

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

DATE: January 13, 2016

TO: George Velastegui, Regional Director
Region 32

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

SUBJECT: DynCorp International
Case 32-CA-157275

512-5012-6787

512-5012-6787-3300

This case was submitted for advice as to whether the Employer violated the Act by notifying employees, pursuant to an express directive from the United States Navy, that they are not allowed to wear Union stickers or signs, or display them in personal vehicles, at their workplace on the grounds of a Naval base. We conclude that, while a violation of the Act arguably could be established in the instant case, it would not effectuate the purposes and policies of the Act to issue complaint in these circumstances.

FACTS

Since March 2015,¹ DynCorp International (the Employer) has provided aircraft maintenance services to the United States Navy at Fallon Naval Air Station, Nevada. The Employer's employees at Fallon are represented by IUE-CWA Industrial Division of the Communication Workers of America, AFL-CIO-CLC, Local 89119 (the Union). These employees park their personal vehicles in an outdoor parking lot on the Naval base, near the hangar facility in which they work.

In March and early April, soon after the Employer assumed operations from a predecessor employer, the Union filed numerous grievances alleging that the Employer was not abiding by the terms of the Union's collective-bargaining agreement with the predecessor employer. During this period, the employees regularly wore fluorescent green stickers bearing messages such as: "We Want A Fair Contract" and "Honor Our Contract." The Union's chief steward also posted these stickers on several Employer-provided Union bulletin boards located throughout the facility. In early April, the Employer and the Union entered into a bridge agreement, effective until January 2016.

¹ All dates hereinafter are 2015, unless otherwise indicated.

In early June, when employees and the Union became dissatisfied with the Employer's bargaining over certain unresolved staffing issues, and with the pace in which the Employer was processing the pending grievances, employees resumed wearing the stickers, as well as placing stickers on government-owned property such as doors, door frames, and windows. In mid-June, an Employer supervisor asked the Union's chief steward not put any stickers on anything other than the employees themselves, and to tell other employees to do the same. The Union chief steward says he had no problem with these instructions, because he agreed with the Employer that it was important not to upset the Navy. The chief steward posted a memo on the Union bulletin boards thanking employees for wearing the stickers, and asking employees not to place stickers on government property. When the chief steward placed his memo on the bulletin boards, he also removed any Union stickers he saw on government property.

In July, employees began to also display, in the windows of their parked personal vehicles, large fluorescent green poster board signs bearing the same slogans that were on the stickers, as well as other slogans such as "Shame On DynCorp" and "United We Stand." These signs apparently were visible to Navy aviators walking in the area of the parking lot.

On the afternoon of July 23, various Employer representatives met with Union's chief steward and other stewards. The Employer representatives stated that the Navy, relying on a naval regulation, was considering towing away the employee vehicles that displayed signs and revoking or pulling the "common access cards" which employees need in order to gain access to the base and to the government computers necessary for their work. The Employer representatives told the Union stewards that the Navy had complained that the stickers and signs were a form of illegal picketing and protesting on the base. Several Navy personnel had apparently complained that employees were more concerned with their labor dispute than their work, and expressed their belief that this created a safety issue. The Employer representatives also said that the Navy was concerned that the signs might distract pilots as they were flying over the base just prior to landing. The Employer representatives said that the Employer was waiting to receive further formal instructions from the Navy.

The Employer representatives repeatedly stated at the July 23 meeting that the Employer did not have any problem with the stickers or signs, and that it was entirely the Navy's concern. The Employer's site supervisor told the stewards that Employer had been ignoring the stickers and signs, but that the Navy was raising the issue. None of the Employer representatives ever threatened that the Employer would impose any discipline or other potential consequences on employees for continuing to display stickers or signs.

During the July 23 meeting, the Employer representatives informed stewards that the Navy representative who had been raising these issues with the Employer was the Navy's contracting officer. The Union's chief steward asked for the Employer's permission to meet with the contracting officer about the stickers and signs, and the Employer representatives expressly gave the Union permission for such a meeting.

Later on July 23, soon after meeting with the Employer representatives, the Union's chief steward and one other steward met with the Navy's contracting officer. The contracting officer said that he was waiting for some official "JAG memo" and further instructions from an unnamed Navy attorney in Maryland. The chief steward said that he did not believe that Navy regulations applied to the employees of a subcontractor, but the contracting officer disagreed. The chief steward assured the contracting officer that the Union was not looking to be adversarial or antagonistic and that he would tell employees that the stickers and signs needed to be removed. The stewards and the contracting officer agreed that the Union would have until Monday July 27 to remove all Union stickers and signs, which the chief steward relayed to the Employer.

Also on July 23, the Navy staff judge advocate issued a memorandum to the Employer instructing the Employer to prohibit employees from displaying stickers or signs supporting union activities, including on their persons and personal vehicles. The Navy staff judge advocate's memorandum went on to say that employees who failed to comply with this order could be barred from the base or have their personal vehicles impounded.

On July 24, Employer representatives again met with Union stewards, and passed on the Navy staff judge advocate's memorandum. In this meeting, the Employer representatives repeated their assurances that the Employer did not have any problem with the stickers or signs, and that this issue was being addressed solely because of the Navy's concerns. After the meeting, the Union's chief steward posted a copy of the Navy staff judge advocate's memo on the Union bulletins boards. He also personally informed as many employees as he could contact that they had to remove their stickers and signs, and that the stickers and signs were not worth losing one's job over.

