

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

In the Matter of
ARAMARK EDUCATIONAL SERVICES, INC.

and

UNITE HERE LOCAL 26

Case 1-CA-43486

In the Matter of
ARAMARK d/b/a HARRY M. STEVENS, INC.

and

UNITE HERE LOCAL 26

Case 1-CA-43657

In the Matter of
ARAMARK SPORTS, INC.

and

UNITE HERE LOCAL 26

Case 1-CA-43658

**BRIEF IN SUPPORT OF THE EXCEPTIONS OF RESPONDENTS
TO THE SUPPLEMENTAL DECISION ON REMAND**

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Respondents ARAMARK Educational Services, Inc. (“ARAMARK Educational”), ARAMARK d/b/a Harry M. Stevens, Inc. (“ARAMARK Stevens”), and ARAMARK Sports, Inc. (“ARAMARK Sports”) (collectively, “ARAMARK”), by their undersigned counsel, submit the following brief in support of their position that the National Labor Relations Board (“Board”) should reject the Recommended Order of the Administrative Law Judge and dismiss this case with prejudice.

I. PROCEDURAL POSTURE

The trial of this case was conducted in October 2007. The issues were: (1) whether ARAMARK violated Section 8(a)(5) of the National Labor Relations Act (“the Act”) by failing to bargain over the implementation of its Social Security Number Verification Policy in Boston, Massachusetts in Fall 2006, and (2) whether ARAMARK violated Section 8(a)(5) of the Act by failing adequately to respond to certain information requests served upon it by UNITE HERE Local 26. On May 13, 2008, the Administrative Law Judge issued a Decision, ruling for ARAMARK on both issues. With respect to the bargaining issue, the Decision rejected ARAMARK’s chief arguments regarding Local 26’s waiver of bargaining rights, and instead ruled that whatever failure to bargain occurred at the local level was cured by ARAMARK’s national bargaining over the issue with the UNITE HERE International Union. (ALJD, Part II.D, p. 14, line 28 – p. 16, line 4).¹

On June 3, 2009, the Board issued a Decision and Order Remanding, in which the Board affirmed the ruling for ARAMARK on the information requests issue (NLRB Decision, p. 7, fn. 4), but remanded for further findings of fact and legal conclusions on the cure aspect of unilateral

¹ ARAMARK will cite to the original May 13, 2008 Decision of the Administrative Law Judge with the abbreviation “ALJD” and to his Supplemental Decision on Remand of October 7, 2009 as “ALJSDR”. ARAMARK will cite to the June 3, 2009 Decision and Order of the Board as “NLRB Decision”.

implementation issue (NLRB Decision, p. 7). The Board expressly held in abeyance ARAMARK's arguments regarding waiver. (NLRB Decision, p. 7, fn. 4.)

On September 30, 2009, the Administrative Law Judge issued a Supplemental Decision on Remand, in which he reversed his earlier ruling in favor of ARAMARK on the cure issue. (ALJSDR, p. 5, lines 11-19.) Except with respect to the matters specifically reversed in the Supplemental Decision on Remand, the Administrative Law Judge adopted his entire original Decision by reference. (ALJSDR, p. 2, lines 21-24.)

The Exceptions ARAMARK files today, and this Brief in support thereof, address only the unilateral implementation claim, as that issue is the only one left open by the Board's Decision of June 3, 2009. The information requests issue was fully resolved in ARAMARK's favor and is no longer at issue. In the present Exceptions and Brief, ARAMARK repeats the same waiver arguments that the Board held in abeyance in its June 3, 2009 Decision.

ARAMARK also addresses why the Administrative Law Judge was wrong to reverse his original Decision with respect to cure and why, even if ARAMARK is found to have committed an unfair labor practice in Fall 2006, the impasse reached at the national level in January 2007 renders the remedy proposed by the Administrative Law Judge improper.

II. STATEMENT OF THE CASE

A. Legal Context

The parties agree that this case is not about whether ARAMARK violated or complied with federal immigration or tax laws. However, the legal context in which ARAMARK operates is important background to this case. As the Administrative Law Judge noted, "these laws must be taken into consideration in this case."

From time to time, ARAMARK (and many other employers) receive "no-match letters" from the Social Security Administration ("SSA"), identifying employees whose names and

Social Security Numbers (“SSN”), as reported by ARAMARK for federal tax purposes, do not match each other. In 2006, ARAMARK received no-match letters for its various corporate entities, examples of which were admitted as Exhibits R-3 and R-4. The initial letters provide partial lists of SSNs only, and no mismatched names. In 2006, ARAMARK requested and received from SSA comprehensive lists of mismatched names and numbers. The pertinent lists were admitted as Exhibits R-5 and R-6. Over 4,400 ARAMARK employees appeared on the various lists ARAMARK received for its various corporate entities.

