

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

WALT DISNEY WORLD CO.

and

Case 12-CA-25889

UNITED FOOD AND COMMERCIAL
WORKERS UNION, LOCAL 1625

GENERAL COUNSEL'S REPLY TO RESPONDENT'S ANSWERING BRIEF

Christopher C. Zerby, Esq.
Counsel for the General Counsel
National Labor Relations Board
Region 12
201 East Kennedy Blvd., Suite 530
Tampa, Florida 33602-5824
(813) 228-2693

I. Introduction

On June 2, 2009, Administrative Law Judge George Carson II (the ALJ) issued his decision in this case. The ALJ concluded that Respondent altered the scope of the bargaining unit and violated Section 8(a)(1) and (5) of the Act by eliminating the classifications of food and beverage captain (banquet captain), beverage captain (bar captain), and beverage host/hostess (bartender). (ALJD 14:45-48). The ALJ further concluded that Respondent unlawfully modified the terms and conditions of employment of the three classifications of employees in violation of Section 8(a)(1) and (5) of the Act and that Respondent also violated Section 8(a)(1) and (5) of the Act by refusing to provide the Union with requested information relevant to Respondent's decision to eliminate the classifications. (ALJD 15:9-12).

Respondent filed Exceptions to the ALJ's decision on July 7, 2009. On August 5, 2009, Counsel for General Counsel filed an Answering Brief to Respondent's Exceptions, Cross-Exceptions and a Brief in Support of Cross-Exceptions. On September 9, 2009, Respondent filed an Answering Brief to General Counsel's Brief In Support of Cross-Exceptions.¹ The arguments set forth in Respondent's Answering Brief are without merit and most of them require no response.² However, Respondent has set forth certain assertions in Sections III(B) and (C) of its Answering Brief that should be addressed. The following section of this brief addresses those assertions and Section III concludes the brief.

II. The General Counsel has Consistently Maintained that Respondent Unlawfully Altered the Scope of the Bargaining Unit and Violated Section 8(d) and the Requested Remedies are Consistent with the General Counsel's Theories

In Section III(B) of its Answering Brief, Respondent contends that the General Counsel is belatedly arguing that Respondent's "reorganization" is a permissive subject of bargaining. Respondent asserts that General Counsel is "arguing out of both sides of his mouth on this

¹ As used herein, "R. Brief" and the following number(s) refer to a page or pages of Respondent's Answering Brief. "GC Ex." and the following number refer to General Counsel exhibits.

² Counsel for General Counsel disagrees with some of Respondent's assertions of fact. However, the facts were extensively addressed in General Counsel's Answering Brief to Respondent's Exceptions and General Counsel's Brief In Support of Cross-Exceptions and will not be addressed again here.

issue, given that the Complaint, as amended, alleges that the reorganization was a mandatory subject of bargaining about which the Company failed to bargain with the Union.” (R. Brief 16). Respondent cites to paragraphs 6, 7(d) and 10 of the Complaint in support of its argument. (R. Brief 16). By referring to all of its changes as a “reorganization,” Respondent glosses over the nuances in the General Counsel’s theory of this case.³

Paragraphs 6(a) and 6(b) of the Complaint address Respondent’s elimination of the unit job classifications of banquet captain and beverage captain and the transfer of the work formerly performed by the unit employees who held those positions to the non-bargaining unit position of guest service manager. (GC Ex. 1(g)). Paragraphs 6(c) through 6(e) of the Complaint address the elimination of the unit job classification of bartender, the transfer of the work formerly performed by the bartenders to other bargaining unit employees, and Respondent’s unilateral changes to certain terms and conditions of employment as set forth in the collective-bargaining agreement. (GC Ex. 1(g)).

In paragraph 7(a) of the Complaint, the General Counsel alleged that Respondent’s conduct set forth in paragraphs 6(a) and 6(b) was an alteration to the scope of the bargaining unit. (GC Ex. 1(g)).⁴ Furthermore, in paragraph 7(d) of the Complaint, the General Counsel alleged that the terms and conditions set forth in paragraphs 6(c) through 6(e) were mandatory subjects of bargaining. (GC Ex. 1(g)). Thus, contrary to Respondent’s assertion, the General Counsel has consistently contended that Respondent’s unilateral elimination of the banquet captains and bar captains and the transfer of their work to non-bargaining unit employees

³ As noted previously (see pages 35 and 36 and footnote 19 of the General Counsel’s answering brief and page 9 and footnotes 3 and 4 of General Counsel’s brief in support of cross-exceptions), the ALJ’s theory concerning the alteration of the scope of the unit was a broader one than the General Counsel’s. However, Respondent did not specifically except to the ALJ’s findings that by its conduct Respondent altered the scope of the bargaining unit, nor did Respondent otherwise specifically argue in its exceptions and brief in support of exceptions that the ALJ was in error in making these findings that it altered the scope of the unit. (ALJD 13:35-43; 74:45-48). The alteration of the scope of the unit is, of course, a permissive subject of bargaining. See Grosvenor Orlando Associates, Inc., 336 NLRB 613, 617 (2001) enfd. 52 Fed. Appx. 486, 177 LRRM 3024 (11th Cir. 2002).

