



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

REGION 8
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CLEVELAND, OH 44199-2086

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November 13, 2019

William E Yockey, Trustee, Local 1982
International Longshoremen Association, Local #1982
2300 Ashland Ave
Ste 225
Toledo, OH 43620-1280

Re: Midwest Terminals of Toledo International, Inc.
Cases 08-CA-195939 and 08-CA-208319

Dear Mr. Yockey:

We have carefully investigated and considered your charges that Midwest Terminals of Toledo International, Inc. has violated the National Labor Relations Act.

Decision to Dismiss: Based on that investigation, I have decided to dismiss your charges for the reasons discussed below.

In Case 08-CA-195939, you allege that Midwest Terminals of Toledo International, Inc. ("Employer") violated Section 8(a)(1) and (5) of the Act by having non-bargaining unit employees perform bargaining unit work on a regular and continuing basis. In Case 08-CA-208319, you allege that since May 1, 2017, the Employer violated Section 8(a)(1) and (5) of the Act by assigning managers and other non-bargaining unit employees to perform bargaining unit work without exhausting the available bargaining unit work force and without attempting to secure additional casual employees.

The charge allegations referenced above are grounded in three basic assertions. First, you allege that the Employer violated the Act by having non-bargaining unit employees perform the loading of aluminum for movement from the wet side to the dry side of the dock at the Employer's Facility One. Second, you allege that the Employer was having supervisors and other non-bargaining unit employees perform bargaining unit work on a regular basis and provided specific occasions in which work was performed by supervisors or other non-unit employees. Finally, you allege that the Employer unilaterally assigned the unloading, loading, and movement of pipe to non-unit employees.

With minimal exceptions, the Union has jurisdiction over work performed on the wet side of the dock. The issue of the aluminum work was addressed by the Board in Midwest Terminals of Toledo International, Inc., 365 NLRB No. 158 (December 15, 2017), in which the Board affirmed the administrative law judge's determination that the Employer made an unlawful unilateral change when it began having Teamster-represented employees come to the wet side of the dock on forklifts to load aluminum. The Board's decision has since been enforced by the United States Court of Appeals for the District of Columbia. While the evidence disclosed that the Employer has continued the practice of having Teamster-represented employees come to the

west side of the dock to load aluminum, those actions will be addressed as part of the compliance proceedings in the enforced Board Order case.

The investigation failed to support the allegations that the Employer was having other non-bargaining unit employees load aluminum for movement from the wet side to the dry side of the dock. Rather, the evidence supported that the Employer utilized bargaining unit employees to perform this work. Allegations stemming from the way that the Employer utilized these employees to perform the loading of aluminum will be subject of a complaint, absent settlement, in pending Case 08-CA-204544. To the extent the evidence supported that there were non-bargaining unit employees working alongside these bargaining unit employees, the investigation did not reveal that these non-bargaining unit employees were performing any work on the wet side of the dock or performing work that was otherwise considered bargaining unit work.

Next, regarding the allegation that the Employer unilaterally started a practice of having supervisors and other non-bargaining unit employees perform unit work without exhausting the available bargaining unit employees and without attempting to secure additional casual list employees, there was insufficient evidence to support a violation. The parties' expired collective bargaining agreement contained provisions providing that the Employer could hire from any available source once all available bargaining unit employees, including casual list employees, were exhausted. The contract further provided that supervisors were entitled to provide temporary assistance and the contract gave the Employer the ability to assign jobs to supervisors when it determined adequate employees were not available. While the contract has expired, these provisions were part of the surviving terms and conditions of employment in place at the time of the allegations set forth in these charges.

During the investigation, the Union presented evidence regarding specific instances where it considered the Employer to have violated the Act by having supervisors and other non-bargaining unit employees perform bargaining unit work. In most of those instances, the work at issue was not bargaining unit work or there was simply insufficient evidence to establish it was unit work. In other instances, the facts established that the Employer utilized supervisors and other non-bargaining unit employees only after exhausting the available workforce. The circumstances presented questions of whether the use of supervisors was considered temporary, as allowed by the contract, and whether the Employer's ability to hire from any available source and to assign jobs included the ability to have supervisors and other non-bargaining unit employees perform unit work once all available unit employees had been hired in some capacity. These questions are a matter of contract interpretation and the Board is not required to endorse one reasonable interpretation of the contract over another. NCR Corp., 271 NLRB No. 175 (1985).