Although the SSA’s no-match letters are written in fairly benign language, the identification of SSN no-matches are in fact an extremely serious matter, causing significant exposure for ARAMARK (or any other company in a similar position). Several federal statutes and regulations require ARAMARK to ensure that its employees have valid SSNs. See, e.g., 26 C.F.R. § 31.6011(b)-2 (requiring employee to provide SSN to employer on first day of employment, and requiring employer to record and utilize employee’s SSN in appropriate records, returns, and forms). The consequences for an employer who ignores or permits incorrect SSNs are significant. For each incorrect SSN, the IRS is authorized to impose a \$50 penalty. See Internal Revenue Service, Reasonable Cause Regulations and Requirements for Missing and Incorrect Name/TINs (Publication 1586), at 2 (2004) (cited at ALJD, p. 6, lines 35-38). To put this penalty in proper context, in 2006 alone, ARAMARK’s potential liability, based on 4,400 unmatched SSNs, was over \$220,000.

Separate from the IRS penalties, but at least as important, is the potential liability the no-match letters create for ARAMARK under the Immigration Reform and Control Act of 1986 (“IRCA”). Section 1324a of IRCA provides as follows:

(2) Continuing employment

It is unlawful for a person or other entity, after hiring an alien for employment in accordance with paragraph (1), to continue to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment.

8 U.S.C. § 1324a(2). Interpreting this statute, the Supreme Court of the United States wrote:

[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. § 1324a(a)(2). Employers who violate IRCA are punished by civil fines, § 1324a(e)(4)(A), and may be subject to criminal prosecution, § 1324a(f)(1).

Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 148 (2002).²

Federal courts have held that Section 1324a creates a constructive knowledge standard for employers, according to which “a deliberate failure to investigate suspicious circumstances imputes knowledge”:

Contrary to the argument ... that the government has the entire burden of proving or disproving that a person is unauthorized to work, IRCA clearly placed part of that burden on employers. The inclusion in the statute of section 1324a(b)'s verification system demonstrates that employers, far from being allowed to employ anyone except those whom the government had shown to be unauthorized, have an affirmative duty to determine that their employees are authorized. This verification is done through the inspection of documents. *Notice that these documents are incorrect places the employer in the position it would have been if the alien had failed to produce the documents in the first place: it has failed to adequately ensure that the alien is authorized.*

New El Ray Sausage Co. v. U.S. Immigration & Naturalization Serv., 925 F.2d 1153, 1158 (9th Cir. 1991) (emphasis added) (cited at ALJD p. 6, lines 43-47). In a footnote, the Ninth Circuit added: “Although compliance with the paperwork procedures [at the hiring stage] establishes a

² Hoffman ultimately held that employees who are not authorized to work in the United States are not entitled to back pay or reinstatement even if their employer commits an unfair labor practice. Id. at 151-52. ARAMARK anticipates that this decision would have enormous importance if a compliance hearing became necessary in this case. It is ARAMARK's position that no compliance hearing should be necessary, because it committed no unfair labor practices.

good faith defense against a finding of unlawful hiring, 8 U.S.C. 1324a(a)(3), it should provide no defense against a violation of section 1324a(a)(2). While the hiring can be considered in good faith since the false nature of the documents was unknown, the continuing employment is done with the knowledge that the document is false.” Id. at 1158 n.7.

IRCA is particularly relevant to no-match letters because the Department of Homeland Security (“DHS”), which, since 2003, has been responsible for enforcement of IRCA, takes the position that the receipt of a no-match letter puts an employer on notice of a potential violation of the immigration laws. DHS recently stated: “Receipt of a No-Match letter, when considered with other probative evidence, is a factor that may be considered in the totality of the circumstances and may in certain situations support a finding of ‘constructive knowledge.’ A reasonable employer would be prudent, upon receipt of a No-Match letter, to check their own records for errors, inform the employee of the no-match letter, and ask the employee to review the information. Employers would be prudent also to allow employees a reasonable period of time to resolve the no-match with SSA.” Department of Homeland Security, Safe-Harbor Procedures for Employers Who Receive a No-Match Letter: Rescission, 71 Fed. Reg. 34281 (Oct. 7, 2009).³

³ DHS decided to rescind a regulation establishing a “safe harbor” for employers who take certain specific steps with respect to the receipt of no-match letters – not because employers should ignore such letters, but because it “decided to focus on more universal means of encouraging employer compliance than the narrowly focused and reactive process of granting a safe harbor for following specific steps in response to a no-match letter.” Department of Homeland Security, Safe-Harbor Procedures for Employers Who Receive a No-Match Letter: Rescission, 71 Fed. Reg. 34281 (Oct. 7, 2009). DHS expressly stated in the public notice announcing the rescission that it currently takes the same position with respect to no-match letters and constructive knowledge that the DHS and its predecessor agency, Immigration and Naturalization Services, have taken under previous administrations. Id. at 34280, 32481.

B. ARAMARK's Operations and Collective Bargaining Agreements at MIT, Hynes, and Fenway

ARAMARK provides managed services internationally and throughout the United States at over 5,000 locations. (Tr. at 54-55, 118.) Among these locations are Massachusetts Institute of Technology ("MIT"), Hynes Convention Center ("Hynes"), and Fenway Park ("Fenway"). At each location, UNITE HERE Local 26 ("Local 26") represents food service employees.

