

National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

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U.S. Postal Service, Cases 12-CA-14384(P); 14421(P)

240-3367-0125, 240-3367-0825-3300

These Section 8(a)(5) cases were submitted for advice as to whether Collyer⁽¹⁾ deferral of an allegation that the Employer bypassed the Union in adjusting a grievance with an employee is appropriate, while holding in abeyance closely related allegations that the Employer failed to furnish information relevant to that grievance.⁽²⁾

We conclude that Collyer deferral is not appropriate herein. After the Union filed a grievance over the Employer's decision to discharge an employee and requested information regarding that decision, the Employer denied the grievance at a Step 1 meeting. Subsequently, the Union and the employee rejected the Employer's proposed settlement of the grievance, and the Union filed the Section 8(a)(5) charge alleging a refusal to furnish information. Two days later, the Employer approached the employee, while no Union representative was present, and again offered the previously rejected settlement, which the employee accepted without conferring with the Union. The Union then appealed the grievance to Step 2 and filed the "direct dealing" charge.

The basis for the Employer's contention that the latter charge should be deferred under Collyer apparently is the following language from the grievance-arbitration procedure of the parties' collective-bargaining agreement:

... In all grievances appealed from Step 1 or filed at Step 2, the grievant shall be represented in Step 2 for all purposes by a Steward or a Union representative who shall have authority to settle or withdraw the grievance as a result of discussions or compromise in this Step...

And, since the "direct dealing" charge essentially alleges that the Employer adjusted the discharge grievance without affording the Union the opportunity to be present, as required by the second proviso to Section 9(a), the Employer takes the position that an arbitrator can decide, consistent with the Act, that the above contract language waives the Union's Section 9(a) rights.

However, it is well established that waivers of statutory rights must be "clear and unmistakable."⁽³⁾ Any interpretation of the above contract language purporting to establish a "clear and unmistakable" waiver would, in our view, be frivolous. A waiver of the Union's right to be present at grievance adjustments prior to Step 2 cannot be "lightly inferred" by the contract's specific inclusion of the Union's Section 9(a) rights at Step 2.⁽⁴⁾ Therefore, the Employer's "claim of contract privilege is untenable and raises no genuine issue of interpretation," and "Board policy designed to facilitate private dispute settlement machinery does not countenance abdication of its jurisdiction to remedy unfair labor practices simply because the party charged has interposed an unfounded contractual defense...."⁽⁵⁾ Accordingly, Collyer deferral is not warranted.

Since Collyer deferral of the "direct dealing" charge is not appropriate, the Region should issue a Section 8(a)(5) complaint, absent settlement, consistent with its determination that both charges herein are meritorious.

R.E.A.

¹ Collyer Insulated Wire, 192 NLRB 837 (1971); United Technologies Corp., 268 NLRB 957 (1984).

² The Region has determined that these allegations have merit, and is prepared to issue complaint, absent settlement, if deferral is not considered appropriate.

³ See *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983).

⁴ *Id.*

⁵ *Ram Construction Co.*, 228 NLRB 769, 774, n.18 (1977). See also *Peerless Pressed Metal Corporation*, 198 NLRB 561, n. 1 (1972).