

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

DATE: March 31, 2017

TO: Paula S. Sawyer, Regional Director
Region 27

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

SUBJECT: Denver Uniserv Unit
Case 27-CA-182658

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506-6050-0183-0000
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The Region's submission of this case for advice presents two major issues: (1) whether employees engaged in a protected work stoppage when, to protest an employee's perceived demotion, they ceased work for several hours, skipping a mandatory staff meeting and instead holding a union meeting, but expected payment for the work hours missed;¹ and (2) whether the Employer violated an employee's *Weingarten* right to union representation during an investigatory interview when the Employer precluded representation by other employees because the Employer intended to question them about the same issue.

We conclude, first, that the employees engaged in a protected work stoppage regardless of their expectations about receiving payment. We conclude, further, that the Employer violated the interviewed employee's *Weingarten* rights because the Employer failed to establish a legitimate and substantial justification for limiting the employee's choice of representative.

¹ The Region has reserved decision on whether, assuming the employees engaged in a protected work stoppage, the Employer has committed any violations of the Act in connection therewith.

FACTS

The issues addressed herein arose from a labor dispute between the Denver Uniserv Unit (the “Employer”) and the Denver Uniserv Staff Organization (“DUSO”). The Employer, a labor organization, is affiliated with the Colorado Education Association (“CEA”), and employs staff serving three local education-related unions. DUSO, also a labor organization, is affiliated with the Colorado Education Association Staff Organization (“CEASO”), and represents a bargaining unit of the Employer’s approximately five non-managerial employees. At the time the instant charge was filed, DUSO and the Employer were negotiating a successor to an expired CBA.

The pertinent labor dispute between the parties arose on July 22, 2016. That morning, some of the Employer’s managers met with a bargaining unit employee. In this meeting, the managers instructed the employee to downgrade [REDACTED] administrator privileges for the Employer’s Facebook page. This upset the employee, who perceived the change as a demotion.

After the meeting, the aggrieved employee recounted the meeting and the Facebook change to three other unit employees. The discussion that followed led three of the employees, including the aggrieved employee, to decide to respond to the Employer’s conduct by skipping a mandatory staff meeting scheduled for that same day and holding an emergency meeting of DUSO instead.² The fourth employee declined to join them.

The staff meeting was scheduled to begin at 1:00 p.m. Before that time, the three-employee group left their office suite, which is part of a larger building owned by CEA. The group relocated to an unoccupied conference room in the building to hold their DUSO meeting.

Meanwhile, the remaining unit employee went to the staff meeting. There, [REDACTED] met the Employer’s Executive Director and another manager. The employee told the managers that the other employees were angry about the aggrieved employee’s demotion and that they would not come to the meeting. Around the same time, at 1:08

² At the time the employees made the decision, there were several other outstanding sources of conflict between DUSO and the Employer that were also factors in the group’s decision. However, the timing of events and testimonial record make clear that the perceived demotion of the aggrieved employee was the primary factor driving the group’s decision.

p.m., the group sent the Executive Director a text message stating, “We are having an emergency DUSO meeting.”³

After learning of the group’s intended absence, the Executive Director sent the missing employees an email instructing them to come to the meeting. The employees did not do so.⁴ Meanwhile, the managers broke off the staff meeting and went out to lunch with the remaining employee.

The employee group held the DUSO meeting until around 3:30 p.m., whereupon they returned to their office suite to resume work. Around the same time, a group member responded to the Executive Director’s earlier email, stating, “Given recent events in the office, DUSO determined that it was necessary to hold an emergency meeting this afternoon.”

The two managers and the remaining employee returned to the office shortly thereafter. The managers then called the three-employee group into a meeting. During the meeting, the Executive Director told the group that the expired CBA did not permit emergency DUSO meetings,⁵ that the group’s conduct felt like a temper tantrum, and that the group’s pay would be docked. The employees, meanwhile, reiterated that they had called the DUSO meeting because of recent events in the office, elaborated that one of their reasons for doing so was the aggrieved employee’s perceived demotion, and stated that they had skipped the staff meeting as a form of protected concerted activity. Additionally, later reactions by the employees and DUSO to the Executive Director’s announcement that the employees’ pay would be docked support an inference that the employees believed they were entitled to payment for the work hours they missed that afternoon.⁶

³ The Executive Director states that [REDACTED] did not immediately receive the text message because [REDACTED] had not brought her phone to the meeting.

⁴ It is unclear whether the employees read the Executive Director’s email while the DUSO meeting was ongoing, although one of the group members states that [REDACTED] “received” the email “during” the DUSO meeting.