At all times relevant to this case, each of the three locations was covered by a separate, then-effective collective bargaining agreement. The MIT and Hynes agreements contained identical language concerning immigration and social security number no-match issues:

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 Hotel 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.

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.

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 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.

No employee employed continuously since November 6, 1986 (or before as amended by Congress) shall be required to document immigration status.

In the event that an employee is not authorized to work in the United States following his/her probationary 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 that 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.

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

(ALJD, p. 8, line 52 through p. 9, line 36; ALJD, p. 10, lines 31-32; see also Exhibit GC-3, Article 36; Exhibit GC-12, Article 19).⁴ Brian Lang, Vice-President of Local 26, testified that this language covered how ARAMARK was to respond to the receipt of a no-match letter at the two locations. (Tr. at 59.)

Each of the three contracts, including the Fenway contract, includes strong management rights language permitting ARAMARK to establish reasonable working rules. (Exhibit GC-3, Article 7; Exhibit GC-12, Article 5; Exhibit GC-18, Article 34.)

C. ARAMARK's Social Security Number Verification Policy

ARAMARK has had a Social Security Number Verification Policy ("the Policy") since 2000. Although the policy has been revised since that time, the basic structure of the policy has remained constant:

- Upon receipt of a no-match letter, ARAMARK payroll attempts to identify the nature of the error.
- ARAMARK asks the employee to verify the information in its payroll system.

⁴ In the MIT contract (GC-3), the paragraphs are numbered. For the sake of simplicity, the quotation above omits those paragraph numbers, which do not appear in the Hynes contract (GC-12).

- If the information in the payroll system is incorrect, the correct information is verified (e.g., through production of a social security number card), entered into the system, and compared with the information provided by SSA.
- If the employee verifies that the information in the payroll system is correct, he/she is informed of the discrepancy and instructed to go to SSA to correct the discrepancy.
- Employees whose payroll information does not match the SSA's information after the steps outlined above are required to provide documentation that he/she has gone to SSA to correct the problem (i.e., a replacement card or documentation of corrective action). Employees who fail to do so are placed on unpaid suspension.
- Represented employees have several months to present a new social security card. Those who do not are terminated.

(Exhibit GC-17, second through eighth pages; see also ALJD, pp. 6-8.) These essential elements have remained constant since 2000. (Exhibits R-7, GC-22; see also ALJD, pp. 6-8.) Since 2005, represented employees have had 14 days to provide documentation that he/she has gone to SSA to correct the mismatch. ARAMARK gives represented employees two letters notifying them of their obligations under the Policy – an initial letter notifying them of the start of the 14-day period, and a second letter after seven days, letting them know that they have seven more days to avoid suspension.

ARAMARK acknowledges that its enforcement of the Policy was imperfect and sporadic prior to 2006. ARAMARK presently has no evidence that it enforced the Policy at Hynes, MIT, or Fenway prior to 2006.

D. Enforcement of ARAMARK's Social Security Number Verification Policy in 2006

In 2006, ARAMARK determined that it would increase its efforts to enforce the Policy uniformly and corporate-wide. (Tr. at 131.) Because of the imperfect enforcement of the Policy prior to 2006, ARAMARK's Labor Relations Department decided to emphasize notification of international and local union leaders regarding the enforcement strategy and the terms of the

Policy. (Tr. at 131-32.) On September 7, 2006, Vice President of Labor Relations Rick Ellis conducted a teleconference with the Labor Relations Directors and Senior Directors who report directly or indirectly to him. (Tr. at 131-32.) Ellis instructed the Directors and Senior Directors to provide notice to all local union leaders whose members might be affected by the 2006 enforcement program, and to meet with anyone who requested a meeting on the topic. (Tr. at 132.) Ellis followed up the teleconference by issuing a protocol describing the strategy in represented locations. (Tr. at 132-33.) The new protocol was not a new policy but rather simply contained guidelines for enforcing the Policy in represented locations. (Tr. at 131-33; Exhibit GC-21.)

1. Notice to Local 26

ARAMARK provided Local 26 with ample advance notice of its 2006 enforcement efforts. On September 5, 2006, Meghan King, Associate General Manager for ARAMARK at MIT, sent a letter to Union Business Agent Eugenio Fernandez notifying him that ARAMARK intended to begin enforcement of the Policy with respect to employees at MIT identified on ARAMARK's 2006 no-match letter. (Exhibit GC-6.) Within days after the September 7, 2006 Labor Relations teleconference, Ted Bennett, ARAMARK's Senior Labor Relations Director responsible for administration of the MIT contract, also notified Brian Lang of ARAMARK's intentions. (Tr. at 156-57, 162.) ARAMARK did not take any action pursuant to the Policy until September 21, 2006, and did not suspend any employees until October 5, 2006. (Exhibits GC-8, R-13.)

