JD–24-08
Boston, MA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

ARAMARK EDUCATIONAL SERVICES, INC.

and Case 1-CA-43486

UNITE HERE LOCAL 26

ARAMARK d/b/a HARRY M. STEVENS, INC.

and Case 1-CA-43657

UNITE HERE LOCAL 26

ARAMARK SPORTS, INC.

and Case 1-CA-43658

UNITE HERE LOCAL 26

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DECISION

Statement of the Case

WALLACE H. NATIONS, Administrative Law Judge. This case was tried in Boston, Massachusetts on October 23 and 24, 2007. The charge in Case 1-CA-43486 was filed September 27, 2006[1] and an amended charge was filed on January 19, 2007 by UNITE HERE Local 26 (herein Union) and a Complaint based thereon was issued on December 21, 2006 against ARAMARK Campus, Inc., herein called by its correct name, ARAMARK Educational

[1] All dates are 2006 unless otherwise indicated.

Services, Inc. (herein ARAMARK Educational or MIT). On December 8, 2006, the Union filed a charge and then on January 19, 2007 filed an amended charge in Case 1-CA-43657 against ARAMARK d/b/a Harry M. Stevens, Inc. (herein ARAMARK Stevens or Hynes). The Union filed a charge in Case 1-43658 on January 19, 2007 against ARAMARK Sports, Inc. (herein ARAMARK Sports or Fenway). Region 1 issued an Order Consolidating Cases, Amended Consolidated Complaint and Notice of Hearing (herein Complaint) on March 7, 2007. The Complaint alleges that ARAMARK Educational, ARAMARK Stevens and ARAMARK Sports or collectively Respondents or ARAMARK, have engaged in conduct in violation of Section 8(a)(1) and (5) of the National Labor Relations Act (herein Act). Respondents filed a timely Answer to the Complaint wherein, inter alia, they admit the jurisdictional allegations of the Complaint.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Union and Respondents,[2] I make the following:

Findings of Fact

I. Jurisdiction

ARAMARK Educational, a corporation, provides food and beverage service at its place of business at the MIT Faculty Club in Cambridge, Massachusetts. During the calendar year ending December 31, 2006 purchased and received at its MIT facility goods valued in excess of $50,000 directly from points outside of Massachusetts and provided food and beverage services for the Massachusetts Institute of Technology valued in excess of $50,000, an enterprise within the Commonwealth of Massachusetts.

At all material times, ARAMARK Stevens, a corporation, has provided food and beverage service at its Fenway Park facility. During the calendar year ending December 31, 2006, ARAMARK Stevens purchased and received at its Fenway Park facility goods valued in excess of $50,000 directly from points outside of Massachusetts and provided food and beverage services valued in excess of $50,000 to the Boston Red Sox, an enterprise located within the Commonwealth of Massachusetts.

At all material times, ARAMARK Sports, a corporation, has provided food and beverage services at its facility in the Hynes Convention Center. During the calendar year ending December 31, 2006, ARAMARK Sports purchased and received at its Hynes facility goods valued in excess of $50,000 directly from points outside of Massachusetts and provided food and beverage services valued in excess of $50,000 to the Hynes Convention center, an enterprise located within the Commonwealth of Massachusetts.

The Respondents have admitted and I find that Respondents are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

[2] Respondents' brief contains certain attachments denoted by capital letters. Some of these exhibits were not introduced at the hearing and are clearly hearsay. General Counsel has filed a motion to strike the attachments marked C, D, E, I, K, and L. The motion is granted and these attachments are not part of the record.

II. Alleged Unfair Labor Practices

A. Complaint Allegations

The Complaint alleges that at all material times the following individuals have held the positions set forth opposite their respective names and have been supervisors of Respondents within the meaning of Section 2(11) of the Act and agents of Respondents within the meaning of Section 2(13) of the Act:

Meghan King	Associate General Manager, MIT Faculty and Catering, ARAMARK Educational
Richard K. Ellis	V. P. Labor Relations, ARAMARK Stevens
Rob Gould	Labor Relations, ARAMARK Stevens
Julie Jordan	General Manager, ARAMARK Stevens
Isaac Jackson	Director of Operations, ARAMARK Sports
Leigh C. Thumith	General Manager, ARAMARK Sports

The following employees of ARAMARK Educational, herein called the MIT unit, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time employees of the Faculty Club Dining Room and Bar, and all full-time and regular part-time employees of the Faculty Club Kitchen who work twenty (20) hours per week or more, including those in the classifications listed in Article 19-Wages, but excluding all other employees including maintenance employees, hostesses, MIT students employed in any capacity, casual temporary and seasonal employees, managerial and confidential personnel, office clericals, guards, working supervisors as defined in the Act.

Since about 1996, and at all material times, the Union has been the exclusive collective bargaining representative of the Unit, and since that date, the Union has been recognized as such by Respondent. This recognition has been embodied in successive collective bargaining agreements, the most recent of which is effective from July 1, 2002 to June 30, 2007(herein the 2002-2007 MIT contract.)

The following employees of ARAMARK Stevens, herein called the Fenway Park Unit, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All non supervisory full-time and regular part-time food and beverage employees including stand leaders, cooks, stand workers, warehouse personnel, beer sellers, suite attendants, suite runners, bartenders, servers, bussers, runners, utility, catering personnel and vendors who have actually worked more than ten events after April 12, 1982, who are employed at Fenway Park, Boston, Massachusetts. Excluded are managers, assistant managers, office and clerical employees, professional employees, confidential employees, supervisory

employees and vendors who have not actually worked more than ten events after April 12, 1982.