⁵ The CBA permitted union meetings during the business day subject to the Executive Director’s approval, and, whenever possible, at least five days’ notice. The time used for such meetings would be “reported and charged as union leave.”

⁶ Because we find the employees’ expectation of payment to be legally irrelevant to whether they engaged in a protected work stoppage, we do not recount these reactions in detail.

Several days later, on July 25, 2016, the two managers conducted investigatory interviews of the employees who had skipped the staff meeting. The managers separately interviewed each employee. At the beginning of each interview, the Executive Director told the respective employee to keep the meeting confidential from the other two interviewees while the investigation was open.⁷ [REDACTED] also told the employees that they were entitled to union representation.

The employee interviewed first (“Employee A”) requested representation by the aggrieved employee (“Employee B”). The Executive Director denied the request, stating that neither Employee B nor the third member of the employee group (“Employee C”) could serve as Employee A’s representative because the managers intended to talk to them about the same issue. If Employee A wanted a Union representative, the Executive Director said, [REDACTED] would need to contact the unit employee that had declined to join the group.⁸ Employee A asked for a CEASO employee to represent [REDACTED] instead, and the Executive Director acquiesced.

After the representative arrived, the managers commenced Employee A’s interview.⁹ They asked Employee A about the employees’ decision to skip the staff meeting, along with unrelated topics implicating the propriety and professionalism of Employee A’s behavior as an employee. Employee A testified that, during the interview, the Executive Director specifically asked [REDACTED] whose idea it had been to skip the staff meeting.¹⁰

Employee B’s subsequent interview involved similar but fewer questions, and Employee C’s interview involved fewer yet. In each case, however, the managers asked why the employee had skipped the staff meeting. As a follow-up question, the managers also asked the employees, “Do you recognize the authority of governance to make decision[s] about [] Facebook?”

⁷ The Region has determined that the Employer thereby violated Section 8(a)(1).

⁸ The Director referred to that employee by name, rather than by [REDACTED] relationship to the group.

⁹ The Employer’s questions are partly reflected in prepared sets of questions for each employee that the Employer submitted as evidence.

¹⁰ The Region has reserved decision on whether the Employer violated Section 8(a)(1) by asking Employee A this question pending this office’s decision as to whether the employees engaged in a protected work stoppage.

Several days later, on August 5, 2016, the Employer formally disciplined each member of the employee group. Concomitantly, the Employer required each employee to use personal time off to cover the work time missed on July 22.

ACTION

We conclude, first, that the employees engaged in a protected work stoppage regardless of their expectations about receiving payment. We conclude, further, that the Employer violated Employee A's *Weingarten* rights because the Employer failed to establish a legitimate and substantial justification for limiting [REDACTED] choice of representative.

A. The employees engaged in a protected work stoppage.

The right to strike is statutorily protected under Sections 7 and 13 of the Act.¹¹ This right encompasses not only conventional strikes called by unions to support collective-bargaining demands, but also work stoppages by employees to protest terms and conditions of employment.¹²

A one-time strike of short duration is presumptively protected.¹³ However, to invoke the Act's strike protection, employees must generally cease work *entirely* during the relevant time period. If employees continue performing some work tasks while refusing others, the Board generally deems them to be engaged in an

¹¹ *NLRB v. Preterm, Inc.*, 784 F.2d 426, 429 (1st Cir. 1986) (pursuant to Section 7, "employees are granted the right to peacefully strike, picket and engage in other concerted activities"); *NLRB v. Teamsters Local 639*, 362 U.S. 274, 281 (1960) (Section 13 "provides, in substance, that the Taft-Hartley Act shall not be taken as restricting or expanding either the right to strike or the limitations or qualifications on that right . . . unless 'specifically provided for' in the Act itself").

¹² See *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 15 (1962) (employer unlawfully discharged employees who "walked out together in the hope that this action might spotlight their complaint and bring about some improvement in what they considered to be the 'miserable' conditions of their employment").