ARAMARK supplemented the advance notice provided at MIT with similar efforts at Hynes. On about September 13, 2006, Isaac Jackson, Director of Operations for ARAMARK at Hynes, provided Lang with verbal notice of enforcement of the Policy with respect to employees at Hynes. (Tr. at 36.) Rob Gould, ARAMARK's Labor Relations Director responsible for

administration of the Hynes and Fenway contracts, also spoke with Brian Lang. (Tr. at 38-39.) Following notice to Local 26, ARAMARK began enforcement of the policy at Hynes. (Tr. at 36-41.)⁵

At Fenway, when the 2006 baseball season ended, the two active employees who had appeared on the 2006 no-match list were advised that they would have to provide documentation that they had begun rectifying the problem with SSA prior to coming back to work for the 2007 baseball season. (Tr. at 177-78.) During the course of earlier discussions regarding MIT and Hynes, Local 26 already had received notice of ARAMARK's corporate-wide intentions, including its intentions to enforce the policy at Fenway. (Tr. at 39.)

At no time during any of the conversations or communications between ARAMARK and Local 26 did Local 26 request bargaining regarding the Policy. In written correspondence, Brian Lang requested a "meeting on this matter." (Exhibits GC-7, GC-13.) Lang testified that he and Bennett or Gould typically met by telephone and almost never in-person. (Tr. at 68.) Indeed, as outlined above, Lang had several telephone conversations with Bennett about the matter and at least one with Gould. In his first conversation with Bennett, Lang claimed that ARAMARK's approach violated the MIT contract and threatened to arbitrate the impending suspensions. (Tr. at 157-79.) Bennett testified that he would have been happy to travel to Boston to discuss the no-match issue had Lang requested it, and indeed Ellis' instructions would have required him to do so. (Tr. at 132, 156-58.) Lang made no such request. (Tr. at 157.) As noted above, Lang and Gould also spoke by telephone, and in Lang's words, they just "agreed to disagree" about the

⁵ ARAMARK excepts to the Administrative Law Judge's finding that Leigh Thumith, ARAMARK's General Manager at Hynes, refused to bargain about the no-match issue. (Exception 2.) There is no dispute in the record that Gould was the designated collective bargaining representative for Hynes. (Tr. at 38-39.) Thumith may have stated her impression that no-match issues were not subject to negotiation, but she also referred Lang to Gould to discuss these issues. (Tr. at 38-39.) Clearly, Thumith was in no position to refuse bargaining even if she had tried, which the record shows that she did not. In any event, as this Brief demonstrates, Lang was given advance notice of the policy enforcement at Hynes and chose not to request bargaining.

merits of the Policy. (Tr. at 39.)⁶ Bennett and Gould testified unequivocally that Lang never requested bargaining regarding the no-match issue (Tr. at 84, 86, 157), and Lang made no assertion to the contrary (Tr. at 11-75). Even in the General Counsel's rebuttal case, when Lang was permitted by evidentiary ruling to clarify matters about which he had already testified during the case-in-chief, Lang did not contradict Bennett's or Gould's testimony that he never requested bargaining. (Tr. at 190-93.)

2. Negotiations with the International Union

In the Fall of 2006, as ARAMARK officials with responsibility for the three locations notified Local 26 of the Policy enforcement efforts, Ellis concurrently notified his counterparts at the UNITE HERE International Union of those efforts. (Tr. at 132.) Ellis notified first Kurt Edelman, UNITE HERE International Director, and then Jim Dupont, who was Mr. Edelman's superior.⁷ Edelman and Dupont requested bargaining. (Tr. at 135.) Consistent with his instructions to his Labor Relations Directors, Ellis obliged the International's request. (Tr. at 135.) As is undisputed, and as the Administrative Law Judge found, "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." (ALJD, page 12, lines 6-9; Exhibit R-1.)

⁶ ARAMARK excepts to the Administrative Law Judge's finding that Gould "took the position that it was perfectly legitimate for the Company to implement the new no match policy despite the Union's opposition." (Exception 3.) Even Lang's testimony does not make that assertion. Lang simply testified that they agreed to disagree about the merits of ARAMARK's company-wide policy. (Tr. at 39.)

⁷ ARAMARK excepts to the Administrative Law Judge's finding that Ellis first notified the International Union in *late* September 2006. (Exception 4.) Ellis' *unrebutted* testimony was that he called Edelman "around September 12." (Tr. at 132.) The Administrative Law Judge's finding is not decisive to his conclusions, which are supportable regardless of when in September ARAMARK first notified the International Union of its intentions. ARAMARK's notifications to both Local 26 and the International Union of its intention to enforce the policy unquestionably preceded any enforcement efforts.

Over the next several months, ARAMARK and the International bargained over the no-match issues. (Tr. at 133-36.) Ellis stopped any enforcement of the Policy while discussions were pending. (Tr. at 135.) On January 8, 2007, Ellis and Dupont met face-to-face and exchanged positions for about two hours. (Tr. at 135-36.) The parties were diametrically opposed on the issue of whether ARAMARK had an obligation to take action with respect to no-match letters. (Tr. at 135.) Their efforts to work out an agreement included the discussion of specific language. (Tr. at 135.) On January 25, 2007, Dupont notified Ellis that there would be no resolution to the matter. (Tr. at 135-36.) Impasse having been reached, Ellis restarted ARAMARK's enforcement of the Policy. (Tr. at 135-36.) The Administrative Law Judge quoted and accepted completely Ellis' unrebutted testimony on these negotiations. (ALJD, p. 12, lines 1-22; p. 15, lines 30-46.) Indeed, no other witness at the hearing provided any testimony on this issue.

