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

DATE: November 21, 2001

TO : Veronica I. Clements, Acting Regional Director
Bruce I. Friend, Assistant to Regional Director
Region 32

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

SUBJECT: MSGi Direct
Case 32-CA-18854-1

530-6050-4100
530-6050-6650
530-6067-4044-4000
530-8049

This Section 8(a)(5) case was submitted for advice as to whether MSGi Direct (the Employer) unlawfully failed to give Longshoremen ILWU Local 6 (the Union) notice and an opportunity to bargain over the discharge of a unit employee, in light of the Board's recent decision in Monterey Newspapers.[1]

FACTS

The Employer is a telemarketing firm that operates a calling center in Berkeley, California. In March 2001,[2] the parties commenced bargaining pursuant to an interim bargaining order,[3] since superceded by a Board bargaining order issued in the absence of exceptions to an ALJ's decision.[4]

Chandra Garsson had worked for the Employer as a telephone solicitor since 1996. In April the Employer

[1] 334 NLRB No. 128 (2001).

[2] All dates are 2001 unless otherwise indicated.

[3] Scott v. Stephen Dunn & Associates, 241 F.3d 652 (9th Cir. 2001), reversing 1999 WL 33318826 (N.D.Cal.).

[4] MSGi Direct, p/k/a/ Stephen Dunn & Associates, Cases 32-CA-17506, et al., Order dated July 27, 2001.

began to call Garsson in for meetings, telling her that she was making too few contacts per hour and was not following other rules during phone solicitations. These meetings continued for several days, and Garsson feared she would be fired.

On April 25, in order to increase her number of contacts per hour, Garsson deliberately miscoded four or five wrong numbers as "no's," which count as contacts.[5] The Employer discovered Garsson's miscoding during routine monitoring of employees' work. When the Employer confronted Garsson, she did not deny miscoding the calls, and the Employer immediately discharged her for falsifying records. It is undisputed that the Employer did not notify or give the Union an opportunity to bargain over Garsson's discharge.

The Employer's training manual clearly establishes that a wrong number is not a contact, and the Employer's employee handbook provides that falsifying forms, records, or reports will result in disciplinary action up to and including immediate termination. Although the Employer has previously discharged employees for falsifying credit card records, and Garsson herself had received a warning for miscoding calls, no one had ever been discharged for miscoding calls.

ACTION

We conclude that Monterey Newspapers is not applicable to the instant case, and that the Employer unlawfully failed to notify the Union and provide it with an opportunity to bargain over Garsson's discharge. Accordingly, absent settlement, the Region should issue a Section 8(a)(5) and (1) complaint.

Because the instant case involves an incumbent employer, we conclude that Monterey Newspapers is inapposite. In Monterey Newspapers, a successor employer exercised its Burns[6] privilege to set initial terms and conditions of employment, including a pay system which accorded the employer discretion to set the starting wage for new employees within a pay band for each job classification. 334 NLRB No. 128, slip op. at 1. The Board held that the employer did not violate Section 8(a)(5) and (1) by failing to notify the union and provide

[5] The Employer bills its clients based upon the number of contacts its telephone solicitors make; thus miscoded calls would result in a client being overcharged.

[6] NLRB v. Burns International Security, 406 U.S. 272 (1972).

it an opportunity to bargain over the initial wage rates to be offered to new employees. Id., slip op. at 2—3. In this regard, the Board stated that "the setting of initial employment terms by a lawful Burns successor stands on different footing than decisions made by an incumbent employer." Id., slip op. at 3. Thus, the Board made clear that its conclusion was based upon the employer's successor status.[7]

An employer must bargain with the union representing its employees before it undertakes unilateral discretionary acts involving mandatory subjects of bargaining, even where: (1) the union has been recently certified or recognized; and (2) the employer is merely continuing to exercise the same kind of discretion it had exercised prior to the union's certification or recognition.[8] A decision to discharge an employee is a mandatory subject of bargaining.[9] Thus, in Crestfield, during negotiations between the employer and a recently certified union, the employer discharged a unit employee for purported work rule

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[7] Since Monterey Newspapers has no bearing on the instant case, we need not address the proper application of the Board's "discretion within bounds" principle (334 NLRB No. 128, slip op. at 3 n.11) to Garsson's discharge.