⁴ An alternative theory concerning the captains was amended out of the Complaint on February 10, 2009, well before the trial began. (GC Ex. 1(o)).

without the consent of the Union is an impermissible change in the scope of the bargaining unit. See Wackenhut Corp., 345 NLRB 850 (2000).⁵

General Counsel does however, argue that Respondent's elimination of the bartenders and assignment of their work to other bargaining unit employees and Respondent's other unilateral changes to the terms and conditions of employment are changes to mandatory subjects of bargaining as was alleged in paragraph 7(d) of the Complaint. Although the General Counsel argues that those items were mandatory subjects of bargaining, the General Counsel further argues that Respondent could not implement changes to those terms and conditions of employment during the term of the collective-bargaining agreement without first obtaining the consent of the Union.⁶ See New Season, Inc., 346 NLRB 610 (2006); Nick Robilotto, Inc., 292 NLRB 1279 (1989).

In Section III(C) of its Answering Brief, Respondent argues that the General Counsel's request that the Board order Respondent to adhere to the terms and conditions of the collective-bargaining agreement is inconsistent with its legal theory. (R. Brief 17-18). That argument is simply without merit.

Respondent committed multiple violations of the Act and multiple remedies are necessary to address those violations. One of the necessary remedies is an order requiring Respondent to adhere to the terms of the collective-bargaining agreement. Such an order is the standard Board remedy in cases where Respondent has refused to fulfill its bargaining

⁵ In further response to Respondent's contention that there has been an "abrupt shift" in General Counsel's theory of the case, it should also be noted that in Section III(B) of the General Counsel's Brief to the ALJ, Counsel for the General Counsel argued that the unilateral elimination of the banquet captains and bar captains was an unlawful alteration in the scope of the unit. Furthermore, in Section III(C) of the brief, Counsel for General Counsel argued that Respondent also engaged in conduct in derogation of Respondent's Section 8(d) bargaining obligation and in violation of Section 8(a)(1) and (5).

⁶ Following the expiration of the collective-bargaining agreement, an employer may unilaterally implement changes to mandatory terms and conditions of employment after bargaining to a good faith impasse, so long as the changes are consistent with the employer's final offer to the union. See NLRB v. Crompton-Highland Mills, Inc., 337 U.S. 217 (1949); NLRB v. Katz, 369 U.S. 736, 745 (1962). However, an employer cannot alter the bargaining unit without first obtaining the consent of the union or insist to impasse on eliminating positions from the unit, because the scope of the unit is not a mandatory subject of bargaining. See Grosvenor Orlando Associates, Inc., 336 NLRB 613, 617 (2001) *enfd.* 52 Fed. Appx. 486, 177 LRRM 3024 (11th Cir. 2002).

obligation as set forth in Section 8(d) of the Act. See New Season, Inc., 346 NLRB 610, fn.4 (2006); Caamano Brothers, Inc., 304 NLRB 24 (1991). Respondent's argument that General Counsel's request that the Board order Respondent to adhere to the contract is somehow a concession that General Counsel believes that this case involves only mandatory subjects of bargaining lacks merit and should be rejected.

III. Conclusion

The arguments set forth in Respondent's Answering Brief are without merit and they should be rejected by the Board.

DATED at Tampa, Florida this 23rd day of September 2009.

Respectfully submitted,

/s/ Christopher C. Zerby /s/
Christopher C. Zerby
Counsel for the General Counsel
National Labor Relations Board
201 East Kennedy Boulevard, Suite 530
Tampa, Florida 33602
(813) 228-2693

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document, General Counsel's Reply to Respondent's Answering Brief in Case 12-CA-25889 was filed electronically with the Office of the Executive Secretary, National Labor Relations Board, and was served by electronic mail on Peter Zinober, Esq., Greenberg Traurig, P.A. (zinoberp@gtlaw.com) and Richard Siwica, Esq., Egan, Lev & Siwica, P.A. (rsiwica@eganlev.com) this 23rd day of September 2009.

/s/ Christopher C. Zerby /s/
Christopher C. Zerby, Esq.
Counsel for the General Counsel
National Labor Relations Board
201 East Kennedy Boulevard, Suite 530
Tampa, Florida 33602
(813) 228-2693