As the Administrative Law Judge found, there is neither evidence in the record nor any logical reason to believe that the suspensions in Boston played any role in the impasse in national bargaining. (ALJSDR, p. 6, lines 4-24.)

3. Effect of the Policy at MIT, Hynes, and Fenway

The parties stipulated at trial that MIT, Hynes, and Fenway received lists of employees from the locations appearing on the 2006 no-match lists, and that ARAMARK substantially complied with the Policy at MIT and Hynes. (Tr. at 165.) Some employees at these two locations resigned; some disappeared; some produced documentation allowing them to return to work (either before or after a suspension was imposed); and some were suspended and never returned to work. (Tr. at 165-66.) At Fenway, as noted above, the end of the 2006 baseball season preempted enforcement of the Policy, and the two affected employees were simply advised that they needed to rectify the mismatched SSN prior to the beginning of the next

baseball season. (Tr. at 176-78.) One employee returned to work with a new name and new SSN in the Spring of 2007, and following verification that the name and SSN matched, the employee missed no time. (Tr. at 178-79.) The other employee was never heard from again. (Tr. at 178.) Given this unexplained disappearance and the high level of turnover from one season to the next (acknowledged by Lang) (Tr. at 65), it is impossible to know whether this employee's decision not to return to work the next season was related to his no-match issue.

III. STATEMENT OF QUESTIONS

Did the Administrative Law Judge err in ruling that Local 26 did not clearly and unmistakably waive its right to further bargaining on ARAMARK's response to the receipt of no-match letters through its agreement to contractual language covering this response?

Suggested Answer: YES. (Exceptions 8-10.)

Did the Administrative Law Judge err in ruling that Local 26 did not clearly and unmistakably waive its right to bargaining on ARAMARK's response to the receipt of no-match letters through its failure to request such bargaining? Suggested Answer: YES. (Exceptions 1-7.)

Did the Administrative Law Judge err in ruling, in the Supplement Decision on Remand, that, to the extent an unlawful failure to bargain at the local level occurred in early fall 2007, ARAMARK did not cure that failure through its bargaining with the International Union?

Suggested Answer: YES. (Exceptions 11-12.)

Did the Administrative Law Judge err in ordering back pay and reinstatement for the suspended employees, given the lawful impasse reached in national bargaining in January 2007?

Suggested Answer: YES. (Exceptions 13-19.)

IV. ARGUMENT

ARAMARK did not violate Section 8(a)(5) of the National Labor Relations Act (“the Act” or “the NLRA”) by unilaterally implementing terms and conditions of employment without affording Local 26 the opportunity to bargain. It was the General Counsel’s burden at trial to show not only that ARAMARK unilaterally implemented a material, substantial, and significant change in terms and conditions of employment, but also that ARAMARK implemented the change without giving Local 26 advance notice and an opportunity to bargain before implementation. Bohemian Club, 351 NLRB 1065, 1066 (2007); American Geri-Care, Inc., 278 NLRB 676, 678 (1986). The General Counsel did not carry that burden.

At MIT and Hynes, ARAMARK did not just give Local 26 the opportunity to bargain over SSN no-match issues; the parties actually *did* bargain and reached agreement over those issues in collective bargaining agreements. Moreover, at all three locations, ARAMARK gave Local 26 advance notice prior to enforcing the Policy in 2006, and Local 26 chose not to request additional bargaining. Further, although ARAMARK’s position is that no failure to bargain occurred at the local level, any such failure would have been cured by ARAMARK’s bargaining with the International Union. Finally, to the extent the Board finds any unlawful failure to bargain in Fall 2006, reinstatement and back pay is an inappropriate remedy for the suspended employees.

A. Local 26 Clearly and Unmistakably Waived its Right to Bargain Over ARAMARK’s Response to No-Match Letters at MIT and Hynes Through Contractual Language.

In a recent case, the Board discussed the theory of contract waiver in the context of a unilateral implementation claim:

[A] union has the statutory right to require an employer to bargain before making a unilateral change with respect to a term or condition of employment. Conversely, the employer's authority to

act unilaterally is predicated on the union's waiver of its right to insist on bargaining. A leading treatise summarizes the Board's well-established principles this way:

[U]nless discharged or waived, the duty to bargain continues during the term of the collective bargaining agreement.

A party may contractually waive its right to bargain about a subject. Where such a waiver is claimed, the test is whether the putative waiver is in “clear and unmistakable” language.

