UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

ALSTATE MAINTENANCE LLC

And **Case No. 29–CA–117101**

TREVOR GREENIDGE, an Individual

Colleen Breslin Esq., for the
General Counsel.
Ian B. Bogaty Esq. and
Kathryn J. Barry Esq., for the
Respondent.
Brent Garren Esq., for Local 32B/J
SEIU.

Decision

Statement of the Case

RAYMOND P. GREEN, Administrative Law Judge. I heard this case on various dates in Brooklyn, New York. The charge in this proceeding was filed on November 13, 2013, and the complaint was issued on November 21, 2014. In substance, the complaint alleged that on or about July 19, 2013, the Respondent discharged Trevor Greenidge because of his concerted activity of complaining about the amount of tips received.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

Findings and Conclusions

I. Jurisdiction

The parties stipulated that Alstate Maintenance, LLC, located in Rockville Centre, New York, is engaged in providing ground services at JFK Airport. They also stipulated that during the past calendar year, it purchased and received at its Rockville Center facility goods and supplies valued in excess of $50,000 directly from points outside the State of New York and performed services valued in excess of $50,000 for Lufthansa Airlines, Air France and Aero Mexico, which are themselves directly engaged in interstate commerce.

The question here is whether Alstate as a contractor performing services for airlines, is exempt from the NLRA's jurisdiction and should be covered by the Railway Labor Act. Section 2(2) of the National Labor Relations Act excludes any person subject to the RLA.

This case is related to Case 29–CB–103994. That case, although involving a different set of transactions, involved the same employer. And for the same reasons set forth in that

case, JD(NY)–12–16, I find that Alstate is not covered by the National Mediation Board, but is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. The alleged unfair labor practice

Alstate has a contract to perform services for an airline consortium at terminal 1 located at JFK airport. Among the airlines using this terminal is Lufthansa. Alstate's employees are classified as skycaps, wheelchair agents, baggage handlers, passenger service agents, boarding gate agents, and CTX baggage handlers.

Trevor Greenidge, at the time of his discharge, was employed as a skycap. In this job, he earned the minimum wage for tipped employees and the remainder of his income consisted of passenger gratuities. And although the minimum wage for skycaps is lower than for others, it appears that this is a desired job because tips more than compensate for the lower wage rate.[1]

During the evening of July 17, 2013, Greenidge was working at terminal 1 with a group of other skycaps whose names were Allan Wills, Terrence Boodram, and Basil Rodney. From the account of the witnesses, this was a slow time.

At some point during the early evening, the skycaps were notified by Respondent's supervisor, Crawford, that Lufthansa Airlines had requested Alstate to provide four skycaps to meet and assist a van that was soon to arrive with a soccer team and their equipment. Upon receiving this notification Greenidge commented to the other skycaps that: "We did a similar job a year prior and we didn't receive a tip for it."

The credible evidence shows that when the van arrived, the four skycaps did not go to the van to offer assistance in unpacking the luggage. Instead, despite being waved over, they walked away. At this point, Lufthansa's manager, Isabelle Roeder, told the terminal one Manager, Klaudia Fitzgerald, that there was no one willing to assist with the baggage. Shortly thereafter, while Roeder was standing outside with the van, Alstate's supervisor, Crawford, told her that the skycaps did not want to take the equipment because they did not think that they would get a big enough tip. In my opinion, the skycaps simply refused to assist the soccer team with their equipment and luggage and thereby refused to do their jobs. It is also clear that their refusal was based on the belief that the soccer team would not be generous in their tips. The result was that Alstate brought in a group of baggage handlers to do the work and only after the baggage handlers started bringing in the luggage, did the skycaps begin to assist the customer. Notwithstanding the initial refusal of the skycaps to assist, Lufthansa gave them an $83-tip.