Since about 1975, and at all material times, the Union has been the exclusive collective bargaining representative of the Fenway Park Unit, and since that date, the Union has been recognized as such by ARAMARK Stevens. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which is effective from January 1, 2004 through December 31, 2008 (herein called the 2004-2008 Fenway Park contract).

The following employees of ARAMARK Sports, herein called the Hynes Unit, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All employees as defined in the collective bargaining agreement effective between the Union and ARAMARK Sports for the period June 1, 2002 to May 31, 2007 (herein called the 2002-2007 Hynes contract).

At all times since 1988, based on Section 9(a) of the Act, the union has been the exclusive collective bargaining representative of the Hynes Unit and recognized as such by ARAMARK Sports.

In September and October, 2006, the Union sent the Respondents a letter wherein it sought certain information deemed necessary for and relevant to, the Union's performance of its duties as the exclusive collective bargaining representative of the involved Units. The Respondents have, since receipt of those letters, failed and refused to furnish the Union with the information sought.

About September 1, 2006, the Respondents changed their policy regarding verification of Social Security numbers for employees who have discrepancies in their Social Security numbers by disciplining employees who failed to correct such discrepancies. The policy in question is the response that Respondents make to the so called "no match" lists which the Social Security Administration periodically sends to employers, noting the names of employees whose names do not match up with the social security number submitted for them. The change in policy relates to the hours, wages and other terms and conditions of employment of the employees in the involved Units and is a mandatory subject of bargaining. The Respondents implemented the policy change without prior notice to the Union and without affording the Union an opportunity to bargain with Respondents with respect to the change in policy and its effects. The complaint alleges that the Respondents' conduct noted above violates Section 8(a)(1) and (5) of the Act.

The information sought by the Union related the alleged change in policy. In each instance the Union sought the following information:

1. A copy of any and all documents reflecting communications, whether written, oral or electronic, between the Social Security Administration ("SSA") and ARAMARK between January 1, 2002 and the present, regarding the social security numbers of employees of ARAMARK.

2. A copy of any and all documents reflecting communications, whether written, oral or electronic, between the Department of Homeland Security ("DHS") and ARAMARK between January 1, 2002 and the present, regarding the social security numbers of employees of ARAMARK.

3. A copy of any and all documents that ARAMARK sent to the SSA or DHS between January 1, 2002 and the present.

4. A copy of any and all documents that ARAMARK sent to the SSA or DHS between January 1, 2002 and the present in order to verify employees' social security numbers.

5. A copy of any and all documents created or received by ARAMARK between January 1, 2002 and the present, regarding internal company policies or procedures for responding to social security "no match" letters.

6. A copy of any and all documents created or received by ARAMARK between January 1, 2002 and the present, regarding internal company policies or procedures for verifying employees' social security numbers with SSA.

7. A copy of any and all documents reflecting ARAMARK's oral communications with the SSA, including the SSA's Employee Verification Service, between January 1, 2002 and the present, regarding verification of social security numbers of employees of ARAMARK.

8. A copy of any and all documents asking, or reflecting an oral request that, ARAMARK report back to the SSA regarding social security "no matches" between January 1, 2002 and the present.

9. A copy of any and all registration forms submitted by ARAMARK to the SSA between January 1, 2002 and the present to register for the SSA's Employee Verification System.

There are two issues framed by the Complaint and facts of this case. These issues are:

1. Did Respondents violate Section 8(a)(5) and (1) of the Act by unilaterally changing their no-match letter policy and practice by requiring employees, as a condition of employment, to resolve discrepancies in the SSA information within 90 days?

2. Did Respondents violate Section 8(a)(5) and (1) of the Act by refusing to provide the Union with Respondents' communications with the SSA and DHS regarding no-match matters, and Respondents' internal documents on current and previous no-match policies?

B. The Relevant Facts Relating to the Issues Presented

1. Background Concerning the No-Match Issue

SSA maintains earnings information on workers for the purpose of determining eligibility for Social Security benefits. Employers submit employee wages to SSA on Forms W-2 Wage and Tax Statements. Sometimes, SSA is unable to match a worker's name and Social Security Number (SSN) from the Form W-2 with its own records. Since 1994, SSA has attempted to correct mismatched records by sending no-match letters to employers requesting corrected information.

The language in SSA's letters downplays the immigration implications of a mismatched SSN. No-match letters sent in 2006 emphasized that receipt of the letter does not imply that the employer or employee intentionally gave the government wrong information about the employee's name or SSN. The language also cautions that the letter makes no statement about an employee's immigration status. The letter goes on to warn employers that they should not use the letter to take any adverse action against an employee, such as laying off, suspending, firing, or discriminating against that individual, just because his or her SSN appears on the list. The letter states that by doing so, the employer could be violating State or Federal law.

On June 14, DHS began the rulemaking process and proposed a new rule that would add receipt of a no-match letter to a list of things that could lead to a finding that an employer had constructive knowledge of an employee's unauthorized immigration status. Under the new rule, DHS proposed to create "safe-harbor" procedures that the employer could follow in response to a no-match letter to be certain that DHS would not find that the employer had constructive knowledge that the employee referred to in the letter was not authorized to work in the United States. The safe harbor procedure called for the employer to check its records for the source of the mismatch within 30 days. If the discrepancy was not due to error in the employer's records, then the employer had to request that the employee confirm his or her information, and advise the employee to resolve the discrepancy with the SSA within 90 days of the date the employer received the no-match letter.

