

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
FIRST REGION

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

**GENERAL COUNSEL'S BRIEF IN REPLY TO RESPONDENTS' ANSWER TO THE  
EXCEPTIONS OF THE GENERAL COUNSEL AND CHARGING PARTY**

Respectfully Submitted by

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## **I. INTRODUCTION**

This brief replies to Respondents' Brief in Answer to the Exceptions of the General Counsel and the Charging Party ("Answering Brief"). General Counsel's previous brief has already discussed most of the issues Respondents raise in their Answering Brief. However, Respondents make some unsupported and misleading assertions that have never been addressed. Given the page limitations herein, and without waiving any of the arguments previously raised, General Counsel will address the most egregious of these assertions.

## **II. RESPONDENTS' DISCUSSION OF SSA, DHS AND IRCA IS MISLEADING**

In their Answering Brief, Respondents discuss immigration law issues that they claim have relevance to this case. Although they admit that "this case is not about whether ARAMARK violated or complied with immigration or tax laws," they quote the ALJ's comment that "these laws must be taken into consideration in this case" (RAB 1).<sup>1</sup> Respondents then set forth an analysis of the law that purports to be an immigration law defense to their unilateral change in their no-match policy. The implication is that the changes they made were somehow required by the Social Security Administration (SSA), the Department of Homeland Security (DHS), or the Immigration Reform and Control Act of 1986 (IRCA) (See RAB 1-3). This immigration law defense is false and misleading for several reasons.

First, SSA has continually emphasized that the mere fact that an employee is the subject of a no-match letter does not mean that the employee, or his or her employer, is in violation of any immigration law. The language in SSA's no-match letters specifically downplays the immigration implications of a mismatched Social Security Number (SSN). No-match letters sent by SSA 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 (GC 10, p.11; GC 20, p. 2). The letter warns 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 (GC 10, p. 12).

Second, DHS's Safe-Harbor Provisions for Employers Who Receive a No-Match Letter were not in effect in 2006, are not in effect now, and have never been in effect. Accordingly, it is very misleading for Respondents to state that the DHS, in the safe-harbor provisions "takes the position that the receipt of a no-match letter puts an employer on notice of a potential violation of the immigration laws" (RAB 4). Until these regulations go into effect, they are of no legal consequence.

Third, in setting forth their immigration law defense, Respondents exaggerate their potential liability to the Internal Revenue Service (IRS) by stating that "ARAMARK's potential liability, based on 4,400 unmatched SSNs, was over \$220,000" (RAB 2). They fail to mention that the number of unmatched SSNs involved the three bargaining units at issue in this case is not 4,400, but only 15. In other words, Respondents' potential IRS liability in the bargaining units at issue in this case is \$750 not \$220,000.

Fourth, a recent Court of Appeals decision undermines Respondents' immigration law defense. The decision stems from Aramark's discharge of employees at the Staples Center in Los Angeles. At the trial in the present case, Respondents presented testimony suggesting that IRCA required them to discharge the Staples Center employees who were the subjects of a no-match letter, and who failed to resolve the matter with SSA. Vice President of Labor Relations, Richard Ellis,

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<sup>1</sup> In this brief, "RAB" refers to Respondents' Answering Brief, "GC" refers to General Counsel Exhibits, "T" refers to the transcript of the trial.

testified that an arbitrator ordered the employees reinstated and a Federal District Court judge vacated the arbitrator's decision (T 130).

On June 16, 2008, the Ninth Circuit Court of Appeals reversed the Federal District judge's decision. See *Aramark Facility Services v. SEIU Local 1877*, 530 F.3d 817 (2008). The Court's reasoning is instructive in the present case. It rejects the claim that IRCA requires employers to discharge employees who are the subject of a no-match letter. The Court also rejects the argument that a no-match letter together with the employee's responses to the letter constitute constructive knowledge of the employee's undocumented status. *Id.* at 825-826.

