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

Advice Memorandum

DATE: January 7, 2004

TO : Earl Ledford, Acting Regional Director
Region 9

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

SUBJECT: United Parcel Service
Cases 9-CA-39862; 39863; 39868; 39981
Teamsters International and Local 89 518-4040-8300
Cases 9-CB--10817; 10818; 10821; 10851 536-2567

After further investigation into the performance of alleged unit work by both unit and nonunit employees,[1] the Region resubmitted these cases on whether the parties lawfully added the nonunit employees to their nationwide unit on the ground that they were lawfully recapturing lost unit work under Lockheed Martin.[2]

We conclude, in agreement with the Region, that the parties' addition of the nonunit International Auditors and FDC/ODC clerks to the unit was an unlawful accretion of historically excluded, nonunit employees.[3] We reject the parties' contention that they were lawfully recapturing lost unit work because that work was no longer unit work since it has been almost exclusively performed by nonunit employees since 1985, with the Union's knowledge and acquiescence.

FACTS

This case concerns international auditing (IA) work where employees insure that exported or imported packages contain proper documentation to clear customs. The parties assert that IA work was performed manually from 1979 to 1985 by specially trained package drivers and clerks, all

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[1] This investigation was conducted pursuant to the prior Advice memorandum in this case dated July 29, 2003.

[2] See Lockheed Martin Tactical Aircraft Systems, 331 NLRB 1407 (2000).

[3] See United Parcel Service, 303 NLRB 326 (1991); Laconia Shoe Co., 215 NLRB 573 (1974); Aerojet-General Corp., 185 NLRB 794 (1970).

of whom were unit employees. However, the Employer appeared to have had relatively small amounts of this IA work prior to 1985. Thus, the Employer's computer records show[4] that (1) no unit employees have been classified as performing IA work since 1979; and (2) prior to 1985, only one nonunit employee was listed with the title "international clerk." The Employer advises it is not clear if that nonunit employee had been performing IA work.

In 1985, the Employer opened its first air hub and began to perform enormously increased amounts of IA work with nonunit employees, with the knowledge of the Union.[5] By 2002, some 1750 nonunit International Auditors and FDC/ODC clerks were performing virtually all the Employer's IA work. The Employer acknowledges that the IA positions placed into the unit in 2002 were occupied by the nonunit employees who were primarily performing IA work.

ACTION

We conclude that the parties unlawfully added the 1750 nonunit International Auditors and FDC/ODC clerks to the unit because these employees were not performing unit work that had "seeped out" from the unit, as in Lockheed Martin. Rather these employees were performing nonunit work because that work had been almost exclusively performed by nonunit employees since 1985, with the Union's knowledge and acquiescence. Thus the parties' addition of these employees to the unit was an unlawful accretion of historically excluded, nonunit employees.

In Lockheed Martin, the number of unit jobs had shrunk from around 2000 in 1990, to around 1100 in 1993. The parties began to perform job audits, particularly in those departments where unit employees had filed grievances protesting alleged performance of unit work by nonunit employees. In one such department the parties audited 76

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[4] In response to the Region's request for additional information, the Employer conducted a computer search of job classifications in its payroll records that would encompass IA work. The Employer admitted that not every employee performing IA work was classified as such. However, this is the only evidence adduced regarding the distribution of IA work before and after 1985. The Union presented no additional evidence.

[5] See Case 31-RC-7342, a 1995 representation case ultimately withdrawn by the Union, involving nonunit IA work performed at the Employer's Ontario, CA air hub.

jobs. The audit disclosed that 26 of those jobs consisted primarily of unit work. The parties reclassified those jobs as bargaining unit positions and offered the nonunit employees occupying those positions the choice of transferring into the newly titled positions as bargaining unit employees. A Board majority found that adding these 26 nonunit positions into the existing unit of 1100 unit positions was not an unlawful accretion, but rather was a lawful return of admitted bargaining unit work which had "seeped out" of the unit over time.

In contrast to the circumstances in that case, here only a small number of unit employees manually performed a relatively little amount IA work prior to 1985. Thereafter, almost all of a hugely expanded amount of IA work was performed by nonunit employees. By 2002, approximately 1750 nonunit employees were performing virtually all the Employer's IA work. Even assuming that some IA work was performed by unit employees before 1985, this case clearly does not involve adding back into the unit a small number of nonunit positions performing unit work that had "seeped out" over time. Rather, this case involves newly created classifications, employing a huge number of employees, all performing work that came into existence almost wholly outside the unit. We therefore conclude that this case is not governed by Lockheed Martin.

Rather, the more appropriate analysis is the traditional accretion principle that classifications historically excluded from a unit may not be accreted into the unit.[6] We reject the parties' claim that they were entitled to include these positions in the unit because unit employees performed IA work in the past. In the Section 8(b)(4) context, a union may not raise a valid work preservation defense when it seeks work performed over many years outside of the unit. For example, in B&W Distributors,[7] the employer's union-represented employees had performed the work of distributing papers dropped off by a printing company. In 1974, the publisher of the papers discontinued the employer's distribution contract and awarded a similar distribution contract to B&W. Some ten years later in 1984, the union threatened a strike asserting the primary object of reclaiming the distribution

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[6] Aerojet-General Corp., 185 NLRB 794, 798 (1970); Beverly Health and Rehabilitation Services, 322 NLRB 968, 971 (1997).

[7] Newspaper and Mail Deliverers Union (B&W Distributors), 274 NLRB 929 (1985).

work. The ALJ, adopted by the Board, found the strike threat was not primary, rejecting the union's reclaimed unit work defense. Noting that B&W had performed the distribution work for ten years with the union's knowledge, the ALJ found that the union had "acquiesced" in that performance and thus waived any unit work preservation defense.[8] The same circumstances that led the Board to reject a work recapture defense in B&W Distributors are also present here. We thus also reject the parties' claim of a recapture of unit work and find that IA work is not unit work.

Finally, since we find that the parties unlawfully accreted 1750 historically excluded, nonunit employees into the unit, the remedy encompasses all 1750 unlawfully accreted nonunit employees.[9] Accordingly, the Region should issue complaint, absent settlement, alleging that the parties' addition of the nonunit International Auditors and FDC/ODC clerks to the unit was an unlawful accretion.[10]

B.J.K.

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[8] Id. at 931-932. See also Teamsters Local 814 (Santini Bros., Inc.), 208 NLRB 184, 198 (1974) (where independent contractors had supplanted unit employees and performed their long distance moving unit work for many years, with the union's knowledge, union strike to force the employer to cease using independent contractors for long distance work found 8(b)(4)(B)).

[9] See United Parcel Service, supra.

[10] [*FOIA Exemption 5*

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