

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

S.A.M.

DATE: March 21, 2017

TO: Jill H. Coffman, Regional Director
Region 20

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

SUBJECT: Matheson Postal Services, Inc. 530-6067-4055-8500
Case 20-CA-186264 625-4400-0000
625-4467-7700

The Region submitted this case to Advice on the issue of whether, pursuant to the Board's decision in *Total Security Management*,¹ it is appropriate to seek backpay for the six-day, unpaid suspension of the alleged discriminatee in the upcoming consolidated unfair labor practice and compliance proceeding. We conclude that the Region should seek backpay in this case.

FACTS

The Employer is a United States Postal Service contractor providing intercity trucking services. The Union was certified in September 2015 as the exclusive bargaining representative for a unit of the Employer's drivers. The parties have not yet reached a first collective-bargaining agreement.

The alleged discriminatee (herein "the lead driver") was a lead driver for the Employer since before the Union's certification. During the relevant period, the lead driver split (b) (6), (b) time between working in the office and driving routes. On (b) (6), (b) (7)(C) 2016,² at (b) (6), (b) (7)(C), a new driver (driver A) initiated a text-message exchange with the lead driver on the lead driver's company-issued phone asking if someone could cover (b) (6), (b) run because (b) (6), (b) had hurt (b) (6), (b) (7)(C). The lead driver was off duty at the time and was not due back to work until (b) (6), (b) (7)(C) the next morning. Receiving no response, at (b) (6), (b) (7)(C), driver A texted the lead driver that (b) (6), (b) had not been assigned a truck and was waiting at the yard for a vehicle, adding, "Please get somebody else for tomorrow, I'm doing big effort to do this tonight." The lead driver immediately

¹ 364 NLRB No. 106 (August 26, 2016).

² All dates hereinafter are in 2016 unless otherwise noted.

responded with a truck number and said that there was nobody else to cover driver A's route. Driver A responded that somebody else was using (b) (6), (b) (7)(C) truck, that (b) (6), (b) (7)(C) was talking to "Central" (referring to the Employer's operations center, the MCC), and that "...I cannot work with my (b) (6), (b) (7)(C) hurt." The lead driver asked which trucks were available and told driver A to take one of them. After some back and forth about which truck driver A should take, driver A wrote, "run is too long and on top of that I hurt my (b) (6), (b) (7)(C) because I felt [sic] today from the truck and [I'm] doing great effort to finish this run." There were no more texts or other communications between the two on (b) (6), (b) (7)(C)

On the night of (b) (6), (b) (7)(C), driver A did not report to work or call in. The MCC scrambled to cover the route, with assistance from the lead driver after (b) (6), (b) (7)(C) arrived for (b) (6), (b) (7)(C) own route at (b) (6), (b) (7)(C) on (b) (6), (b) (7)(C). After the lead driver finished (b) (6), (b) (7)(C) route on (b) (6), (b) (7)(C), (b) (6), (b) (7)(C) met with the terminal manager, who told (b) (6), (b) (7)(C) that driver A claimed (b) (6), (b) (7)(C) had reported an injury to the lead driver on (b) (6), (b) (7)(C). A few hours later, the terminal manager told the lead driver that (b) (6), (b) (7)(C) was being placed on administrative leave, effective immediately, pending investigation into (b) (6), (b) (7)(C) failure to report driver A's injury and find a replacement driver. The lead driver then called (b) (6), (b) (7)(C) shop steward and explained what happened. Shortly thereafter, at (b) (6), (b) (7)(C), the Employer emailed the Union's business agent stating that the lead driver had been placed on suspension and administrative leave pending investigation for behavioral misconduct, and that documentation would follow after the investigation. The Union's business agent states that (b) (6), (b) (7)(C) did not contact the Employer after receiving this email to request bargaining because the lead driver had not yet contacted (b) (6), (b) (7)(C) the parties would be meeting for bargaining on (b) (6), (b) (7)(C), and because the Union doesn't have a good relationship with the Employer. On October 13, the Union filed the instant charge.

During the (b) (6), (b) (7)(C) negotiations, the parties discussed the charge and agreed to meet on (b) (6), (b) (7)(C) to discuss the lead driver's suspension, but neither the lead driver nor the shop steward would be allowed in the room. During the (b) (6), (b) (7)(C) meeting, the Employer explained the accusations against the lead driver³ and that it wanted to demote (b) (6), (b) (7)(C) to a regular driver position. The Union's business agent left the room to consult with the lead driver and shop steward, and then returned to inform management that the lead driver wanted full backpay for both (b) (6), (b) (7)(C) driving and office hours, as well as another 20 hours of office work at a higher hourly rate for the following week until the next driving rebid. There was further back and forth about

³ The Employer's written report on the findings of the investigation concluded, *inter alia*, that the lead driver had: failed to find coverage for driver A's run as (b) (6), (b) (7)(C) had in the past and to notify (b) (6), (b) (7)(C) manager and the MCC that coverage was needed; and failed to notify (b) (6), (b) (7)(C) supervisor and the MCC of the workplace injury and to inform driver A of the appropriate process for reporting the injury.

the amount of backpay, rate of pay, and rebidding, but the parties were unable to reach an agreement.