Provena Hospitals, 350 NLRB 808, 811 (2007) (citations omitted) (quoting I American Bar Association, Section of Labor & Employment Law, The Developing Labor Law 1006-07 (5th Ed. 2006 John E. Higgins, Jr. ed.)). Provena rejected the “contract coverage” standard that certain courts of appeals, including the D.C. Circuit and the 1st Circuit, apply in contract waiver cases. Id. at 812-15; see also Bath Marine Draftsmen’s Ass’n v. NLRB, 475 F.3d 14 (1st Cir. 2007); NLRB v. United States Postal Service, 8 F.3d 832 (D.C. Cir. 1993). ARAMARK requests that the Board reconsider that decision and adopt the contract coverage standard, but ARAMARK should prevail on the basis of Local 26’s contract waiver regardless of the standard applied. Under Provena, the contract language upon which the employer relies must either (a) constitute an explicit waiver or (b) demonstrate that the issue was fully discussed and consciously explored and that the union intentionally relinquished its right to further bargaining in this area. Id. at 811-12, 815; Georgia Power Co., 325 NLRB 420, 420-21 (1998). The language in the MIT and Hynes contracts meets that standard.⁸

⁸ It is even more clear that the language in the MIT and Hynes contracts “covers” ARAMARK’s response to no-match letters, as Lang acknowledged in his hearing testimony. (Tr. at 59.)

The waiver in this case is clear and unmistakable. As Lang testified, Article 36 of the MIT contract (Exhibit GC-3) and Article 19 of the Hynes contract (Exhibit GC-12) clearly cover how ARAMARK was to respond to the receipt of a no-match letter. The first paragraph of those Articles covers three scenarios: (1) an employee's having a problem with his/her right to work in the United States, (2) notification by the INS that an immigration audit or an investigation is being initiated, and (3) ARAMARK's receipt of a no-match letter from SSA. The last sentence of that paragraph reads: "Whenever possible, this meeting shall take place before any action by the Employer is taken." Clearly, then, in collective bargaining, the parties acknowledged that ARAMARK would have to take action in response to receipt of a no-match letter.

What action did the parties contemplate? The second paragraph refers to ARAMARK's duty to furnish certain information to employees who are *terminated* for one of the reasons enumerated in the previous paragraph. The fifth and sixth paragraphs refer to the necessary preconditions for reinstatement / rehire following termination for one of these reasons. The MIT and Hynes contracts do not specifically address the steps between receipt of a no-match letter and termination, but such detailed description of those steps is unnecessary. The management rights clauses in each contract permit ARAMARK the discretion to establish reasonable working rules and to discipline or discharge employees for just cause, to the extent such actions do not conflict with other provisions of the agreement. With the Immigration language so clearly permitting termination of employees appearing on no-match letters, no such conflict existed. ARAMARK clearly had the contractual right to establish and follow the procedures in the Policy. Cf. Tyson Foods, Inc., 123 Lab. Arb. (BNA) 484 (2006) (Bankston, arb.) (holding that a management rights clause alone authorized a response to no-match letters that mirrored ARAMARK's efforts in 2006).

To the extent Local 26 wanted to argue that ARAMARK committed some technical violation of the contractual language at MIT or Hynes, it could have pursued these cases in grievance arbitration. Indeed, its initial focus on grieving the suspensions demonstrates this point, and Lang's focus on the contract in his first conversation with Bennett further emphasizes the contractual nature of the dispute. Nonetheless, this case is not about ARAMARK's compliance with the contracts, and the General Counsel does not argue that ARAMARK modified contractual language in violation of Section 8(d) of the Act. The case is about unilateral implementation and whether Local 26 waived its right to further bargaining once it agreed to the immigration and management rights language in the MIT and Hynes contracts. Clearly and unmistakably, it did so.

B. Local 26 Clearly and Unmistakably Waived its Right to Bargain Over ARAMARK's Response to No-Match Letters at All Three Locations Through its Conduct Following Notice of the Policy.

Following ARAMARK's advance notice to Local 26 of its intention to enforce the Policy in 2006, Local 26 waived its right to bargain over the Policy or no-match issues in general at any of the three locations. "It is settled Board law that '[W]hen an employer notifies a union of proposed changes in terms and conditions of employment, it is incumbent upon the union to act with due diligence in requesting bargaining.'" Haddon Craftsmen, Inc., 300 NLRB 789, 790 (1989) (quoting Jim Walter Resources, 289 NLRB 1441 (1988) (quoting Clarkwood Corp., 233 NLRB 1172 (1977))). The Board has held that as little as two days' notice may fulfill an employer's obligation to provide advance notice. Shell Oil Co., 149 NLRB 305 (1964). "A Union has an obligation to seize the bargaining opportunity afforded by advance notice of a proposed employment condition change or risk waiver of its statutory right. A union does not preserve its statutory bargaining right by declining to meet and negotiate while seeking to assert a bargaining right by protesting an employer's conduct or by filing an unfair labor practice

charge....” Boeing Co., 337 NLRB 758, 763 (2002) (internal citations omitted). As noted above, it is the General Counsel’s obligation to show that Local 26 fulfilled its obligation to affirmatively seek bargaining on a change in terms and conditions about which it had advance notice. Bohemian Club, 351 NLRB No. 59, slip op. at 2 (Nov. 19, 2007); American Geri-Care, Inc., 278 NLRB 676, 678 (1986).