On August 15, 2007, DHS concluded its year long rulemaking process and issued the new rule to be effective on September 14, 2007. However, the U.S. District Court for the Northern District of California blocked the rule by issuing a preliminary injunction. The Court's ruling is under appeal and the rule has never gone into effect.

However, there are laws already in effect which bear on the issues raised by the no-match letters. In 2006, ARAMARK received no-match letters for its various corporate entities. The initial letters provided partial lists of SSNs only and no mismatched names. Respondent requested and received from SSA comprehensive lists of mismatched names and numbers. Over 4,400 of its employees appeared on the various lists it received for its corporate entities. The Respondents took the receipt of these no-match lists seriously. Several federal statutes and regulations require Respondent to ensure that its employees have valid SSNs. The Company has cited several of them. For example the IRS is authorized to fine a company $50 for each incorrect SSN that it allows remain incorrect. The Immigration Reform and Control Act of 1986 (IRCA) makes it unlawful for a company to continue to employ an unauthorized alien when it learns that that alien is unauthorized. The Supreme Court in *Hoffman Plastic Compounds, Inc.v. NLRB,* 535 U.S. 137 (2002) interpreted the provisions of the act cited above thusly: "[I]f an employer unknowingly hires an unauthorized alien, or if the alien becomes unauthorized while employed, the employer is compelled to discharge the worker upon discovery of the worker's undocumented status. Employers who violate IRCA are punishable by civil fines and may be subject to criminal prosecution. (citations omitted). Federal Courts have held that this Act creates a constructive knowledge standard for employers, according to which " a deliberate failure to investigate suspicious circumstances imputes knowledge." *New El Ray Sausage Co. v. U.S. Immigration & Naturalization Serv.,* 925 F.2d 1153 (9th Cir. 1991). I believe these laws must be taken into consideration in this case.

2. Respondents' No-Match Policy and Practice Before September 2006.

Two exhibits in the record set forth Respondents' no-match policy as they existed before 2006, Respondents' Ex. 7 and GC Ex. 22. R-7 contains a cover memorandum from

Respondents' Payroll Department dated December 15, 2000. The exhibit also contains two documents that both have the title "Social Security Number (SSN) Verification Process Checklist." One is undated and the other is dated November 21, 2000. An additional undated document that is referred to in the memorandum and is titled "Notice to All Applicants and Employees," completes the exhibit. The memorandum, checklists, and notice, taken as a whole, form a confusing mosaic as to what the no-match policy was. It is not clear whether employees who failed to correct discrepancies in their SSA information "may" or "must" be terminated. The memorandum states, "If an employee fails to produce an original Social Security Card within the time allotted, you *must* terminate his/her employment. However, the checklists state, "If the employee fails to bring in proper documentation within 3 business days or a valid card within 60 days, if required, then you *may* terminate the employee for failure to have a valid Social Security Number." The notice states, "[A]ll existing employees that have been identified to ARAMARK by the Social Security Administration as having an error in their Social Security account *may* also be required to also produce an original card. NOTE: Employment *may* not continue if an employee fails to produce an original Social Security Card within the time allotted."

GC-22 is titled "Social Security Number (SSN) Verification Process Checklist" and is dated December 2002. According to this checklist, existing employees who have a SSN discrepancy are to be informed of the discrepancy. They are then given 3 business days to go to the SSA, correct the discrepancy, and return to the Company with verification that the employee has taken corrective action. The checklist continues, "If the employee fails to bring proper documentation within 3 business days or a valid card within 90 days, then you *may* terminate the employee for failure to comply with Company policy."

Regardless of the ambiguously written policy that was in place, the record evidence establishes that Respondent's practice was not to enforce the policy at any of the three locations at issue in this case: Massachusetts Institute of Technology (MIT); Hynes Convention Center (Hynes); and Fenway Park (Fenway). Respondent stipulated that prior to 2006, the local managers at these three locations did not enforce Respondent's no-match policy at their locations. Moreover, Respondents' Vice-President of Labor Relations, Richard Ellis, conceded in his testimony that Respondents' written policy was "probably not" enforced in the period between 2000 and 2006. Ellis explained: "I think part of the problem is that - promulgate these rules, then we have changes in management ongoing, changes in HR, changes in labor relations, there's not the consistency that probably should take place."

Respondents practiced a lais-sez faire policy at the three locations before September 2006. It simply notified the employees that they were the subject of the no-match letters and left it up to the employee to decide how to deal with the problem. Employees were allowed to continue working regardless of whether they ever resolved the discrepancies with SSA. Brian Lang, the Union's Vice-President and Staff Director, testified that no employees were disciplined as a result of no-match letter related problems.

Lang gave an example of Respondent Educational's practice in 2004. Respondent Educational informed the Union, by letter, that three bargaining unit employees at MIT were the subject of a no-match letter. A few days later, the Union responded, by letter, setting forth the Union's position on the matter. The Union took the position that the Company should take no action against the employees, and that the Company had fulfilled its obligation by notifying the employees of the discrepancies. Lang testified that later that month, he met with Hilary Noel, Respondent Educational's General Manager at MIT at the time. At the meeting, Noel told Lang that before she agreed to anything, she would have to check with someone in a higher management position. Within a week, she informed Lang that the Company agreed with the Union and would not take any adverse action toward the employees who had showed up on the

no-match letter.