The Court of Appeals' analysis contradicts Respondents' argument in the present case that their potential liability under SSA rules, DHS rules or IRCA necessitated the discharge of the employees. The Court points out that there is no penalty from SSA for employers who ignore a no-match letter, nor does the IRS impose sanctions stemming from no-match letters. The Court also notes that even if the safe harbor provisions were in effect, they would not treat the no-match letter itself as creating constructive knowledge of an immigration violation. *Id.* at 826-828.

### **III. RESPONDENTS' ASSERTION THAT THEY "CURED" ANY BREACH OF THEIR BARGAINING OBLIGATION IS CONTRARY TO BOARD LAW**

The ALJ erroneously concluded that Respondents "cured" any breach of their bargaining violation by agreeing to "freeze" implementation of the new no-match policy and by bargaining with the International Union after the change had been implemented. The General Counsel has excepted to that conclusion as contrary to Board law and the argument is set forth at pages 4-7 of the General Counsel's Brief in Support of Exceptions.

The ALJ cited no cases to support his "cure" analysis. Respondents offer two cases in support of the theory: *Whiting Milk Co.*, 145 NLRB 1458 (1964) and *Nocona Boot Co.*, 116 NLRB 1860 (1956). Neither case is on point.

*Whiting*, unlike the present case, has nothing to do with unilateral action. It involves an employer who was alleged to have unlawfully conditioned a wage proposal at the bargaining table. Between the time the complaint issued and the time of the trial, the employer cured the alleged violation by returning to the bargaining table, modifying its proposal, and reaching an overall agreement on a contract with the union. These facts are clearly distinguishable from the present case which involves a unilateral change before bargaining began.

Nor does *Nocona* support the ALJ's "cure" theory. In *Nocona*, the employer unilaterally changed its employees' wage rate. The union neither objected to the change nor requested bargaining. It filed a charge about 12 days after the change. When the employer received the charge, it immediately rescinded the change. Under these circumstances, the Board found that the employer had cured whatever violation it had committed.

In the present case, unlike *Nocona*, the Union objected to Respondents' change to its no-match policy. It also requested bargaining. Respondents never rescinded the new policy; they only temporarily froze further implementation of it. The freeze was not a rescission, nor was it a resolution of the matter. The 15 employees who had been suspended pursuant to the new policy were not reinstated.

General Counsel submits that the present case is more properly analyzed by following the Board's ruling in *Mid-Wilshire Health Care Center*, 337 NLRB 72, 73 (2001). There, the employer bargained with the union after unilaterally changing wages. The Board, reversing the ALJ, found a violation, even though Employer had rescinded the change and had made employees whole. The Board rejected the judge's reliance on *Nocona* and *Whiting* and found that the employer violated the Act because it failed to bargain with the union before it implemented the changes instead of after.

**IV. CONCLUSION**

For all the foregoing reasons, and for the reasons set forth by the General Counsel in his previous brief, the Board should find that Respondents violated Section 8(a)(5) of the Act when they unilaterally changed their no-match policy, suspended 15 employees pursuant to the change, and refused to provide the Union with information relevant to the no-match policy.

Dated at Boston, Massachusetts this 12<sup>th</sup> day of August, 2008.

Respectfully submitted,



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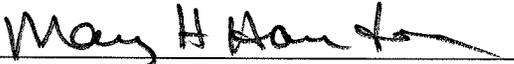
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DATE OF MAILING August 12, 2008

**AFFIDAVIT OF SERVICE OF copy of GENERAL COUNSEL'S BRIEF IN REPLY TO RESPONDENTS'  
ANSWER TO THE EXCEPTIONS OF THE GENERAL COUNSEL AND CHARGING PARTY**

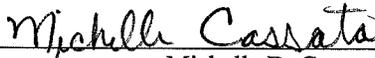
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Mary H. Harrington

Subscribed and sworn to before me this 12th day of August, 2008

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