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

COUNSEL FOR THE GENERAL COUNSEL'S BRIEF IN ANSWER TO RESPONDENTS' CROSS-EXCEPTIONS

Respectfully Submitted by

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I. INTRODUCTION

On July 25, 2008, Respondents filed cross-exceptions to the decision of the Administrative Law Judge (ALJ) in these cases. Counsel for the General Counsel files this brief in answer to the cross-exceptions. Counsel for the General Counsel submits that the ALJ's findings of fact that Respondents except to are supported by the record, and that the ALJ's conclusion of law that Respondents except to is supported by the law.

As to ALJ's factual findings, the record shows that: (1) the Union timely requested bargaining in five letters to Respondents, some of which contained multiple requests; (2) Respondents began implementing their new no-match policy on September 5, 2006 in a letter to the Union that indicated they were implementing their policy; (3) Respondents refused to bargain when they falsely claimed in a letter to the Union that they did not have to bargain about their new no-match policy because it was mandated by federal law; (4) Respondents took the position that it was perfectly legitimate to implement their new no-match policy despite the Union's opposition; (5) Respondents suspended two employees at Fenway Park; and (6) Respondents began conversations with the International Union in late September 2006.

As to the ALJ's legal conclusion, there is ample Board precedent to support his conclusion that the Union did not waive its right to bargaining by virtue of immigration language and a management rights clause in its collective-bargaining agreements with Respondents. See *Provena St. Joseph Medical Center*, 350 NLRB No. 64 (2007); *California Offset Printers, Inc.*, 349 NLRB No 71 (2007).

II. RESPONDENTS' EXCEPTIONS TO ALJ'S FACTUAL FINDINGS LACK MERIT

A. The Record Supports the ALJ's Finding that the Union Requested Bargaining About Respondents' New No-Match Policy.

The ALJ found that the Union timely requested bargaining (ALJD 15, lines 6-17).[1] Respondents except to this finding, apparently because the record does not show that the Union ever used the exact words "we request bargaining." General Counsel is unaware of any precedent that requires the use of any particular words when requesting bargaining, and Respondents cite none.

There is ample record evidence to support the ALJ's finding that the Union timely requested bargaining. The correspondence between the Union and Respondents at the time the Respondents were implementing their new no-match policy reveals that the Union made multiple requests.

On September 5, 2006, Meghan King, the Respondents' Associate General Manager at MIT, sent the Union a letter that described the new no-match policy Respondents had begun to implement (GC 6).[2] On September 12, the Union's Vice-President and Staff Director, Brian Lang, replied by letter stating that the Union wanted to meet to discuss the new policy (GC 7). In the letter Lang stated:

> Thank you for informing us that a "no match" letter has been sent to ARAMARK at MIT by the Social Security Administration. We would like to meet with you to discuss what the next appropriate steps are in response to the "no match letter." (GC 7).

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[1] In this brief, GC refers to General Counsel's exhibits; R refers to Respondents' exhibits; T refers to transcript pages; and ALJD refers to pages of the ALJ's decision.

[2] Henceforth, all dates will be 2006, unless otherwise indicated.

After raising several objections to the Respondents' new policy, Lang went on to say:

> 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. You also should not interview employees about the contents of the letter. If you do so, please contact Local 26 before doing so. (GC 7)

Based on this language, the ALJ properly concluded that by requesting a meeting, the Union had requested bargaining. He also noted that Lang sent a similar letter to Respondents' manager at the Hynes Convention Center (ALJD 15, lines 8-9; GC 13). The letter, dated September 13, uses the same language as the September 12 letter.

The ALJ also reasonably found that the letter Lang sent Respondents at Fenway on October 7 "impliedly requests bargaining." The ALJ quoted the relevant language from the letter:

> 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. (ALJD 15, lines 11-14; GC 2(b)).

This language, as analyzed by the ALJ, supports his conclusion that the Union requested bargaining.

Although not expressly relied on by the ALJ, further evidence demonstrates that the Union timely requested bargaining. It is undisputed that the Union sent two additional letters that used language similar to that referred to above in the October 7 letter: one to MIT on September 21, and the other to Hynes on September 29 (GC 2(a), 2(c); T 7, 8, 28, 37). In sum, the record shows that the Union timely requested bargaining in five letters to Respondents, some of which contained multiple bargaining requests.

B. The ALJ's Finding that Respondents Began Implementing Their New No-Match Policy Prior to Formulating Their Protocol on September 7 is Supported by the Record.