¹³ *NLRB v. McEver Eng'g*, 784 F.2d 634, 639 (5th Cir. 1986); see, e.g., *id.* (employees engaged in protected strike by stopping work for duration of rainfall to protest unsafe working condition); *Pepsi-Cola Bottling Co.*, 186 NLRB 477, 477-78 (1970) (in-plant work stoppage lasting a few hours during employees' normal working hours was protected), *enforced*, 449 F.2d 824 (5th Cir. 1971).

unprotected “partial” strike.¹⁴ Partial striking is unprotected because employees thereby unfairly exert economic pressure on their employer without assuming the inherent risks of striking, e.g., loss of pay and possible replacement.¹⁵ In contrast, when employees completely cease work, they do not tread upon their employer’s legitimate interests in receiving employees’ full effort for compensated work time and in maintaining operations during a work stoppage.¹⁶

Whether a work stoppage is protected depends, in part, on its purpose. To obtain protection, employees must be withholding labor to pressure their employer to remedy a work-related complaint or grievance.¹⁷ That requirement does *not* entail

¹⁴ See, e.g., *Audubon Health Care Center*, 268 NLRB 135, 136–37 (1983) (unprotected partial strike where nurses aides selectively refused to care for patients in a particular section while continuing to care for others); *Yale University*, 330 NLRB 246, 247–48 (1999) (teaching fellows engaged in unprotected partial strike by refusing to turn in students’ grades while continuing to perform other duties).

¹⁵ See, e.g., *St. Barnabas Hospital*, 334 NLRB 1000, 1011 (2001) (to “retain their statutory protection . . . [employees] must be willing to assume the status of strikers, contemplating the risk of replacement and loss of pay”), *enforced mem.*, 46 F. App’x 32 (2d Cir. 2002); see also Memorandum OM 17-02, dated Oct. 3, 2016, Brief Insert at 10 (while urging the Board to reconsider its jurisprudence on unprotected intermittent strikes, explaining that “[t]he General Counsel does not challenge the principle that the exertion of economic pressure without the attendant risks of a strike—i.e. loss of pay and possible replacement—does not warrant protection”).

¹⁶ See, e.g., *Solo Cup Co.*, 114 NLRB 121, 134 (1955) (employer would have been free to deduct pay for one-hour work stoppage), *enforced*, 237 F.2d 521 (8th Cir. 1956); *Jasper Seating Co.*, 285 NLRB 550, 550–51 (1987) (rejecting argument that employer had no choice but to discharge or discipline two employees who walked off to protest working conditions because employer “could have exercised its lawful option to replace them without significant delay or disruption to business operations”), *enforced*, 857 F.2d 419 (7th Cir. 1988); *Swope Ridge Geriatric Center*, 350 NLRB 64, 67 (2007) (finding series of weekend strikes unprotected, but rejecting argument that employer had been deprived of right to permanently replace strikers, regardless of length of each strike and difficulty of finding weekend replacements, absent “legal impediment” to permanent replacement).

¹⁷ See, e.g., *New York State Nurses Assn.*, 334 NLRB 798, 800 (2001) (nurses’ concerted refusal to volunteer for overtime work was strike because it was “intended to put pressure on the [employer] to change its staffing practices”) (citing *Empire Steel Mfg. Co.*, 234 NLRB 530, 532 (1978)); cf. *Quantum Electric, Inc.*, 341 NLRB

any further requirement to provide the employer with advance notice of the work stoppage¹⁸ or articulate a specific grievance to which the employer can respond.¹⁹ However, employees' communications to the Employer about the intent of their work stoppage may be critical evidence to establish their protest intent.²⁰

Here, we conclude that the three-employee group engaged in a protected work stoppage on July 22, 2016. The employees left their workstations shortly after and primarily as a response to the aggrieved employee's perceived demotion that morning. They ceased work entirely for the duration of a scheduled staff meeting,²¹ and

1270, 1279 & n.29 (2004) (leaving work early to attend union meeting was unprotected where not intended as protest of working conditions).

¹⁸ See, e.g., *McClendon Electrical Services, Inc.*, 340 NLRB 613, 613 (2003) (rejecting employer's *Wright Line* defense that employee discharged for picketing would have been lawfully terminated for failure to give notice to supervisor before leaving worksite) (citing *International Protective Services*, 339 NLRB 701, 702 (2003)). In certain contexts, however, the Act explicitly requires pre-strike notice. See, e.g., *New York State Nurses Assn.*, 334 NLRB at 798 (applying Section 8(g)'s requirement that labor organization provide ten days' notice prior to striking at health care institution).

¹⁹ See *Accel, Inc.*, 339 NLRB 1052, 1052–53 & n.3 (2003) (rejecting employer's argument that unrepresented employees' walk-off to protest denial of work breaks was unprotected due to employees' failure to articulate grievance to which management could respond, because, first, Board law imposes no such requirement and, alternatively, because employer was aware of reason for employees' walk-off); *Safety Kleen Oil Services*, 308 NLRB 208, 209 (1992) ("sickout" is protected concerted activity where employer knew or had reason to know that employees were not really sick, but were engaged in work stoppage to protest working conditions) (collecting cases), *enforced mem.*, 998 F.2d 1004 (3d Cir. 1993); *Washington Aluminum Co.*, 370 U.S. at 13 (rejecting argument that employee walkout was unprotected because the workers "summarily left their place of employment without affording the company an opportunity to avoid the work stoppage by granting a concession to a demand").