With respect to the above, it should be noted that although tips comprise a substantial part of a skycap's income, it cannot be construed as a wage that is paid by their employer. For better or worse, the custom of tipping in the United States, puts the onus on the customer and not the employee's employer. If a customer refuses to tip (or gives an inadequate tip), this is not a matter that is addressable between the employee and his or her employer. In this case,

[1] The General Counsel claims that the minimum wage paid to skycaps and skycap captains was lower than what was permitted under the relevant wage-and-hour laws. She cites to the fact that several months ***after*** Greenidge was discharged, the New York Attorney General's Office began an investigation regarding their pay rates. I do not know whether the skycaps were paid in accordance with either Federal or State law and it is not within my jurisdiction to make such a determination. More importantly, for purposes of this case, there is no evidence that Greenidge initiated or was involved in that investigation or that the Respondent was motivated by that investigation in its decision to discharge him.

the reason for the refusal to perform work was the perceived dissatisfaction with the customer and not with Alstate. Perhaps it would have been a different matter, if Greenidge and the other skycaps had concertedly complained to Alstate and engaged in a work stoppage in order to compel the Respondent to raise their wages or in some other fashion compensate them in lieu of tips.[2] But that is not what happened here. This particular dispute was between the skycaps and the soccer team. It was not between the skycaps and the Respondent.

That night, Fitzgerald sent an email to Alstate's managers, Deb Traynor and Vince Orodisio and to Ed Paquette, the manager of terminal one. This stated:

> As you may be aware, a French soccer team is travelling on LH405 tonight and on behalf of Lufthansa, we had requested skycap services. There were no issues with the soccer team players regular baggage as they dropped them off directly at the pit, however, the equipment was a totally different story. At approximately 1900 hrs, we were advised by LH that the truck with the equipment was stuck in traffic and wasn't going to arrive for at least another hour, but at 1920 LH ASM Isabelle informed that the equipment should be arriving in the next five minutes. I requested assistance from Crawford via radio to mobilize all the sky caps so that they are standing by. I observed only one skycap standing outside, but not assisting the soccer team and LH ASM Isabelle. I proceeded outside and at this point Crawford was explaining to Isabelle that the skycaps don't want to handle it because of the large quantity of bags and a small tip. I interjected and instructed Crawford to get all the skycaps on departures by revolver #2 to handle these bags immediately. As per Crawford and LH Isabelle, Wills was one of the skycaps who refused to assist and eventually showed up after being called on the radio for the third time. I believe Crawford will fill you in with the additional details as to who were the other employees and supervisors being uncooperative. In attempt to compensate for the mishandling, I asked Crawford to send over few [sic] baggage handlers to assist and Crawford went above and beyond to do so. One of the soccer coaches said to LH ASM that they might as well handle these bags themselves. Even after providing this substandard service, the skycap captain received a tip from LH Isabelle. I'm wordless; how service provider [sic] employees don't comprehend their job descriptions, why they have jobs and would refuse to provide skycap services to a partner carrier or any customer for that matter. I must say that in my entire professional career I have never been this embarrassed in front of the customer and I expect that you thoroughly investigate and take appropriate action immediately. I had personally apologized to LH ASM Isabelle on behalf of Terminal One and Alstate, but would highly suggest that you do the same.

On the following morning there was a series of emails between Paquette and Alfred DePhillips. The first of which was sent at 5:28 a.m.

> This is totally unacceptable and embarrassing to say the least. I expect a full report on my desk before lunchtime.

[2] For example, in many European countries, restaurants add a service charge to a customer's bill and customers are not expected to tip the restaurant's staff.

> I want each of the SKYCAPs involved removed from the Terminal One project immediately, the supervisors as well. I do not need supervisors on duty who cannot control their people.
> Figure out how you are going to cover the vacancies as I also expect uninterrupted service.

At 12:25 p.m., Paquette sent a second email that stated:

> It's now 12:30 and I have yet to hear from anyone regarding this incident or the one Neil sent to you regarding wheelchairs.
> If I do not hear from someone shortly I will pull everyone I think was Involved from the swipe system. [3]

At 12:37 p.m. DePhillips replied:

> We have not ignored the issue at hand. We are currently finishing our investigation. Our report will be to you shortly.