Respondents except to the ALJ's finding that "Respondents began implementing their new policy at MIT, Hynes, and Fenway even before the finalization of the protocol." (ALJD 8, lines 33-34). Ellis' unrefuted testimony establishes that the protocol describing the new policy was not finalized until September 7 (T 141). The ALJ found this to be the date the protocol was developed and there is no dispute about this finding (ALJD 8, lines 26-28).

Respondents argue that they did not take any action pursuant to their new policy until September 21 and did not suspend any employees until October 5. However, the record evidence supports the ALJ's finding that Respondents began implementing their new policy on September 5, two days before finalization of the protocol.

It is important to consider the background for the ALJ's finding. He found that Respondents' no-match policy prior to 2006 was "ambiguously written" and a "confusing mosaic" (ALJD 7, line 25). He also found it to be a "lais sez faire policy" [sic] in that Respondents' practice was not to enforce whatever was on the books (ALJD 7, lines 5-6, 25-27, 36-37). Respondents have not excepted to any of these findings. Given this background, the ALJ properly found that Respondents' letter of September 5, two days before the protocol was finalized, evidenced implementation of the new policy.

The September 5 letter to the Union is signed by Meghan King, Respondents' Associate General Manager at MIT (GC 6). The ALJ reasonably concluded from the letter that Respondents had begun implementing their policy by that date. In her letter, King states:

> 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 that 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. (GC 6).

This language demonstrates that as of September 5, Respondents had actually implemented their new policy. This letter is in marked contrast to the previous ambiguous laissez-faire policy. As of September 5, the policy was that employees had three business days to go to the Social Security Administration, and ninety days to obtain a new Social Security card. There is nothing in the letter to suggest that King was announcing a policy that would go into effect at some future date. The ALJ reasonably read the letter as describing a policy that was in effect.

C. The ALJ's Finding that Leigh Thumith Refused to Bargain About the No-Match Issue is Supported by the Record.

Respondents except to the ALJ's finding that Leigh Thumith, the General Manager at Respondents' Hynes Convention facility, refused to bargain about the no-match issue soon after September 29. However, the ALJ's finding is fully supported in the record.

The ALJ found that on September 25, Lang spoke by telephone with Thumith. Thumith told Lang that Rob Gould, Labor Relations Director for Respondents, would be calling him to discuss the no-match-issue (ALJD 46, GC 2(c)).[3] On September 29, Lang sent a letter to Thumith. He stated that he had still not heard from Gould. He also objected to Respondents' implementation of the new no-match policy without bargaining with the Union (GC 2(c)). As discussed above, the ALJ properly concluded that this letter was a request for bargaining.

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[3] The ALJ's decision refers to the date of Thumith's call to Lang as September 29. This is an inadvertent error. Neither Thumith nor Lang specifically testified about the date of the call, but Lang's September 29 letter to Thumith describes it as having happened on September 25 (GC 2(c)).

Thumith responded with an undated letter that the Union received soon after September 29 (ALJD 10, lines 51-52; GC 14; T 37-38). In the letter, she expressly 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 (GC 14).

The ALJ reasonably understood Thumith's language to be a negative response to Lang's request for bargaining about the new no-match policy. In other words, the ALJ read her response as claiming that Respondents did not have to bargain with the Union about the new no-match policy because it was mandated by I-9 verification procedures dictated by federal law.[4]

D. The ALJ's Finding that Rob Gould took the Position that It was Perfectly Legitimate for Respondents to Implement Their New No-Match Policy Despite the Union's Opposition is Supported by the Record.

Respondents except to the ALJ's finding that Rob Gould, a Labor Relations Director for Respondents, took the position that it was perfectly legitimate for Respondents to implement their new no-match policy despite the Union's opposition.[5] This exception is without merit; Lang's and Gould's testimony supports the ALJ's finding.

Lang described a telephone conversation that he had with Gould during the week between September 29 and October 7:

> We talked about the Social Security no match situation. Rob explained to me that it was Aramark's company wide policy. I explained to him that it was a change and that I needed some information. It was a cordial conversation where we both agreed to disagree. *The company's position was that what they were doing was completely legitimate and within the law* and that the information that I was requesting was out of bounds (T 39, emphasis added).

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[4] Thumith's claim was obviously false and has apparently been abandoned. At no time since this letter have Respondents claimed that their no-match policy is mandated by I-9 procedures dictated by federal law.

