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

Advice Memorandum

DATE: January 30, 2009

TO : Dorothy L. Moore-Duncan, Regional Director
Region 4

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

530-6050-2575
530-6067-4044-4000

SUBJECT: Quality Roofing Supply Co.
Cases 4-CA-36306, 4-CA-36327, 4-CA-36357

These cases were submitted for advice as to whether the Employer violated the Act by failing to bargain with the newly-certified Union prior to discharging two unit employees for disciplinary reasons. We conclude that the Employer did not violate the Act by failing to bargain with the Union prior to disciplining the two employees, as the Union had not previously requested to bargain about disciplinary actions that were consistent with past practice.

FACTS

Between October 2007 and December 2007, International Union of Operating Engineers, Local 542 (the Union) won Board elections to represent four units of drivers and warehousemen employed by Quality Roofing Supply Company, Inc. (the Employer), including units in Yeadon, and York, Pennsylvania. On December 24, 2007, the Union submitted requests for information related to these units, including a request for "any records or documents of discipline" from 2002 to the present. The Union also requested that the Employer notify it of "any changes whatsoever that may affect the unit in any matter before the changes go into effect," and requested to bargain about "any changes." These requests were repeated a number of times over the next several months. The Union never expressly requested to bargain over unit employee discipline that was not the result of Employer changes, but instead was consistent with the Employer's past practice, albeit discretionary.

On April 28, 2008,[1] Yeadon unit employee George Taliaferro was disciplined for leaving work early on April

[1] All dates hereinafter are in 2008, unless otherwise noted.

22, after his supervisor had told him not to leave. This was Taliaferro's fourth disciplinary action, and the Employer discharged him under its progressive disciplinary system. That same day, the Employer's General Counsel and Vice President Ross Cooper e-mailed Union representative Frank Bankard and gave him notice of Taliaferro's discharge. Bankard immediately responded with an e-mail requesting that Cooper or a regional manager call him about Taliaferro's discharge. Cooper sent Bankard an e-mail stating that he "did not see the need for a discussion on this action, but if you have some specific questions, you may call me at my office." Bankard called Cooper, who told Bankard that Taliaferro was discharged because he had taken time off without prior approval. Cooper stated that he would gather additional information and get back to Bankard. Later that day, Cooper informed Bankard that Taliaferro was discharged for not returning to work after lunch. Bankard asked why he was not discharged immediately, and Cooper responded that the Employer was too busy to discharge him immediately. Bankard accused Cooper of changing the policy in the handbook which requires immediate discharge for insubordination. Cooper said he would look into the matter and get back to the Union. On April 29, Bankard called Cooper and left a message on his voice mail requesting that he call him back about Taliaferro's discharge. Cooper did not call Bankard back.

On September 24, York unit employee Robert Durst was similarly disciplined and discharged under the Employer's progressive disciplinary system after a driver not employed by the Employer called the Employer and alleged that Durst was driving the Employer's truck on the highway in an unsafe manner. That same day, Cooper e-mailed Bankard and gave him notice of Durst's discharge. Bankard replied with a letter to Cooper, also on September 24, in which he stated, "the Union has gone on record numerous times that before any discipline of any nature, the Union wants to discuss and bargain over the way discipline would be administered . . . The Union request[s] immediate discussion and bargaining on this matter and offers to meet at our Union Office in Harrisburg [on] Tuesday at 10 a.m. September 30, 2008." On September 29, Cooper replied to Bankard by e-mail that "I do not believe that negotiations were or are required based upon the information that you have provided. If you would care to clarify, we will be more than happy to reconsider our position." On October 1,

Bankard wrote Cooper another letter reiterating the Union request to bargain about discipline. Cooper did not reply to Bankard's October 1 letter.