At 1:07 p.m. Deborah Traynor responded to Paquette's email. This read:

> Based on my investigation this morning all 4 skycaps will be removed from service, it is unacceptable to Alstate as well to speak or behavior [sic] unprofessional [sic] at any time while doing your Job. Based on the video footage I watched, the equipment was taken from the truck into the terminal in 12 minutes. I do understand that it was not the service provided but the lack of professionalism on Alstate employee's part. I assure you that the removal of this employees will not impact Terminal Ones operation

At 2:35 p.m. Paquette replied to Traynor's email and stated:

> Can I please have the names of the four individuals so that I can have Gary remove them from the Terminal One system.

Subsequent to this exchange of emails, the respondent, by Traynor, informed each of the four skycaps that they were discharged for the circumstances surrounding the Lufthansa incident. The discharge letter to Greenidge states:

> You were indifferent to the customer and verbally make comments about the job stating you get no tip or it is very small tip. Trevor, you made this comments in front of other skycaps, Terminal One Mod and the Station Manager of Lufthansa.

The letters given to the other skycaps also indicate that the reason for the discharges was because of their refusals to perform their duties and the comments made about tipping.

After the four skycaps were discharged, they filed grievances with Local 660, United Workers of America which at that time had a contract with the Respondent. It appears that after

[3] The swipe system refers to the use of a card that allows a person entry to certain nonpublic parts of the terminal.

a period of time, the other three skycaps were offered jobs at the Respondent's sister company, Airway Cleaners. Goodridge was not offered employment.

Analysis

In pertinent part, Section 7 of the Act states:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities…

The provisions relating to "other concerted activity" for the purpose of "other mutual aid or protection," are interpreted broadly and encompass activity that need not be related to union activity. *Brown & Root, Inc. v. NLRB*, 634 F.2d 816, (5th Cir. 1981) (refusal to work in the face of dangerous working conditions); *Walls Mfg. Co. v. NLRB*, 321 F.2d 753 (D.C. Cir.) (writing a letter about sanitary conditions on behalf of fellow employees).

In order to be covered by Section 7, the activity must be concerted in the sense that it is ordinarily engaged in by two or more employees. However, the Board has found that actions by an individual employee may be construed as concerted in a variety of circumstances. For example, if an individual seeks to enforce a collective-bargaining agreement by, for example filing a grievance involving only himself, this will be construed as concerted because it is in furtherance of enforcing a collectively bargained contract. *NLRB v. City Disposal System*, 465 U.S. 822 (1984). Also, activity by a single person may be construed as concerted if it is done in an effort to gain the support of other employees for some type of action, or if it is done on behalf of or in support of the interests of other employees. *200 East 81st Restaurant Corp. d/b/a Beyoglu*, 362 NLRB No. 152 (2016) (lawsuit filed by an individual as a class action for overtime wages construed as concerted activity).

On the other hand, activity by a single individual for that person's own personal benefit is not construed as concerted activity. *NLRB v. Adams Delivery Services*, 623 F.2d 96 (9th Cir. 1980) (individual griping about his overtime pay was not concerted activity); *Pelton Casteel Inc., v. NLRB*, 627 F.2d 23 (7th Cir. 1980) (venting of personal grievance not concerted activity).

In order to fall within the protection of Section 7, the activity has to have some relationship to the wages, hours, or other terms and conditions of employment of employees and not to matters that are personal or unrelated to those subjects. *MCPc, Inc.*, 360 NLRB No. 39 (2014); *Plumbers Local 412*, 328 NLRB 1079(1999). For example, in *Waters Orchard Park*, 341 NLRB 642 (2004), a Board majority concluded that two employees who called a New York State hotline to report that patients were experiencing excessive heat were not engaged in protected activity. Two of the Board members stated that the employees' calls to the hotline did not involve a term or condition of their employment and were not otherwise an effort to "improve their lot as employees." They concluded that this only involved a concern for the quality of care of patients, and therefore did not involve the interests "encompassed by the mutual aid or protection clause." In a concurring opinion, member Meisburg stated that "the statutory language is not infinitely malleable. It was not intended to protect every kind of concerted activity, no matter how salutary." He went on to state; "Absent an intent to improve wages, hours or working conditions, concerted action of the type in this case cannot be deemed" "mutual aid

or protection" because the employees testified that their sole motive was to act in the interests of their patients.