Respondent's records corroborate Lang's testimony. MIT employee Carmen Plasencia appeared on the 2004 no-match letter. Apparently she did not correct the discrepancy because she appears again on the 2006 no-match letter. Nevertheless, Plasencia continued to work at both MIT and Hynes until Respondent changed its policy and suspended her on October 5, 2006.

3. Respondents Change Their No-Match Policy and Practice

In July 2005, Respondents again revised their Social Security Number (SSN) Verification Process Checklist. The revised checklist provides that employees who are the subject of a no-match letter have 14 days to begin corrective action and 90 days to fully correct the problem with SSA. If the employee cannot provide written verification of reapplication or corrective action or an original Social Security card within the time allowed, then the employer "must terminate the employee for failure to comply with ARAMARK policy." There is no evidence that Respondents ever informed the Union of the revised policy or that the Union was aware of the revisions until September 2006.

In May 2006, Respondents received no-match letters from SSA identifying 4400 employees nationally whose SSA information had discrepancies. Between May and August, Respondents went through a process of obtaining the names as well as the SSN's of the no-match employees from SSA.

The first opportunity for Respondents to apply their new policy came in September, after they had obtained the names from SSA. During August, Respondents' managers had held a series of internal discussions corporate wide on the new no-match policy. By about September 7, they developed a "protocol" that set forth a procedure for labor relations employees to follow at Respondents' unionized facilities. The protocol uses the same timetable as the July 2005 checklist, i.e., 14 days to begin corrective action and 90 days to complete the corrective action. It also calls for employees who have not begun the corrective action in 14 days to be suspended and for employees who have not completed the corrective action in 90 days to be terminated.

In early September, even before the finalization of the protocol, Respondents began implementing their new policy at, inter alia, MIT, Hynes and Fenway.

4. Respondent Educational Implements the Changes at MIT

Respondent Educational and the Union are parties to a collective bargaining agreement covering about 20 food service employees employed by the Respondent at MIT. The agreement expired on June 30, 2007. The parties are currently negotiating a successor agreement. Among other things, the agreement contained the following provisions:

Article 7 – Management

The Union agrees that, subject to the terms of this Agreement, the management of the Employer's activities and the direction of the working forces, including but not limited to the establishment of reasonable working rules and reasonable work schedules, the right to hire, assign and transfer employees, to layoff employees because of lack of work or funds, and to discipline or discharge employees for just cause, is vested exclusively in the Employer when not in conflict with other provisions of the Agreement.

Article 36 – Immigration

36.1 In the event that an employee who has completed his/her probationary period has a problem with his/her right to work in the United States, or upon notification by the INS that an immigration audit or an investigation is being initiated, or when the Employer receives No Match letter(s) from Social Security, the Employer shall immediately notify the Union in writing, and upon the Union's request, agrees to meet with the Union to discuss the nature of the problem or investigation to see if a resolution can be reached. Whenever possible, this meeting shall take place before any action by the Employer is taken.

36.2 The Employer will furnish to any employee terminated because he/she is not authorized to work in the United States of America a statement stating the employee's rights and obligations under this Section of the Agreement.

36.3 Upon request, employees shall be released for up to five (5) unpaid working days per year during the term of the Collective Bargaining Agreement in order to attend to INS proceedings and any related matters for the employee and the employee's immediate family (parent, spouse, and/or dependent child). The Employer may request verification of such leave.

36.4 No employee employed continuously since November 16, 1986 (or before as amended by Congress) shall be required to document immigration status.

36.5 In the event that an employee is not authorized to work in the United States following his/her probationary period or introductory period, and his/her employment is terminated for this reason, the Employer agrees to immediately reinstate the employee to his/her former position, without loss of prior seniority (i.e., seniority, vacation or other benefits do not continue to accrue during the period of absence) upon the employee receiving proper work authorization within twelve (12) months from the date of termination.

36.6 If the employee needs additional time (beyond twelve (12) months, the Employer will rehire the employee in the next available opening in the employee's former classification, as a new hire without seniority, upon the employee providing proper work authorization within a maximum of twelve additional months. The parties agree such employees would be subject to a probationary period in this event.

Though since about 2000, the Employer had had in place a procedure for dealing with no-match letters noted above, it began in 2006 to enforce a uniform policy in this regard company wide. This enforcement was in contrast to the hit and miss enforcement that had occurred prior to 2006. The policy had been enforced in some locations around the country, but was not enforced at the three locations involved in this proceeding. In September, the Union received its first indication that Respondent Educational was taking a different approach to SSA no-match letters. By letter to the Union dated September 5, Meghan King, Respondent Educational's Associate General Manager at MIT, identified approximately 15 employees at MIT who had been the subject of the 2006 no-match letter. King's letter to the Union stated:

"Per our discussion we will need to have the individuals identified confirm their Social Security information that we received from them upon their hire. If we find that a discrepancy still exists, they will have three (3) business days to go to the local Social Security office to rectify the discrepancy. Upon visiting the SS office, they will need to provide ARAMARK with proof the discrepancy has been resolved. If they are issued a new Social Security card they will have

ninety (90) days to bring their new card to ARAMARK."