In September, the Union filed the charges in Cases 4-CA-36306, 4-CA-36327, and 4-CA-36327, alleging, inter alia, that the Employer violated Section 8(a)(5) by discharging Taliaferro and Durst without having first bargained with the Union, and by subsequently refusing to bargain with the Union about Taliaferro's and Durst's discharges after implementation. The only issue submitted for advice in the instant cases is whether the Employer violated Section 8(a)(5) by its failure to notify and bargain with the Union prior to disciplining and discharging Taliaferro and Durst; the Region has determined that the Employer violated Section 8(a)(5) by its post-discipline refusal to bargain about the employees' discharges.[2]

ACTION

We conclude that the Employer did not violate the Act by failing to bargain with the Union prior to disciplining the two employees, as the Union had not previously requested to bargain about disciplinary actions that were consistent with the Employer's past practice.

It is well established that an employer must bargain with the union representing its employees before it unilaterally undertakes discretionary acts involving

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[2] [*FOIA Exemptions 2 & 5*

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mandatory subjects of bargaining, where: (1) the union has been recently certified or recognized; and (2) the employer is continuing to exercise the same kind of discretion it had previously exercised prior to the union's certification or recognition.[3] For example, in Eugene Iovine, Inc.,[4] the Board found that an employer violated Section 8(a)(5) when it unilaterally reduced employees' hours of work, despite the employer's argument that it had a past practice of reducing employees' hours during business slowdowns. The Board found that this was "precisely the type of action over which an employer must bargain with a newly-certified Union," as "there was no 'reasonable certainty' as to the timing and criteria for [such] a reduction." Similarly, in Adair Standish Corp.,[5] the Board held that an employer could no longer continue to unilaterally exercise its discretion with respect to layoffs after the union was certified, despite a past practice of instituting economic layoffs.

With regard to discretionary discipline consistent with past practice, however, the employer is only required to notify the union and bargain prior to implementing the discipline if the union has previously requested such pre-discipline bargaining. Thus, in Washoe Medical Center, Inc.,[6] the Board dismissed an allegation that an employer unlawfully failed to bargain over discipline before-the-fact, i.e., prior to the planned imposition of specific discipline on particular employees. The Board noted that "[t]he record does not establish that the Union at any time sought to engage in such before-the-fact-bargaining."[7]

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[3] See, e.g., NLRB v. Katz, 369 U.S. 736, 746 (1962) (employer must bargain with union over merit increases which were "in no sense automatic, but were informed by a large measure of discretion").

[4] 328 NLRB 294, 294-295, 297 (1999), enfd. mem. 242 F.3d 366 (2d Cir. 2001).

[5] 292 NLRB 890 fn. 1 (1989), enfd. in relevant part 912 F.2d 854 (6th Cir. 1990).

[6] 337 NLRB 202 (2001).

[7] Id., 337 NLRB at 202 fn 1.

Similarly, in Virginia Mason Medical Center,[8] the Board dismissed a refusal-to-bargain allegation where it found that "the [u]nion never asked for preimplementation notice . . . and never asked for additional bargaining on the matters at issue here."

In the instant cases, we conclude that the Union did not request pre-discipline bargaining prior to the discharges of Taliaferro and Durst. Thus, while the Union submitted requests for information about discipline, and requested that the Employer notify it of "any changes," the Union had not previously requested to bargain over disciplinary actions that were consistent with the Employer's past practice, albeit discretionary. It was only after Durst's discharge, on September 24, that the Union first clearly requested that, "before any discipline of any nature, the Union wants to discuss and bargain over the way discipline will be administered." In the absence of a prior request for pre-discipline bargaining about discipline that was consistent with past practice, we conclude that the Employer did not violate the Act by failing to notify and bargain with the Union prior to discharging Taliaferro and Durst.[9]

Accordingly, the Region should dismiss, absent withdrawal, the allegation that the Employer violated Section 8(a)(5) by disciplining and discharging Taliaferro and Durst without first providing the Union with notice and an opportunity to bargain over these decisions.

B.J.K.

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[8] 350 NLRB 923, 931-932 (2007).

[9] As we conclude that that the Union did not request bargaining prior to the discharges of Taliaferro and Durst, we need not determine in the instant cases whether the Employer's disciplinary system retained sufficient discretion to the Employer so as to require it to engage in pre-discipline bargaining with the Union upon such a request.