On July 28, the Employer's principal contract administrator sent a letter to the Navy contracting officer stating that the Employer "took action to stop the referenced improper displays and activities," and that the Employer "understands and concurs with the Commanding Officer's concerns and will continue to act to prevent this type of activity in the future." According to the contract administrator, the action referred to in her letter referred solely to the fact that the Employer had provided the Union with a copy of the Navy staff judge advocate's memorandum.

It is undisputed that the Employer has never expressly threatened to itself impose any discipline or other consequences on employees for displaying stickers or signs. The Union asserts, however, that Employer officials have instructed employees on at least three occasions to remove stickers they were wearing, albeit without threatening any specific consequences to the employees. The Region has not investigated these assertions.

ACTION

We conclude that, while a violation of the Act arguably could be established in the instant case, it would not effectuate the purposes and policies of the Act to issue complaint in these circumstances.

It is well established that an employee's wearing or displaying of union-related buttons, stickers, or signs while at work is generally protected activity under the Act, in the absence of special circumstances.² The Board has stated that such special circumstances may include maintenance of production and discipline, safety, preventing discord and violence between competing groups of employees, and preventing alienation of customers.³ As to the last of these, however, the Board has stated that a "mere possibility" of customer offense does not outweigh employees' right to wear union buttons or stickers,⁴ and that "[t]he lawfulness of the exercise by employees of their rights under the Act, including union button wearing, does not turn upon the pleasure or displeasure of an employer's customers."⁵ On the other hand, special circumstances may be established where an employer demonstrates a legitimate interest in preserving customer relationships,⁶ or preventing harm to the

² See, e.g., *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801-803 (1945); *Systems West LLC*, 342 NLRB 851, 856 (2004).

³ See, e.g., *Systems West LLC*, 342 NLRB at 856; *Eckert Fire Protection*, 332 NLRB 198, 202 (2000).

⁴ *Escanaba Paper Co.*, 314 NLRB 732, 733 (1994), *enforced* 73 F.3d 74 (6th Cir. 1996) (no special circumstances found where employees with limited contact with customers wore buttons that said "Flex this" and "No Scab").

⁵ *Howard Johnson Motor Lodge*, 261 NLRB 866, 868 fn. 6 (1982), *enforced* 702 F.2d 1 (1st Cir. 1983) (no special circumstances where employees wore union buttons in guest/customer areas of motel).

⁶ See, e.g., *Pathmark Stores*, 342 NLRB 378, 379 (2004) (employer had legitimate interest in protecting its "customer relationship" where "Don't Cheat About the

employer's business.⁷ The burden is on the employer to prove the existence of special circumstances that would justify a restriction.⁸

In the instant case, when the Employer distributed the Navy staff judge advocate's memorandum to the Union and if, as the Union asserts, the Employer instructed employees to remove stickers they were wearing, the Employer arguably interfered with employees' Section 7 rights in violation of Section 8(a)(1) of the Act.⁹ In this regard, it may be argued that the Employer's inherent authority to impose its own disciplinary action necessarily imbued any instructions it may have made to employees to remove the stickers with a threat of Employer sanctions for continuing to wear or display the Union stickers or signs.¹⁰

Moreover, it is at least arguable that no special circumstances have been demonstrated here that would privilege the Employer to prohibit the stickers and signs. Thus, as discussed above, while the Board has stated that special circumstances may be established where an employer demonstrates a legitimate interest in preserving customer relationships, the Board has been reluctant to find special circumstances based on customers' attitudes towards protected conduct, and

Meat!" slogan would reasonably threaten to create concern among respondent's customers about being cheated).

⁷ See, e.g., *Noah's New York Bagels, Inc.*, 324 NLRB 266, 275 (1997) (General Counsel did not allege that ban on T-shirt stating that "[i]f its not union, its not Kosher" was unlawful, where selling Kosher products was an important element of the employer's business).

⁸ See *W San Diego*, 348 NLRB 372, 372 (2006).

⁹ It is significant, however, that it was the Navy, not the Employer, that prohibited the employees from displaying union stickers or signs, and the Employer even stated repeatedly that it did not have any problem with the stickers or signs and was only following the Navy's directive. It is also significant that, when the Union's chief steward asked for the Employer's permission to meet with the contracting officer to make its case about the stickers and signs, the Employer representatives expressly gave the Union permission for such a meeting.

¹⁰ We note that, as there is no allegation that the Employer has imposed any employee discipline or discharge here, cases that find liability where an employer discharges an employee at the direction of another, such as *Dews Construction Corp.*, 231 NLRB 182, 182 n.4 (1977), *enforced mem.* 578 F.2d 1374 (3d Cir. 1978), are inapplicable.

has placed the burden of demonstrating the existence of special circumstances on the employer.¹¹

Assuming the Employer violated the Act, however, we conclude that it would not effectuate the purposes and policies of the Act to issue complaint. Thus, even if the Employer is found to have violated the Act, and is ordered to cease and desist instructing employees to comply with the Navy's prohibitions, those prohibitions would still remain in place, and employees would still face the significant sanctions threatened in the Navy staff judge advocate's memorandum. And, the Navy has made clear that it will enforce those prohibitions with or without the Employer's assistance. Therefore, we conclude that it would not effectuate the purposes and policies of the Act to issue complaint in the instant case.

Accordingly, the Region should dismiss the charge in the instant case, absent withdrawal.

/s/
B.J.K.

We note, however, that the Navy is the Employer's sole customer at this site and there is more than a "mere possibility" of customer offense here; the Navy has stated clearly that it will not tolerate this conduct and that the Employer must prohibit it.