²⁰ See *The Pantagraph*, Case 33-CA-15798, Advice Memorandum dated Sept. 18, 2009 (concluding employees were not withholding labor to protest employment terms and conditions when employees attended union meeting on work time absent sufficient evidence that employees communicated protest intent to employer or otherwise evinced such intent); cf. OM 17-02, Brief Insert at 13–14 (proposing framework under which multiple strikes would be protected if, *inter alia*, employer is made aware of employees' purpose in striking).

²¹ Cf. *Addressograph-Multigraph Corp.*, 228 NLRB 6, 8–9 (1977) (employees' refusal to attend work meeting unprotected where employees continued production).

simultaneously held an impromptu DUSO meeting in an unoccupied conference room.²² And, although the group did not, at first, communicate the ultimate purpose of its work stoppage to the Employer, the Employer was made aware that the group was protesting the aggrieved employee's perceived demotion. Shortly after the group's work stoppage began, the unit employee who refused to join the group revealed this intent to managers at the staff meeting. Additionally, the group itself made its protest intent explicit when it met with the managers upon returning to work.²³ Thus, the employees engaged in a protected work stoppage.

The employees' apparent expectation that they would not forfeit compensation did not convert their work stoppage into an unprotected partial strike. Although the Board has mentioned employees' expectation of payment *for work* in explaining why partial strikes are unprotected,²⁴ we are aware of no Board decision suggesting that employees' expectation of payment for time *not worked* would render a complete work stoppage unprotected. Moreover, regardless of the employees' expectations, their complete cessation of work subjected them to the risks of lost pay²⁵ and replacement²⁶

²² Although the employees occupied a CEA conference room rather than leaving the premises entirely, there is no need to weigh the employees' right to strike against the Employer's property interests pursuant to *Quietflex Mfg. Co.*, 344 NLRB 1055 (2005). A *Quietflex* analysis is appropriate only where, unlike here, employees occupy an employer's property in the face of an order by the employer to leave. *Atlantic Scaffolding Co.*, 356 NLRB 835, 836–37 (2011).

²³ The question the Employer posed to the employees in their later investigatory interviews concerning management's authority with respect to Facebook clearly shows, further, that the Employer actually knew of the group's protest intent, since that question was posed as a follow-up to the question why the employees skipped the staff meeting.

²⁴ See *Audubon*, 268 NLRB at 137 (employees "were attempting to usurp [their employer's] prerogative to assign work while expecting to be paid for the work they remained willing to perform"); *Honolulu Rapid Transit*, 110 NLRB 1806, 1810 (1954) (employees "could not continue to work and remain at their positions, accept the wages paid them, and at the same time select what part of their allotted tasks they cared to perform") (quoting *NLRB v. Montgomery Ward & Co.*, 157 F.2d 486, 496 (8th Cir. 1946)).

²⁵ Cf. *Vencare Ancillary Servs., Inc. v. NLRB*, 352 F.3d 318, 323–25 & n.11 (6th Cir. 2003) (physical therapy employees who refused to treat patients while completing paperwork were engaged in partial strike notwithstanding their expectation *not* to be paid in light of Fair Labor Standards Act's requirement that employees be paid for any time they are "suffered or permitted to work").

inherent to striking. Hence, there is no basis for finding the employees' work stoppage to be an unprotected partial strike.

B. The Employer violated Employee A's *Weingarten* rights.

An employee has a right to union representation, upon the employee's request, at an investigatory interview that the employee reasonably believes may result in disciplinary action.²⁷ An employee requesting such "*Weingarten*" representation is generally entitled to her preferred representative, rather than a representative assigned by the employer. Only in extenuating circumstances, such as when the immediate unavailability of that representative would delay the employer's investigation, may an employer deny a request for a particular representative.²⁸ Relatedly, where no extenuating circumstances would justify an employer's refusal to supply a particular representative, the employer violates the Act by preemptively foreclosing an employee's request for that representative.²⁹

No binding Board precedent has addressed whether an employer may refuse to supply an employee's desired representative because the employer intends to question both the employee and the representative about the same matters. However, in

²⁶ Although the Employer's ability to hire replacements was practically restrained due to the short duration of the work stoppage, there was no legal impediment to such replacement. *See Swope Ridge Geriatric Center*, 350 NLRB at 67.

²⁷ *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 256–57 (1975).