[5] Gould oversees labor relations at both Hynes and Fenway (GC 39, 80).

Gould's testimony corroborates Lang's version of the conversation:

> Well with respect to both Hynes and at Fenway my charge essentially was to give the union a heads up as we were getting to the point where we were going to call employees in to talk to them about what needed to be done and we proceeded to call Mr. Lang back in September of '06 to let him know essentially what the issue was with Social Security, *the concern that the company had certainly with the potential fines that we would incur* and that I went through the protocol with him. Brian, in turn, *indicated to me what the Union's position was* and there was a cordial discussion at the end of which we agreed to basically disagree in terms of how we were going to proceed (T 82, emphasis added).

The ALJ appears to have simply paraphrased a synthesis of both Lang's and Gould's testimony when he concluded that Gould took the position that it was perfectly legitimate for Respondents to implement the new no-match policy despite the Union's opposition (ALJD 11, lines 10-12). Gould's testimony says the same thing using different words. He gives the specific reason why Respondents believed the new policy was legitimate: to avoid potential fines. In short, Gould's and Lang's testimony completely supports the ALJ's finding.[6]

E. The ALJ's Finding that Two Fenway Park Employees were Suspended on October 1, 2006 is Supported by the Record.

Respondents except to the ALJ's finding that two Fenway Park employees, Dario Roldan and Jose Luissy, were suspended on about October 1 (ALJD 12, lines 31-32). This exception should be rejected because the ALJ's finding is supported by record evidence.

A computer document generated by Respondents shows that Dario Roldan and Jose Luissy were sent warning letters pursuant to Respondents' new no-match policy. Next to each of their names on the document is the notation: "Last day worked was Oct. 1, 2006; employee will not be brought back next season without proper documentation" (GC 19, last page). Grievances

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[6] The ALJ found a conflict in Lang's and Gould's testimony with respect to the date of the conversation. He credited Lang's testimony that the conversation took place between September 29 and October 7 (ALJD 13, lines 24-27).

filed by the Union on behalf of Roldan and Luissy indicate that each was "suspended without just cause." (R 15). These documents alone are sufficient evidence to support the ALJ's finding that Roldan and Luissy were suspended. However, the testimony of a manager at Fenway also supports the finding.

Genevieve McFarland, Respondents' 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 admitted that in October, she met with the two bargaining unit employees who were subjects of the 2006 no-match letter. She also admitted that she told them that that if they wanted to return in April 2007, they would have to provide documentation that they had valid Social Security numbers (T 178-179). She also admitted 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 (T 178-179).

The foregoing evidence supports the ALJ's conclusion that Roldan and Luissy were suspended. Respondents' exception to the finding is more about semantics than substance. They argue that Roldan and Luissy could not have been suspended because they were already on their off-season hiatus. This is a distinction with very little difference. There is no question that the new policy was applied to Roldan and Luissy, as it had been to employees at MIT and Hynes. There is no question that they would not be able to return to work without first correcting their Social Security information. The only differences were that Respondents did not have to go to the trouble of formally suspending Roldan and Luissy because they were on hiatus, and Roldan and Luissy had extra time to correct their Social Security information because Fenway did not

open until April. General Counsel submits that the ALJ considered these differences insignificant to the issues in this case, and properly ignored them.

F. The ALJ's Finding that Conversations Between Richard Ellis and the International Union Began in late September 2006 is Supported by the Record.

Based on the testimony of Ellis, the ALJ found that "conversations" occurred between Respondents and the International Union on the no-match issue:

> 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.... The conversations took place beginning about late September 2006 and early January 2007 (ALJD 12, lines 4-10).

Respondents except to the ALJ's finding. They point out that Ellis' uncontradicted testimony described an earlier conversation with Edelman on about September 12. Respondents are correct that Ellis did testify about a telephone conversation he had with Edelman on about September 12. General Counsel agrees that the ALJ failed to mention the September 12 conversation. However, a careful reading of Ellis' direct testimony about the September 12 conversation shows that the ALJ properly disregarded the testimony because it was too vague to be relied upon. Ellis testified as follows:

> I told Kurt what was going to happen, the situation. And he told me that he didn't think that we had to take any action and I said we were – that's what we were going to do (T 132).