There were a few occasions in which it appeared the Employer acted outside its contractual authority or its past practice in assigning bargaining unit work to non-bargaining unit employees. However, these instances were sporadic and did not amount to a substantial and material change in working conditions, as each instance represented only an insignificant departure from past practice and did not amount to a change to the overall practice. Thus, the

conduct did not constitute an unlawful unilateral change. See UNC Nuclear Industries, 268 NLRB 841, 847 (1984).

Finally, regarding the allegation that the Employer unilaterally moved the unloading and movement of pipe to the dry side of the dock, the evidence did not support the claim that the work at issue was bargaining unit work, as it had arrived by rail on the dry side of the dock and was unloaded from there. The Union made other allegations regarding non-bargaining unit employees unloading pipe from railcars or moving pipe throughout the facility. However, there was insufficient evidence to establish that this work either occurred on the west side of the dock or that the past practice supported that the work at issue was bargaining unit work.

As the investigation did not establish the alleged violations, I am declining to issue complaint in this matter.

Your Right to Appeal: You may appeal my decision to the General Counsel of the National Labor Relations Board, through the Office of Appeals.

Means of Filing: An appeal may be filed electronically, by mail, by delivery service, or hand-delivered. To file electronically using the Agency's e-filing system, go to our website at www.nlr.gov and:

- 1) Click on E-File Documents;
- 2) Enter the NLRB Case Number; and,
- 3) Follow the detailed instructions.

Electronic filing is preferred, but you also may use the enclosed Appeal Form, which is also available at www.nlr.gov. You are encouraged to also submit a complete statement of the facts and reasons why you believe my decision was incorrect. To file an appeal by mail or delivery service, address the appeal to the **General Counsel at the National Labor Relations Board, Attn: Office of Appeals, 1015 Half Street SE, Washington, DC 20570-0001**. Unless filed electronically, a copy of the appeal should also be sent to me.

The appeal MAY NOT be filed by fax or email. The Office of Appeals will not process faxed or emailed appeals.

Appeal Due Date: The appeal is due on **November 27, 2019**. If the appeal is filed electronically, the transmission of the entire document through the Agency's website must be completed **no later than 11:59 p.m. Eastern Time** on the due date. If filing by mail or by delivery service an appeal will be found to be timely filed if it is postmarked or given to a delivery service no later than November 26, 2019. **If an appeal is postmarked or given to a delivery service on the due date, it will be rejected as untimely.** If hand delivered, an appeal must be received by the General Counsel in Washington D.C. by 5:00 p.m. Eastern Time on the appeal due date. If an appeal is not submitted in accordance with this paragraph, it will be rejected.

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Extension of Time to File Appeal: The General Counsel may allow additional time to file the appeal if the Charging Party provides a good reason for doing so and the request for an extension of time is **received on or before November 27, 2019**. The request may be filed electronically through the *E-File Documents* link on our website www.nlr.gov, by fax to (202)273-4283, by mail, or by delivery service. The General Counsel will not consider any request for an extension of time to file an appeal received after November 27, 2019, **even if it is postmarked or given to the delivery service before the due date**. Unless filed electronically, a copy of the extension of time should also be sent to me.

Confidentiality: We will not honor any claim of confidentiality or privilege or any limitations on our use of appeal statements or supporting evidence beyond those prescribed by the Federal Records Act and the Freedom of Information Act (FOIA). Thus, we may disclose an appeal statement to a party upon request during the processing of the appeal. If the appeal is successful, any statement or material submitted with the appeal may be introduced as evidence at a hearing before an administrative law judge. Because the Federal Records Act requires us to keep copies of case handling documents for some years after a case closes, we may be required by the FOIA to disclose those documents absent an applicable exemption such as those that protect confidential sources, commercial/financial information, or personal privacy interests.

Very truly yours,



IVA Y. CHOE
Acting Regional Director

IYC:cj

Enclosure

cc: Chris Blakely
Midwest Terminals of Toledo
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Toledo, OH 43605-1079

Midwest Terminals of Toledo International, - 5 - November 13, 2019
Inc.
Case 08-CA-195939

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