[8] See, e.g., Eugene Iovine, Inc., 328 NLRB 294, 294-95, 297 (1999), enfd. mem. 242 F.3d 366 (2d Cir. 2001) (discretionary reduction in employee hours 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"), citing 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"); Adair Standish Corp., 292 NLRB 890 n.1 (1989), enfd. in relevant part 912 F.2d 854 (6th Cir. 1990) (employer could no longer continue unilaterally to exercise its discretion with respect to layoffs after union was certified, despite past practice of instituting economic layoffs). See also, e.g., Daily News of Los Angeles, 315 NLRB 1236, 1238-40 (1994), enfd. 73 F.3d 406 (D.C. Cir. 1996), cert. denied 519 U.S. 1090 (1997) (employer violated Section 8(a)(5) by unilaterally discontinuing its practice of granting merit wage increases at set times, even though the actual granting of the increases required bargaining with newly-certified union about amounts).

[9] Crestfield Convalescent Home, 287 NLRB 328, 328 (1987); Ryder Distribution Resources, 302 NLRB 76, 76, 90 (1991).

violations. 287 NLRB at 328. The union asked the employer to meet and discuss the discharge. The employer initially denied the union's request, claiming that absent a contractually established discipline and grievance procedure, it enjoyed the right to discipline and discharge employees for violation of its work rules. Id. at 328, 343. The Board, however, stating that "[a] grievance about a discharge is clearly a mandatory subject of bargaining," id. at 328, concluded that the employer's initial refusal and resultant delay in bargaining violated Section 8(a)(5).[10]

However, the Board has stated that where an employer can demonstrate that its imposition of discipline is consistent with a past practice, it need not bargain over such action.[11] In order to find that a past practice has become a term or condition of employment, the Board generally requires that the activity be satisfactorily established by practice or custom.[12]

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[10] 287 NLRB at 328. Accord: Ryder, 302 NLRB at 76, 90 (Board affirmed ALJ who, quoting Crestfield, found that employer, which had not yet agreed to a contract with newly certified union, violated Section 8(a)(5) by refusing to negotiate over the discharges of four bargaining unit employees).

[11] See, e.g., Wabash Transformer Corp., 215 NLRB 546, 546-547 (1974), enfd. 509 F.2d 647 (8th Cir. 1975), cert. denied 423 U.S. 827 (1975) (unit employee's discharge for failure to meet efficiency standards not violative of Section 8(a)(5) and (1) where employer's productivity rule predated union's campaign and certification and employer had actively enforced its rules by interviewing employees in default, posting notices on bulletin board, and delivering speeches to assembled employees; Board concluded that "discharge sanction was merely one means of enforcing preexisting efficiency standards which was implicit in the existence of any such standard"). Cf. Lovejoy Industries, 309 NLRB 1085, 1085, 1142 (1992), enfd. and remanded as to unrelated issues 26 F.3d 1162 (D.C. Cir. 1994), cert. denied 423 U.S. 827 (1975)(departure from pre-election practice violated Section 8(a)(5) and (1) where employer issued written warning to and suspended unit employee shortly after issuing oral warning; employee showed immediate improvement shortly after issuance of oral warning and practice was that subsequent discipline would have awaited "further developments").

[12] See Eugene Iovine, 328 NLRB at 297, citing Exxon Shipping

Although Garsson previously had been warned for miscoding calls, the Employer had never discharged anyone before her for such conduct. Therefore, based upon the evidence thus far adduced, the Employer cannot show a past practice that would abrogate its bargaining obligation. Absent past practice, and applying Crestfield to the instant case, we conclude that the Employer violated Section 8(a)(5) and (1) because it failed to notify the Union and provide it an opportunity to bargain over Garsson's discharge. Further, as Crestfield demonstrates, the fact that the Union and Employer are still negotiating over a contract did not privilege the employer to discharge Garsson without first providing the Union notice and an opportunity to bargain over that decision.

Accordingly, absent settlement, the Region should issue complaint alleging that the Employer violated Section 8(a)(5) and (1) by discharging Garsson without first providing the Union with notice and an opportunity to bargain over its decision. [*FOIA Exemption 5*

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Co., 291 NLRB 489, 493 (1988), and cases cited there; Dow Jones & Co., 318 NLRB 574, 576 (1995), enfd. 100 F.3d 950 (4th Cir. 1996) (Table).

[13] [*FOIA Exemption 5*

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