One would search the record in vain for any indication that Lang ever sought – or even wanted – to bargain over no-match issues in 2006. In fact, as outlined in Part I.B, the following facts are undisputed on the record:

- Ellis instructed Bennett and Gould to give advance notice of Policy enforcement and to meet with any union officials who requested a meeting.
- Bennett and Gould provided advance notice and met with Lang by telephone as often as he wished.
- ARAMARK operators and Labor Relations Directors provided Local 26 with notice of its intent to enforce the Policy before any employee was contacted about appearing on a no-match letter, and certainly well before any employee was suspended.
- *Despite this advance notice, Local 26 never requested any bargaining in response to ARAMARK’s notice.*
- Proving ARAMARK’s good faith and willingness to bargain, Ellis bargained with the International Union over enforcement of the Policy.

Lang had no trouble picking up the phone and calling Bennett and Gould to complain about the Policy, ask why ARAMARK was enforcing it, or threaten multiple arbitrations. He had no trouble sending ARAMARK letter after letter, stating his position on the law and asking for documents and information about the Policy. The one thing he never did was request bargaining. He never testified that he did, even in the General Counsel’s rebuttal case, when he was permitted by evidentiary ruling to clarify his earlier testimony. Bennett and Gould testified

unequivocally that Lang never requested bargaining. On this record, it is clear that Local 26 never satisfied its obligation to request bargaining on no-match or policy enforcement issues.

The Administrative Law Judge reached a contrary conclusion only by trying to convert a number of complaints by Local 26 about no-match issues into requests for bargaining. Local 26 certainly did a fair amount of complaining. It stated its position regarding ARAMARK's legal obligations. It requested "meetings" with ARAMARK officials that were granted and in fact occurred.⁹ The most the Administrative Law Judge could make of all that was that Local 26 "impliedly" requested bargaining." (ALJD, p. 15, line 11; ALJSDR, p. 4, line 6.) The decision does not state that Local 26 *actually* or *explicitly* requested bargaining, for the simple reason that Local 26 did not do so. As the case law set forth above makes clear, Local 26 did not do enough. The Act places significant obligations on employers to bargain in good faith, but *only if* the union first requests bargaining. Complaints or statements of opposition are simply not enough.

The most likely reason Lang chose not to request bargaining is that he saw the matter as a contract dispute, particularly since the two locations where employees were actually suspended – MIT and Hynes – had contract language specifically covering the no-match issue. Indeed, Lang's conversations with Bennett and the fact that he filed grievances on the suspensions at all three locations support this notion. Ultimately, Lang's motivation is unimportant. The record is clear that Local 26 never satisfied its obligation to request bargaining.

C. ARAMARK Engaged in National Bargaining with UNITE HERE in Satisfaction of its Obligations Under Section 8(a)(5) of the Act.

As the Administrative Law Judge's original Decision noted, "[b]argaining with the International rather than the individual locals [made] perfect sense as the changes were taking

⁹ It would be practically impossible and simply absurd for ARAMARK to consider every union request for a "meeting" at each of its locations to be a request for formal bargaining.

place nationwide and would affect all of the International Union's locals at ARAMARK facilities." (ALJD, p. 15, lines 48-50; ALJSDR, p. 4, lines 43-45.) Such national bargaining was not an idea conjured up by ARAMARK. UNITE HERE's Constitution expressly contemplates such bargaining and expressly authorizes the International Union to reach agreements on behalf of the local unions. The General Counsel does not seem to dispute any of these points.

Assuming (for purposes of this section only) that ARAMARK initially implemented its policy without the notice and bargaining required by the Act, long-standing Board precedent supports the Administrative Law Judge's original conclusion that ARAMARK's subsequent bargaining and freeze of its process cured this error. For instance, in Nocona Boot Co., 116 NLRB 1860 (1956), the employer unilaterally implemented a wage increase without bargaining with the union. The employer "candidly conceded[ed] the impropriety of its unilateral action," but "asked to be absolved of liability" on the grounds that it subsequently rescinded its action and engaged in good faith bargaining with the union. Id. at 1875. The Board acknowledged that good faith generally was not a defense upon which employers should rely, but nonetheless refused to find an unfair labor practice in the circumstances of the case. Id. at 1861, 1875. The unilateral implementation was isolated and did not "appear to have been engaged in with any purpose of discredit [sic] the Union or undermine its authority or prestige." Id. at 1875. The Board also emphasized the willingness of the employer to engage in bargaining with the union following the unilateral implementation. Id.; see also Whiting Milk Co., 145 NLRB 1458 (1964) ("Even were it found that the acts complained of constituted a *per se* violation, Respondent's subsequent conduct provides no substantial basis for inferring any disposition on the Respondent's part to engage in like conduct in the future, even though not ordered to cease and

desist therefrom, but does reflect a willingness on its part to continue harmonious bargaining relations with the Union.”).