On (b) (6), (b) (7)(C), the Employer sent the Union's business agent an email stating that the parties had agreed to move the lead driver to a regular driving position but had not agreed on the backpay amount, and that the lead driver would be taken off unpaid leave and returned to work. The Employer offered the lead driver backpay for three of the six days (b) (6), (b) (7)(C) missed. The business agent did not respond to the email because (b) (6), (b) (7)(C) disagreed with the Employer's characterization that the parties had reached an agreement. Nonetheless, the lead driver returned to work as a driver on (b) (6), (b) (7)(C) but without the office duties (b) (6), (b) (7)(C) had previously performed. The lead driver worked as a non-lead driver on (b) (6), (b) (7)(C), and then resigned from the Employer on (b) (6), (b) (7)(C) after accepting a job as a driver with (b) (6), (b) (7)(C).

In processing the instant charge, the Region dismissed a Section 8(a)(3) allegation related to the lead driver's suspension. The Region further concluded that the lead driver was not a Section 2(11) supervisor, that the discretionary investigatory suspension was the type of serious disciplinary action that gives rise to a duty to engage in preimposition bargaining, and that the Employer has not established exigent circumstances privileging its unilateral suspension pending an investigation of the alleged misconduct. The Region thereafter issued a complaint in this case alleging that the Employer violated Section 8(a)(5) and (1) by failing to give the Union notice and an opportunity to bargain prior to placing the lead driver on unpaid administrative leave and suspending (b) (6), (b) (7)(C) from work. The hearing is currently scheduled for (b) (6), (b) (7)(C) 2017.

ACTION

In *Total Security Management*, the Board considered whether an employer has a statutory obligation to bargain before imposing discretionary discipline on unit employees when a union has been certified or lawfully recognized but has not yet entered into a collective-bargaining agreement with the employer.⁴ The Board held, *inter alia*, that discretionary discipline is a mandatory subject of bargaining, and therefore that employers must give unions notice and an opportunity to bargain before imposing certain serious types of disciplinary actions.⁵

Although the Board in *Total Security* elected to apply its holding only prospectively, it addressed the issue of whether reinstatement and backpay would be

⁴ 364 NLRB No. 106, slip op. at 1.

⁵ *Id.*

appropriate in future cases involving the unlawful imposition of discretionary discipline without bargaining.⁶ The Board concluded that the standard remedy for an unlawful unilateral change should be granted, including reinstatement and backpay. It noted, however, that the respondent may raise as an affirmative defense in a compliance proceeding that the discipline was “for cause,” as that term is used in Section 10(c) of the Act, and therefore that reinstatement and backpay are not warranted. Specifically, the Board held that:

We will construe Section 10(c) to preclude reinstatement and backpay if the respondent establishes, consistent with the allocation of proof described below, that the employee’s suspension or discharge was for cause. In order to do so, the respondent must show that: (1) the employee engaged in misconduct, and (2) the misconduct was the reason for the suspension or discharge. In response, the General Counsel and the charging party may contest the respondent’s showing, and may also seek to show, for example, that there are mitigating circumstances or that the respondent has not imposed similar discipline on other employees for similar misconduct. If the General Counsel and charging party make such a showing, the respondent must show that it would nevertheless have imposed the same discipline.⁷

The Board emphasized that the respondent bears the burden of persuasion in this analytical framework, noting that this is consistent with the allocation of the burdens of proof in a standard compliance proceeding and with the Board’s established principle that the wrong-doer bears the burden of uncertainty created by its wrongful conduct.⁸

In this case, it is unclear whether the lead driver engaged in misconduct. Although the lead driver has in the past reported injuries and the need for coverage to the MCC, it is unclear whether, and under what circumstances, such reporting is required, particularly when reported to an off-duty lead who believes that the information has already been reported to the MCC. The Region notes that there is evidence that employees are themselves responsible for communicating with the MCC and that they cannot rely on the lead driver for such communications. Indeed, driver A told the lead driver during the (b) (6), (b) (7)(C) text exchange that (b) (6), (b) (7)(C) was “talking with Central” (the MCC). Moreover, there is no evidence that leads have the responsibility to report injuries and absences that are reported to them while they are off-duty. Thus, the Employer may not be able to meet its burden of showing that the lead

⁶ *Id.*, slip op. at 12-15.

⁷ *Id.*, slip op. at 15.

⁸ *Id.*, slip op. at 15 and n.41.

driver was disciplined for misconduct. But even assuming that the Employer could meet this burden, the above-discussed facts (including that the lead driver was off-duty during the text exchange and reasonably believed that the situation had already been reported to the MCC) constitute mitigating circumstances. So the burden would then shift back to the Employer to show that it would nevertheless have imposed the same discipline, and it has not submitted evidence that would be sufficient to meet that burden.

In these circumstances, we agree with the Region's recommendation to issue a compliance specification and seek backpay in this case.

/s/
B.J.K.

ADV.20-CA-186264.Matheson.Response (b) (6), (b) (7)(C)