Lang responded by letter dated September 12. He reiterated the position the Union had taken in 2004, i.e., that the Company should take no action against the employees, and that the Company had fulfilled its obligation by notifying the employees of the discrepancies. The letter also warned Respondent Educational that:

"[N]or should you demand that employees correct the error in their names or social security numbers with the SSA. If you discipline an employee for failing to do so, you will violate the collective-bargaining agreement's "just cause" prohibition. . . . In sum, we want to schedule a meeting on this matter. You should not demand that employees correct their records with the Social Security Administration."

Lang also spoke by telephone with King on or about September 12. He told her not to take any adverse action. King responded that she was being told by the corporate office that she had to follow the policy set forth in her September 5 letter.

On or about September 21, King sent Lang copies of the letters that were being sent to three bargaining unit employees at MIT. The letters stated that the employees were being given 14 days to go to SSA to start the process of correcting the no-match, and that they would be given 90 days to complete the correction process. Lang responded by letter dated September 21. He requested various items of information. He also objected to Respondent Educational's implementation of a new No Match policy without bargaining with the Union.

5. Respondent Stevens Implements the Changes at Hynes

Respondent Stevens and the Union are parties to a collective bargaining agreement covering about 500 food service employees employed by the Respondent at the Hynes Convention Center and the Boston Convention and Exhibition Center (Hynes). The agreement was effective by its terms from June 1, 2002 to May 31, 2007. It has been extended while the parties are negotiating a successor agreement. The agreement contains a similar immigration provision and an identical management rights provision as found in the MIT agreement.

On about September 13, Isaac Jackson, the Director of Operations for Respondent Stevens at Hynes, spoke to Lang by telephone. He explained that some bargaining unit employees had appeared on a no-match letter. He asked Lang what he was supposed to do. Lang said that Respondent Steven's only obligation was to notify the employees and let them know that they could go to SSA if they wanted to. Lang said he would send him a letter. By letter dated September 13, Lang set forth the Union's position. He reiterated the position that the Union had taken in 2004 and in its letter to Meghan King at MIT the previous day, i.e., that the Company should take no action against the employees, that the Company had fulfilled its obligation by notifying the employees of the discrepancies, that the Company should not discipline employees for failing to correct their SSA information, and that the Union wanted to meet on the matter.

Lang spoke by telephone on September 29 with Jackson's boss, Leigh Thumith. She was the General Manager at Hynes at the time. She told him that Rob Gould, Labor Relations Director for Respondent Stevens, would be calling him to discuss the no-match issue. Later on September 29, Lang sent a letter to Thumith. Lang stated that he had still not heard from Gould. He also objected to Respondent Stevens' implementation of the new no-match policy without bargaining with the Union. He also requested items of information. Thumith responded with an undated letter that the Union received soon after September 29. Thumith refused to bargain

about the no match issue stating:

"Please understand, however, that our compliance with I-9 verification procedures is not subject to negotiation with the Union, but rather is dictated by federal law."

During the week between September 29 and October 7, Lang spoke to Gould by telephone. They spoke about the no-match situation with respect to Hynes and Fenway. Gould explained that the new no-match policy was Company wide. Lang told Gould that the new policy was a change and that he needed information about the change. Gould went through the protocol and Lang reiterated the Union's position. Gould took the position that it was perfectly legitimate for the Company to implement the new no match policy despite the Union's opposition. The conversation ended with Gould and Lang agreeing to disagree.

6. Respondent Sports Implements the Changes at Fenway.

Respondent Sports and the Union are parties to a collective bargaining agreement covering about 2000 food service employees employed by the Respondent at Fenway Park. The basic agreement has been in effect since 1998 and the most recent addendum agreement is effective by its terms from January 1, 2004 to December 31, 2008. The agreement contains no immigration provision and has the following management rights clause:

Article 34 – Management Rights

A. The Company retains the exclusive right to plan, determine, direct and control the nature and extent of all its kitchen, dining room, bar and allied operations, and/or maintenance requirements, and to install or introduce any new or improved production methods or facilities and to maintain, efficient operations. The Company retains its inherent right to direct and control its working force personnel, to determine the number of employees required, and to designate the type of position, assignments and reassignments which it deems any employee is qualified to fill.

B. The Company shall have the right to make such reasonable rules and regulations as it may deem necessary and proper for the conduct of its business, and the Company may, after negotiations with the International Union, change or make other rules or regulations; provided, however, that such rules and regulations shall not be inconsistent with or be in modification of this Agreement.

In Lang's telephone conversation with Rob Gould described above, Lang learned that Respondent Sports was implementing its new no match policy at Fenway. On October 7, after speaking with Gould, Lang sent a letter to Julie Jordan, Respondent Sports' General Manager at Fenway Park. The letter was a request for information and a statement of the Union's opposition to the new no match policy without first bargaining with the Union. The letter was identical to those sent to the MIT and Hynes.

Genevieve McFarland, Respondent Sports' Human Resources Director at Fenway in 2006, testified about the seasonal nature of employment at Fenway. The employees are laid off during the off season (October through March) and are reinstated according to seniority in April. She testified that in October, she met with the two bargaining unit employees who were the subjects of the 2006 no match letter. She also testified that she told them that if they wanted to return in April 2007, they would have to provide documentation that they had valid SSNs. She also testified that typically, employees returning at the start of a season who had worked the previous season were not considered new hires and did not have to fill out I-9 forms.