In *Metro Transport LLC d/b/a Metropolitan Transportation Services*; 351 NLRB 657, 661–662, (2007) the claim was that a group of mechanics were unlawfully suspended because they protested the discharge of a supervisor. In concluding that this was not concerted activity for mutual aid and protection, the Board, with Member Liebman dissenting, applied a three part test: (1) whether the protest originated with the employees rather than other supervisors; (2) whether the supervisor at issue dealt directly with the employees; and (3) whether the identity of the supervisor was directly related to the employees' terms and conditions of employment. The Board majority noted that even assuming that the first two parts of the test were met, the suspension allegation had to be dismissed because there was no relationship between the supervisor and the mechanics' terms and conditions of employment. The Board noted that the record showed that the mechanics were only concerned with the supervisor's employment situation and made no mention of their own interests.

In my opinion, Section 7 affords employees protection for engaging in concerted activity for their mutual aid and protection but this encompasses matters relating to their own or to other workers' wages, hours and/or other terms and conditions of employment. In *MCPc, Inc.*, supra, the Board stated:

> In agreement with the judge, we find that Galanter engaged in concerted activity when discussing with other employees their terms and conditions of employment—staffing shortages resulting in heavy workloads—which constituted protected concerted activity under *Meyers Industries*, 281 NLRB 882 (1986), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). See *Worldmark by Wyndham*, 356 NLRB No. 104 [765], slip op. at 2 [766] (2011) ("[T]he Board has consistently found activity concerted when, in front of their coworkers, single employees protest changes to employment terms common to all employees.").

It is a violation of Section 8(a)(1) for an employer to discharge or discipline an employee or employees who engage in protected concerted activity. In order to establish a primae facie case the General Counsel is required to show that the employee(s) engaged in protected activity and that the activity was a motivating reason for the employer's action. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). See *NLRB v. Transportation Mgmt. Corp.*, 462 U.S. 393, 399 (1983) (approving *Wright Line* analysis). Assuming that the General Counsel meets that burden, then the Respondent can defend its action by establishing that it would have taken the same action notwithstanding the employee's concerted activity.

The entire theory of the General Counsel's case is that on July 17, 2013, Greenidge engaged in concerted activity when, while waiting for the arrival of the van carrying a French soccer team, he said to the other skycaps; "We did a similar job a year prior and we didn't receive a tip for it." This single statement by Greenidge did not call for or request the other skycaps to engage in any type of concerted action or to otherwise make any kind of concerted complaint to their employer about their wages. In my opinion, this was simply an offhand gripe about his belief that French soccer players were poor tippers.

I also do not think that Greenidge's comment can be construed as concerted activity because it did not relate to the skycap's wages, hours, or other terms and conditions of employment.

It is of course true that for income tax purposes, tips are considered to be part of an employee's wages by the IRS. But they are not considered to be a deductible expense for the employer as they are not construed as wages paid by the employer. Although constituting a large portion of a skycap's income, tips are not moneys received from their own employer. Instead, they are received as gratuities from customers. Indeed, in this case, the tips received by skycaps are twice removed from the Respondent as they are received from Alstate's customer's customers. The fact is that if there was any dispute in this case, it was not between the employees and the Respondent. As noted above, a comment about the poor tipping habits of French soccer players was not and could not be addressed by the skycap's employer as this was not within Alstate's control.

Accordingly, I hereby recommend that the complaint be dismissed.

Dated, Washington, D.C. June 24, 2016

Raymond P. Green
Administrative Law Judge