²⁸ *Compare, e.g., Fry's Food Stores*, 361 NLRB No. 140, slip op. at 2, 7–8 (Dec. 16, 2014) (employer unlawfully denied employee choice of preferred and available union representative at investigatory interview), *and Anheuser-Busch, Inc.*, 337 NLRB 3, 8 (2001) (employer violated Act by refusing to supply employee's desired representative absent extenuating circumstances), *enforced*, 338 F.3d 267 (4th Cir. 2003), *with Buonadonna Shoprite, LLC*, 356 NLRB 857, 857 (2011) (employer not required to delay investigation for employee's preferred representative when another qualified representative was available), *and Pacific Gas & Electric Co.*, 253 NLRB 1143, 1143–44 (1981) (employee could not delay investigation by requesting steward from another facility when qualified steward was immediately available).

²⁹ *See Montgomery Ward & Co.*, 273 NLRB 1226, 1227 (1984) (employer unlawfully preempted employee's request for representative where employer told employee that he "could see no one and that [a tape] recording would serve as his representative"), *enforced mem.*, 784 F.2d 316 (9th Cir. 1986).

Dresser-Rand Co.,³⁰ an ALJ found that an employer did not violate the Act when it denied employees' requests for specific representatives during investigatory interviews because the employer demonstrated a legitimate need to simultaneously interview the requested representatives about serious misconduct that had prompted the investigation.³¹ One of the requested representatives was a chief steward whom the employer knew had engaged in the misconduct at issue, namely, recklessly false statements to financial analysts that were highly damaging to the employer.³² The other requested representative was one of a group of union officials that the employer reasonably suspected was also involved in the chief steward's misconduct.³³ Under those circumstances, the judge concluded that the employer had a legitimate interest in denying interviewed employees' requests for representation by either the chief steward or the other union official to avoid compromising the employer's investigation.³⁴ The judge found, furthermore, that in the case before him, the employer's interests outweighed those of the interviewees, and that therefore the employer did not violate the Act.³⁵

Here, we conclude that the Employer violated the Act when it denied Employee A's request for representation by Employee B, and also when it told Employee A that Employee C could not serve as (b) (6), (b) (7) representative either, because the Employer failed to establish a legitimate and substantial justification for precluding such representation. The Employer's stated rationale for its conduct is that it intended to talk to all three employees about the same issue. That was no legitimate justification because the evidence shows that the Employer wished to sequester the employees to question them about their protected work stoppage.³⁶ Notably, the Employer told Employee A that the employee who had not joined the work stoppage could serve as (b) (6), (b) (7) representative. The Employer's willingness to allow that employee to serve as a

³⁰ 358 NLRB 254 (2012), *invalidated by NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014).

³¹ *Id.* at 275–78. No exceptions to the ALJ's *Weingarten* findings were filed.

³² *Id.* at 261, 278.

³³ *Id.*

³⁴ *Id.* at 277–78.

³⁵ *See id.* at 276, 278.

³⁶ The Employer cannot argue that this line of questioning was necessary to determine if the employee group's conduct was protected; as discussed above, it already had sufficient information to know that it was.

representative implies that the Employer's objection to representation by the other employees was based on the key characteristic differentiating them from the remaining employee: participation in the work stoppage.³⁷ Thus, unlike the employer in *Dresser-Rand*, the Employer here cannot establish that disqualifying employees as representatives was necessary for an efficacious investigation of serious misconduct.³⁸ Finally, the record discloses no evidence that these employees were otherwise unqualified to serve as DUSO representatives. For the aforementioned reasons, the Region should issue a complaint, absent settlement, alleging that the Employer violated Section 8(a)(1) by denying Employee A's request for representation by Employee B. Such complaint should also allege that the Employer violated Section 8(a)(1) by preemptively precluding representation by Employee C.³⁹

/s/

B.J.K.

ADV.27-CA-182658.Response.DenverUniservUnit (b) (6), (b) (7)(C)

³⁷ The Region's determination that the Employer violated Section 8(a)(1) in directing each employee to keep the content of their interviews confidential further undercuts the legitimacy of the Employer's rationale.

³⁸ To be sure, in *Dresser-Rand*, the employer's investigatory interviews included illegitimate lines of questioning constituting unlawful interrogation about protected conduct. *See* 358 NLRB at 254 n.2, 275. However, unlike in the instant case, the record there made clear that the employer's structuring of investigatory interviews was, overall, premised on the lawful objective of investigating serious employee misconduct.

³⁹ *See Montgomery Ward*, 273 NLRB at 1227 (employer unlawfully preempted employee's request for representative).