7. Meetings with the International Union

Respondents' Vice-President of Labor Relations, Richard Ellis, testified that he had multiple conversations with two officials from the UNITE HERE International Union, Kurt Edelman and Jim Dupont. UNITE HERE's International constitution authorizes representatives of the International Union to bargain and reach agreements on behalf of the local unions. Any agreement Ellis and the International Union might have reached would have been binding on the local Union in this case. The conversations took place beginning about late September 2006 and early January 2007. Ellis testified that he and Dupont agreed that the Respondents would freeze the no-match procedure until they could meet and negotiate a resolution to the dispute. On or about January 8, 2007, Ellis and Dupont had a face to face meeting. Ellis described what happened:

"[W]e met for about two hours, exchanged positions, talked about clearly their position was we didn't have to do it, clearly ours was we did. We tried to work out some language. I gave him a copy of documents that we would be willing to agree to. He took them and called me back probably around January 25th, said that there would be no resolution to the matter and I said okay, then we would continue the process the way it started."

Ellis testified that Respondents then went back to implementation of their new no match policy as they had been doing earlier, without objection from the International Union.

8. Respondents Suspend Employees

Respondents' records indicate that in about October and November, several employees were indefinitely suspended for violating the new no match policy. At MIT Gorge Aquirre and Carmen Plasencia were suspended on about October 5. At Hynes, Consuelo Buenrostro, Wilson Melgar, Alejandro Silva, Ana Vargas, Maria Salmoran, Ana Martinez, Silvia Vargas, Sandra Montoya, Agnaldo Arruda, James Coakley and Maria Martinez were suspended. At Fenway, about October 1, Dario Roldan and Jose Luissy were suspended. At the start of the new baseball season in 2007, one of these employees came back to work with a new social security card and the other employee failed to show up seeking re-employment.

C. Respondents Refuse to Provide Information to the Union

In his September 21 letter to Meghan King, Lang requested information regarding Respondent Educational's apparent change in its no match policy. The information requested is set out about at pages four and five of this decision. Lang sent similar requests to Respondents at Hynes and Fenway. Other UNITE HERE locals sent similar requests. International Union official Kurt Edelman told Richard Ellis that similar requests were going to be made at all of Respondent's locations nationwide. When Ellis said that Respondent preferred to just deal with the request on the International level, Edelman rejected this approach and reiterated that the requests would be made by the locals.

Although the requests on their face are broad, Lang testified that they were meant to apply only to the MIT, Hynes and Fenway facilities, not all of ARAMARK's facilities. In response to a question from General Counsel, Lang testified that Respondent never sought clarification as to how broad the request was meant to be. However, at a different part of his testimony, Lang admitted that in a telephone conversation with Respondent's official Ted Bennett, Bennett asked and Lang replied as follows:

"…[h]e said well what information exactly do you want. I said I want exactly the information that was on the original information request and he said can't you narrow it down. I said no and that's where it was left."

At MIT, King responded to Lang's request by letter dated September 25. Without giving any reason, she stated that she would not comply with the request. She referred any further question to Ted Bennett, Senior Director of Labor Relations at ARAMARK's Corporate Office in Philadelphia. Shortly after receiving King's letter, Lang telephoned Bennett. He asked Bennett to comply with the information request. He also asked Bennett why Respondent was changing its no match policy without notifying and bargaining with the Union. Bennett did not respond to the question about the change and said he would get back to Lang about the information request.

At Hynes, in response to the Union's information request, Leigh Thumith sent Lang an undated letter at the end of September. She said that she was investigating the Union's information request and would provide the appropriate information after Respondent Stevens had compiled the documents. Thumith never provided any of the requested information.

Lang testified that he spoke by telephone in late September with Rob Gould. According to Lang, he told Gould that the new no match policy was a change and he would need information. According to Lang, Gould told Lang that the information that he had requested at Fenway and Hynes was "out of bounds." Gould testified that this conversation took place on September 24 while he was on vacation and before the written information requests had been sent. Gould remembered Lang asking for an employee list and Gould said he would provide one. He did not follow through if indeed he said he would. On this point, to the extent there is a difference between Lang's and Gould's testimony, I credit Lang. His references to the conversation in correspondence that he wrote to the Company at the time corroborate his testimony.

Local 26 did receive a positive response to its information requests from Richard Ellis acting on information requests made by the International Union. He responded by separate letters dated November 20 (MIT and Fenway) and December 12 (Hynes). The letters were nearly identical, with the only difference being the employee suspension information on the last page of the attachment. Attached to the letters were the documents listed below:

l. A document titled Social Security Number (SSN) Verification Process for New Hires and Current Employees with SSN Discrepancies (Updated July 2005);
2. Documents titled "Letter I" and "Letter II" that instructed employees as to what they needed to do to correct SSN discrepancies.
3. A document titled "Social Security Number Verification Request for New Hires";
4. A document titled "Social Security Number Verification";
5. A document titled "Social Security Card Notice to All Applicants and Employees;"
6. A no match letter dated April 7, with all employee names and SSN's redacted;
7. A computer printout with the names of bargaining unit employees who were suspended for not complying with Company policies.

After reviewing the letter and documents, Lang concluded that the information was not fully responsive to the Union's information request. He wrote to Bennett on December 8. He reiterated the Unions request for all the information he had originally requested. He also enclosed a copy of the original request.