Ellis went on to describe an e-mail contact he had with Edelman, although no e-mails were offered into the record (T 132-134). Ellis then described in more detail the series of

conversations he had with Edelman's boss, Jim Dupont, starting in late September (T 134-136).[7] On cross examination, Ellis replied to one question about the September 12 conversation:

> Q Okay. When you called Mr. Edelman was it fair to say that you were giving him a courtesy call about what had already been decided?
>
> A Yes (T 152).

In its totality, Ellis' testimony about the September 12 conversation reveals very little of substance. He does not describe the conversation in any detail. He uses generalities such as "the situation," without explaining what he is referring to. Accordingly, the ALJ properly ignored the testimony.

There is another reason why the ALJ properly ignored the testimony of the conversation on September 12. Ellis admitted that the conversation did not involve a negotiation of the new policy, but was merely a "courtesy call" about what had already been decided. When Edelman disagreed with what Ellis said he was going to do, Ellis told him Respondents were going to do it anyway. In short, the only thing that the Ellis' testimony establishes is that Respondents were not negotiating with the International about the new policy as of September 12.

III. RESPONDENTS' EXCEPTIONS TO THE ALJ'S LEGAL CONCLUSIONS

A. The ALJ Correctly Concluded that the Union did not Waive Its Right to Bargaining by Virtue of the Collective-Bargaining Language.

An employer may make unilateral changes to 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, 708 (1983); *Provena St. Joseph Medical Center*, 350 NLRB No. 64 (2007); *California Offset Printers, Inc.*, 349 NLRB No. 71 (2007).

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[7] The ALJ refers to these conversations in his decision (ALJD 12).

Respondents justify their unilateral conduct by relying on the collective-bargaining agreements at MIT and Hynes that contain the immigration and management rights language. The ALJ sets forth this language at ALJD 8-10. As the ALJ properly concluded, such reliance is misplaced because the language does not constitute a clear and unmistakable waiver by the Union of its right to negotiate over the changes to the no-match policy.

To meet the "clear and unmistakable" standard, the contract language must be specific, or it must be shown that the matter claimed to have been waived was fully discussed by the parties, and that the party alleged to have waived its rights consciously yielded its interest in the matter. *Allison Corp*, 330 NLRB 1363, 1365 (2000). Furthermore, the Board has held that generally worded management rights clauses will not be construed as waivers of statutory bargaining rights. *Johnson-Bateman Co.*, 295 NLRB 180, 184 (1989).

In the present case, the ALJ concluded that neither the immigration nor the management provisions were specific enough to be construed as a waiver (ALJD 15, lines 19-28). He mentions that the new no-match policy is more restrictive than the contract language. Even a cursory look at the contract language reveals that the ALJ was correct. The contract language makes no mention of an employee's failure to correct no-match information being a dischargeable offense. Nor does it discuss any timeframe for employees to correct the information.

Also, there is no evidence in the record that during contract negotiations the parties discussed making an employee's failure to correct no-match information a dischargeable offense or that they discussed any time frame for correcting no-match information. In fact, the evidence is to the contrary.

Respondents' practice prior to 2006 had been to not discipline no-match employees and to set no time limit for them to correct their SSA information. It would be logical to infer that it was these practices that the parties contemplated when they negotiated the immigration and management language in the contract. Also, Lang's testimony establishes that when the language was negotiated, Respondents agreed that they did not have the right to discipline no-match employees (T 61). Accordingly, the ALJ properly concluded that "the complete change in the enforcement feature of the policy requires bargaining" and that the Union did not waive its right to negotiate over the changes in Respondents' no-match policy. See *California Offset Printers*, 349 NLRB No. 71, slip op. 2-5 (2007) (A union did not waive its rights to negotiate over employer's establishing new condition of employment and grounds for discipline despite contract language related to the changes).

IV. CONCLUSION

For the foregoing reasons, the Counsel for the General Counsel respectfully requests that Respondents' Cross-Exceptions be rejected.

Dated at Boston, Massachusetts, this 19th day of August, 2008.

Respectfully submitted,

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DATE OF MAILING August 19, 2008

AFFIDAVIT OF SERVICE OF copy of **COUNSEL FOR THE GENERAL COUNSEL'S BRIEF IN ANSWER TO RESPONDENTS' CROSS-EXCEPTIONS**

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) by electronic transmission/regular mail upon the following persons, addressed to them at the following addresses:

SEE ATTACHMENT

Mary H. Harrington

Subscribed and sworn to before me this 19th day of August, 2008	DESIGNATED AGENT Claire Lynch-Santos **NATIONAL LABOR RELATIONS BOARD**

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