day that the strikers had voluntarily quit their jobs. According to the Union president, the plant manager told him that he had no intention of allowing the striking employees to return.

On Thursday, February 15, almost all, if not all, of the strikers appeared at the plant at 6 a.m. Although the strikers found the gate locked, the Employer was admitting nonstrikers to the plant. At a Union meeting later that day, the Union president told the employees that they had struck in breach of the collective-bargaining agreement and would not be returning to work unless the Union could persuade the Employer to change its mind. On Friday, February 16, employees returned to the plant and received their paychecks. Attached to the paychecks were statements which said they had voluntarily quit.

ACTION

We conclude, in agreement with the Region, that the Employer unlawfully discharged the strikers because it previously condoned their unprotected strike activity when it effectively told them to return to work the following day.

Condonation can be found and is invocable only where there is clear and convincing evidence that the employer has completely forgiven the guilty employee for his misconduct -- and agrees to a resumption of the company-employee relationship as though no misconduct had occurred. The doctrine prohibits an employer from misleadingly agreeing to return its employees to work and then taking disciplinary action for something apparently forgiven.²

² Packers Hide Association v. NLRB, 360 F.2d 59, 62 (8th Cir. 1966). See also United Parcel Service, 301 NLRB 1142,

The Board has found condonation in circumstances similar to those present in this case.

In United Parcel Service, above, when a driver phoned his dispatcher and said that heavy snow made it impossible to continue deliveries, the dispatcher told the driver to return. The driver returned and continued to refuse to drive. The dispatcher then told the driver to punch out and go home sick even though both the employee and the dispatcher clearly knew that the driver was not sick. The next day, the employer issued the driver a warning letter for having refused to make deliveries the previous day. The Board found the warning unlawful because the employer had condoned the driver's conduct, i.e., the driver's "failure to complete his work was acquiesced in" by the dispatcher. 301 NLRB at 1144.

In Asbestos Removal,³ employees struck on a Wednesday because the employer had failed to install safety equipment. The employer's foreman told the strikers that health officials had shut the job down, there would be a meeting on Thursday and there probably would be work on Friday. The foreman also promised to telephone the striking employees. The employer instead replaced the striking employees claiming they had quit. With Board approval, the ALJ found that the employer "plainly condoned" the employees' strike when it stated that there would probably be work on Friday and that the employer would later get in touch with them.⁴

On the other hand, the Board has found no condonation in other circumstances which are analogous to those present

1144 n.10 (1991); General Electric Co., 292 NLRB 843, 843-45 (1989); General Clothing Corp., 285 NLRB 596, 599 (1987), enfd. mem. 892 F.2d 79 (6th Cir. 1988).

³ 293 NLRB 352, 356-57 (1989), enfd. mem. 849 F.2d 1172 (6th Cir. 1989).

⁴ See also Community Motor Bus Co., 180 NLRB 677, n.1 (1970), enf. denied 439 F.2d 965 (4th Cir. 1971): "[A]ssurances by Respondent's superintendent to the strikers, a few days after the strike began, that he wanted them back at work operated as a condonation of any unprotected activity in which the strikers may have engaged on the first day of the strike."

in this case. In Mid-State, Inc.,⁵ an unfair labor practice striker who had engaged in strike misconduct offered to return to work. The employer responded that it had already replaced the striker; it would be unfair if the employer let someone go to make room for him; it would consult with its lawyer and get back to the striker. The employer never got back and never offered the striker reemployment. The ALJ, adopted by the Board, found no condonation in the employer's stating that it wanted to consult with its lawyer. Condonation also was not found merely because the employer referred to only the striker's replacement, and not to the striker's own misconduct, as a reason to refuse to immediately reinstate the striker.

In Southern Florida Hotel & Motel Association,⁶ the ALJ found that the employer condoned strike misconduct by three employees because the parties' strike settlement agreement required the employer to reinstate all strikers. The Board disagreed, noting that the parties had never discussed the strike misconduct when they negotiated the settlement agreement. The Board held that the language of the settlement agreement, standing by itself, was insufficient to demonstrate that the employer had agreed to forgive.

We conclude that the instant case closely parallels the cases above finding condonation based upon employer invitations to return to work. The Employer here told the strikers that they were not discharged and also asked them to leave and return the next day. The employees clearly understood that they were to return the next day to work because they showed up at 6 a.m. and reported for work.⁷ Having unconditionally forgiven the misconduct, there is no basis for viewing the Employer's subsequent communication to the Union that it decided to discharge the strikers as evidence that it had not condoned the misconduct as a matter of law.

The argument for finding condonation is arguably stronger here than in Asbestos Removal where the employer

⁵ 331 NLRB No. 185, slip op. at 21-23 (2000).

⁶ 245 NLRB 561, 563-564 (1979).

⁷ [FOIA Exemptions 6, 7(c) and (d)

only said there would "probably" be work on Friday. Here, in direct response to employee questions, the Employer specifically affirmed that the employees were not fired and also in effect invited them back to work. This case also parallels the circumstances in United Parcel Service where the dispatcher sent the employee home "sick," knowing he was not sick, in effect stating that the employee was not discharged. The Employer here sent the strikers home explicitly stating that they were not discharged. Additionally, as in Community Motor Bus, the Employer told the strikers that it wanted them back.

The above cases finding no condonation are distinguishable. In Mid-State, the employer merely failed to mention the striker's misconduct and otherwise sought to forego his reinstatement until the employer could consult its lawyer. In contrast, the Employer here stated that the strikers were not fired and invited them back to work. In Florida Hotel, the parties did not at all discuss the strike misconduct. Here, the issue under discussion was whether the strikers would return to work as the Employer requested.

For the foregoing reasons, the Region should issue complaint, absent settlement, alleging that the Employer unlawfully discharged the strikers.⁸

B.J.K.

⁸ Since the Employer has refused to waive the time limits in the contractual grievance-arbitration procedure, deferral to that process is inappropriate under Collyer Insulated Wire, 192 NLRB 837 (1991).