Within a month of the December 8 letter, Bennett telephoned Lang. As noted above, Bennett asked Lang exactly what information he wanted. Lang said he wanted exactly the

information that was on the original information request. Bennett asked if Lang could narrow it down. Lang said no. The Union had not received any information other than the November 20 and December 12 correspondence in response to its information requests.

Lang testified as to why the Union needed the information it requested at the three facilities. He explained that the Union needed the information described in paragraph 1 of its requests in order to ascertain if SSA was putting new requirements on Respondents with respect to their handling of no-match letters. That is why the request goes back to 2002, so that the Union can determine how the SSA requirements have evolved over time.

Lang testified that the Union needed the information requested in paragraph 2 of its requests because it was aware that DHS had proposed the safe harbor provision and the Union was trying to find out if the Respondents' no-match policy was related to the DHS proposal and whether the DHS was directing Respondents to do what they were doing.

Lang testified that the Union needed the information requested in paragraph 3 to see if the SSA's instructions on no-match letters had changed since 2002. The Union also needed the letters to determine the names of employees who had been the subject of the letters in the past. The Union needed the information requested in paragraphs 4, 8 and 9 of its requests in order to determine if there was a change in the way Respondents were relating to DHS and SSA regarding the verification of employee SSNs.

Lang testified that the information requested in paragraphs 5, 6 and 7 of the Union's requests was relevant to the issue of how Respondents' no-match policy had changed over the years since 2002. The Union suspected there had been a change but it was trying to determine the nature of the change.

D. Did the Respondents Violate the Act by Failing and Refuse to Bargain over the Change in its Policy Regarding No-Match Letters

Absent the clearly expressed consent of the union, an employer violates Section 8(a)(5) by changing a term or condition of employment without first bargaining to impasse with the Union. *NLRB v. Katz,* 396 U.S. 736 (1962). The rules governing the imposition of employee discipline are mandatory subjects of bargaining. *United Cerebral Palsy of New York City,* 347 NLRB No. 60, slip op. at 5 (2005). In addition, the establishment of a new condition of continued employment and new grounds for discipline are mandatory bargaining subjects. Where employees are disciplined for failing to comply with a unilaterally changed policy, such a change is material, substantial and significant. *Toledo Blade Co.,* 343 NLRB 385 (2004). An employer can make unilateral changes to such mandatory bargaining subjects only if the union clearly and unmistakably waives its right to negotiate over the changes. See *Metropolitan Edison Co. v. NLRB,* 460 U.S. 693 (1983); *Provena St. Joseph Medical Center,* 350 NLRB No. 64 (2007); *California Offset Printers, Inc.* 349 NLRB No.71 (2007).

First it is clear to me for the reasons set forth in the factual discussion at an earlier point in this decision that Respondents have made a significant change in their policy regarding no match letters, and further, their total about face in their enforcement of the policy by itself requires notice and bargaining upon request of the affected Union. A change from lax enforcement to more stringent enforcement must be bargained over. *United Rentals,* 350 NLRB No. 76, slip op. at 2 (2007).

Respondents take the position that that the Union has waived its right to bargain over the changes in the no match policy and/or its decision to enforce the policy more stringently

because, 1) the Union did not request to bargain over these changes, 2) any request made was not timely, 3) the contracts at Hynes and MIT already address the no match policy changes, and 4) the Respondents did in fact agree to meet and bargain over the changes, albeit at the International Union level.

The first two reasons given are not supported by the facts. Upon being notified of the changes at MIT in letter from King to Lang, the Union requested a meeting over the changes in a letter sent to King the next week. Lang sent a similar letter requesting a meeting over the changes to Issac Jackson, Director of Operations at Hynes on September 13. The information request sent by Lang to Julie Jordan, ARAMARK's General Manager at Fenway on October 7 impliedly requests bargaining stating: "There is another reason that you may not implement the proposed regulation before it is adopted. In the past, ARAMARK has received Social Security Administration no-match letters and has not taken the steps that it is now taking. ARAMARK may not change its employment policies without bargaining with Local 26." This letter was sent about a week after Lang was informed of the changes that would take place at Fenway. I find that the Union made timely request for bargaining over the changes to the no-match policy at each of the involved facilities and they went unheeded at the local level.

The collective bargaining agreements at Hynes and MIT do cover the subject of no match letters without much specificity. In the first paragraph, they call for the Company to inform the Union in writing when a no match letter is received and upon request of the Union, to meet to see if the problem presented can be mutually resolved. The second paragraph calls for the Company to furnish any employee terminated because the employee is not authorized to work in the U.S. his or her rights and obligations under this portion of the collective bargaining agreement. ARAMARK's new policy is more restrictive and specific than the existing contract language and perhaps, more importantly, will be enforced whereas there was no enforcement of the no-match policy before September 2006. The complete change in the enforcement feature of the policy requires bargaining, upon request, as noted above.