The Administrative Law Judge’s finding of a cure by ARAMARK is well-founded. Before enforcement of the no-match policy commenced, Ellis notified the International Union of ARAMARK’s intentions. He instructed his subordinates to do the same on the local level. When the International requested bargaining, a national approach that made abundant practical sense, Ellis readily obliged. Enforcement of the policy was halted, and negotiations began. At that point, no suspensions had occurred at Fenway, and any previous enforcement efforts at the other two Boston locations could have been undone or revised if negotiations or other events (e.g., an employee’s production of a valid social security number) had warranted. Negotiations continued for several weeks, positions were conveyed, and specific language proposals were exchanged. Negotiations concluded only when the International Union’s representative declared that an agreement could not be reached, apparently as a result of the parties’ irreconcilably opposed views of ARAMARK’s legal obligations. Taft Broadcasting Co., 163 NLRB 475, 478 (1967) (holding that impasse is reached when “good-faith negotiations have exhausted the prospects of concluding an agreement”). Only at this point did ARAMARK resume enforcing the policy. All these facts are clear indicia of an employer committed to negotiating in good faith with a union that requested bargaining. Assuming, *arguendo*, that a failure to bargain occurred at the local level in Fall 2006, that failure was cured by ARAMARK’s good faith national bargaining through January 2007.

D. Even Assuming That the September/October Suspensions Were Improper and Uncured by National Bargaining, No Back Pay or Reinstatement Is Warranted.

With the exception of his conclusion that ARAMARK initially implemented its policy without the notice and bargaining required by the Act, the Administrative Law Judge’s

discussion (in the Supplemental Decision on Remand) of the lack of impact of the Boston suspensions on the national bargaining is accurate and well-supported in the record:

Though I concede that the unfair labor practices found to have been committed need to be remedied, I think it would be incorrect to say that they affected the negotiations over the proposed change in the Respondent's no-match letter policy. The Respondents' reasons for the change are valid and discussed in detail in my original decision. For the reasons offered by Respondent and discussed in my original decision, the Respondent's position is fixed. The Union's position has been fixed since it learned of the change in policy. The Union at all times opposed enforcement of Respondents' no-match letter policy. This position did not change by Respondents' suspension of its implementation between November 2006 and January 2007. Nor was it affected materially by Respondents' unilateral implementation and enforcement of the no-match letter policy.

I can find no evidence that the violations created any friction above and beyond the friction that the proposed changes caused. I can find no move in the baseline and alteration of what the parties could expect to achieve in the negotiations over the proposed change because of the unlawful implementation. I can find no evidence to convince me that the Union's walking away from the January 2007 negotiations, saying that no resolution of the parties' differences could be reached, was any way affected by the Respondents' unfair labor practices. The unfair labor practices were certainly not cited as the reason for leaving or even part of the reason. Accordingly, I find that the impasse reached was not tainted by unremedied unfair labor practices and that the subsequent implementation and enforcement of the Respondents' no-match letter policy was lawful.

(ALJSDR, p. 6, lines 5-13.) This discussion needs no amplification. There simply is neither evidence in the record nor any logical reason to believe that the Boston suspensions had any effect on this national bargaining. The parties clearly reached a lawful impasse.

The Administrative Law Judge's back pay and reinstatement remedy does not follow the logic of the quotation above. At MIT and Hynes, only two to three months elapsed between the suspensions and the impasse in national bargaining. Had the MIT and Hynes suspensions not occurred in September and October 2006, the result of impasse indisputably would have been

that the same suspensions would have occurred in January 2007. The lapse in time was essentially inconsequential and certainly not worthy of a back pay / reinstatement remedy.

The situation at Fenway is even more stark. There, no suspensions occurred in Fall 2006; none could have occurred until the beginning of the 2007 baseball season – well after national impasse had been reached. One employee appeared with a new name and number at the beginning of the 2007 baseball season and missed no time at all. The other employee never sought employment with ARAMARK in 2007, and given the undisputedly high turnover at Fenway from one season to another, that failure cannot be attributed to ARAMARK's policy enforcement.

At most, even accepting the Administrative Law Judge's findings regarding failure to bargain and subsequent impasse, *limited* back pay for the MIT and Hynes employees – covering only the time between the suspensions and the impasse – would be warranted. There is no conceivable justification for on-going back pay and certainly not for reinstatement, and no conceivable justification for *any* remedy for the single Fenway employee. The proposed remedy would not make the suspended employees whole; it would make them *more than whole*. It would put them in a better position than if they had been suspended following the lawful impasse found by the Administrative Law Judge, and it would put them in a better position than that of other UNITE HERE members suspended across the country, after impasse, for non-compliance with the Policy. That result would make no sense.

V. CONCLUSION

ARAMARK respectfully requests that the Board grant ARAMARK's Exceptions and issue an order dismissing this case with prejudice.

Respectfully Submitted,

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Dated: November 6, 2009

CERTIFICATE OF SERVICE

I hereby certify that, on this date, I caused a copy of the foregoing Brief in Support of Exceptions to Supplemental Decision on Remand to be served by e-mail upon the following persons:

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