On the other hand, I believe Respondents' fourth defense to be a valid one. While Bennett and Gould notified Lang of the impending no-match policy enforcement, Ellis concurrently notified his counterparts at UNITE HERE's International Union of those changes. UNITE HERE's Constitution authorizes representatives of the International Union to bargain and reach agreements on behalf of the local affiliates. Any agreement Ellis and the International might have reached would have been binding on Local 26. Upon receiving the notification from Lang, the International Union requested bargaining over the changes. Over the next several months, Ellis and officials of the International Union discussed and negotiated the issue over the phone and then in January met face to face to bargain. During these discussions, ARAMARK froze the implementation of the changes. The discussions throughout the fall of 2006 and the face to face meeting included exchanges of proposals. However the parties could not reach agreement on whether the Company would change its no-match policy or the extent of the change. As evidenced by letters sent by Local 26 to the Company, the Union's position is fixed, it wants no enforcement of the Employer's no-match policy. The Respondent's position is equally fixed, it wants to comply with existing immigration law and implement its no-match policy. The International Union walked away from negotiations saying no resolution of the parties differences could be reached.

Bargaining with the International rather than the individual locals makes perfect sense as the changes were taking place nationwide and would affect all of the International Union's locals at ARAMARK facilities. The parties, in my opinion, did bargain over the changes at the International Union level and could not reach agreement. Though I believe that the Respondents may have violated the Act by their September conduct, I find they cured this

violation by agreeing to bargain with the International Union and then freezing implementation while bargaining took place. I find that the parties did bargain as the law demands and reached impasse. This impasse is effective with respect to Local 26. Therefore I find no violation of the Act and will recommend this portion of the Complaint be dismissed.

E. Did Respondents Violate the Act by not Providing Local 26 Information Requested.

As with its bargaining obligation, Respondents chose to respond to the International Union and provide it with information with copies to the locals with which it had a bargaining relationship. Ellis advised the International Union what he would produce, produced it to the International, and never had an objection from the International Union. ARAMARK also received information requests from local unions other than local 26. It responded identically as it did with Local 26 and provided them with the information provided to the International Union. Other than a local in Washington, none objected. The Washington local filed a charge with the involved Region and it was dismissed. As the changes proposed were nationwide, I agree with Respondent that dealing with the International Union rather than a number of local unions was the only sensible approach. Further, I agree with Respondent that Local 26's information requests were overly broad, and not limited in any way. Though Lang testified that the requests were meant to apply only to Fenway, Hynes and MIT, it is not clear from the testimony that this limitation was expressed to Respondents. Local 26 has refused to narrow the scope of its information requests though urged to do so by Respondents. Thus most of the requests are overbroad, and unnecessarily burdensome to comply with as they require production of information for employees not part of the bargaining unit. They also seek historical information on employees that is meaningless in the context of the changes made to the no-match letter policy in 2006. I also find the information requested to be of only marginal relevance at best.

I believe the information that was requested and that is relevant to the local's role has either been provided in the material supplied pursuant to the International Union's request or satisfied by material produced at hearing pursuant to the General Counsel's subpoena or by stipulation. Local 26 has now received, by virtue of Aramark's response to the General Counsel's subpoena, the no-match letters covering MIT, Hynes and Fenway in 2006. Even if it were practical to gather the same information for the years 2002-05, I cannot see what relevance the historical information would have had for Local 26 in 2006. By virtue of ARAMARK's informal communications and its response to the International Union's request, Local 26 knew which of its members wree affected by the no-match policy in 2006 and how they would have been treated. I do not believe Local 26 needed anything more to effectively represent its members in 2006 and subsequent years. I see no reason to order the production of this historical information, given the difficulty in gathering it, its marginal relevance and considering the information obtained by Local 26 from the General Counsel's subpoena. In a similar vein, Respondent has provided a sample 2006 no-match letter received in 2006 and has received from SSA no instructions beyond what is contained in that letter and virtually identical letters in 2002-05.

Local 26's requests for all communications between ARAMARK and DHS and SSA have not shown to be relevant enough to the Local's role as representative to require the Respondents to reply. Even before the DHS began its rulemaking, the Respondents already had a clear duty under existing federal immigration laws to follow up on no-match letters to ensure that its workforce was authorized to work in the US. ARAMARK was subject to civil and criminal penalties if it failed to do so. Lang testified that Local 26 wanted to see whether the government's instructions to ARAMARK, or ARAMARK's policy had changed. First, if that was the extent of Lang's need for information, a look at the Policy (which ARAMARK provided to Local 26) and a simple request for copies of instructions from the government would have

sufficed. Moreover, a historical look at ARAMARK's practices would not assist Local 26 in representing employees in 2006. Knowing the names of ARAMARK employees on no-match lists prior to 2006 would not have any meaning as nothing happened to them and they would not be affected unless their names came up on the 2006 no-match letter or a subsequent one.

As noted, ARAMARK has supplied information on the matter of its no-match policy to the International Union, without complaint, and a copy of that information response was given to Local 26. By virtue of that response, and the response to General Counsel's subpoena, Local 26 in my opinion has received everything requested in its request that is even marginally relevant and not overly broad. Local 26's refusal to limit the scope of its request makes it unreasonable to require Respondents to further respond. Given my ruling on the lawfulness of the changes in the no-match policy, and my discussion of Respondents' response to the information requests, I do not find that Respondents have violated the Act. I will recommend dismissal of this portion of the Complaint.

Conclusions of Law

1. Respondents ARAMARK Educational Services, Inc., ARAMARK d/b/a Harry M. Stevens, Inc., and ARAMARK Sports, Inc. are employers engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. UNITE HERE Local 26 is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent's did not commit the unfair labor practices alleged in the Complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The complaint is dismissed.

Dated, Washington, D.C. May 13, 2008

_____
Wallace H. Nations
Administrative Law Judge

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.