

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

**PROFESSIONAL MEDICAL
TRANSPORT, INC.**

and

**Cases 28-CA-22175
28-CA-22289
28-CA-22338
28-CA-22350
28-CA-22519**

**INDEPENDENT CERTIFIED EMERGENCY
PROFESSIONALS OF ARIZONA, LOCAL #1**

GENERAL COUNSEL'S REPLY BRIEF

I. INTRODUCTION

On December 31, 2009, Counsel for the General Counsel (CGC) filed Cross-Exceptions and a Brief in Support of Cross-Exceptions to the Decision of Administrative Law Judge William G. Kocol [JD(SF)-38-09], which issued in this matter on November 9, 2009.¹ On January 14, 2010, Respondent filed an Answering Brief to CGC's Cross-Exceptions. Pursuant to Section 102.46(h) of the Board's Rules and Regulations, CGC files this Reply Brief to Respondent's Answering Brief.

II. CGC'S CROSS-EXCEPTIONS AND RESPONDENT'S ARGUMENTS

A. CGC's Cross-Exceptions to the ALJ's Failure to make a Finding on the Section 8(a)(3) Allegations Concerning the Transfer of Unit Work

CGC argued in her cross-exceptions that after the ALJ found that Respondent had violated Section 8(a)(1) and (5) by transferring bargaining unit (the Unit) work to non-Unit

¹ Professional Medical Transport, Inc., is referred to herein as Respondent. Independent Certified Emergency Professionals of Arizona, Local #1, is referred to as the Union. References to the ALJD show the applicable page number. "Tr. __" refers to pages of the transcript of proceedings for the hearing held during the period from July 21 through July 23, 2009. "GCX __" refers to exhibits introduced by General Counsel at the hearing.

firefighters, the ALJ erred in failing to render a decision on the Section 8(a)(3) allegation involving the same conduct. Respondent has offered nothing new in its Answering Brief.

1. Composition of the Unit

In its Answering Brief, Respondent continues to contend that CGC's position is that the non-Unit firefighters are members of the Unit, a position that is inconsistent with CGC's position that the transfer of the work at issue is a Section 8(a)(3) violation. Respondent points to CGC's Cross-Exceptions where CGC ends the section using the words "part-time firefighter employees." Respondent conveniently leaves out the word that precedes this phrase, i.e., "casual." (CGC Cross-Exceptions at page 8) Respondent's argument is without merit. CGC has never argued that the part-time firefighters are members of the Unit and, in fact, has argued strenuously against that contention in her Brief to the ALJ, a position the ALJ agreed with. (ALJD at 15) CGC and the ALJ's position is that the "casual, part-time firefighters" are not members of the Unit.

2. Section 10(b) Argument

In its Answering Brief, Respondent argues that no Section 8(a)(3) violation can be found because no charge upon which to base such a violation was filed within the Section 10(b) period. This question was not resolved by the ALJ as he failed to render a decision on the Section 8(a)(3) violation regarding the transfer of Unit work. CGC has offered substantial argument in its Cross-Exceptions concerning the Section 10(b) issue.

Respondent's Answering Brief contends that the transfer of the work, which is ongoing conduct by Respondent, does not qualify as a continuing violation. Respondent fails to mention the ALJ's finding that in September 2008, Respondent changed the scope and size of its hiring of firefighters by hiring a much larger contingent than in the past. (ALJD at 13)

Such hiring constituted a new act, and each subsequent new hire and displacement of a Unit member constituted a new violation.

3. No Union Animus Argument

Respondent contends that a Section 8(a)(3) violation cannot be found because there is no evidence of animus. Respondent's contention is without merit. The record shows Respondent became increasingly hostile to the Union during the relevant period. Respondent viewed the Union's actions in fighting hard during collective bargaining as a thorn in its side. Respondent's reaction was to hire a significant number of firefighter employees so as to hit the Unit where it counts -- in overtime hours. The connection between the Union's advocacy on behalf of Unit employees, the frustration of Respondent, and the denial of overtime hours to Unit employees, is palpable.

Specifically, on September 3, 2008, Respondent sent a letter (GCX 10) to all employees, attacking the Union and its' president, and highlighting the Union's position with regard to the hiring of the firefighters. (Tr. 131-132; GCX 10) The letter accuses the Union's president of making "false and misleading comments" and states that the Union's letter concerning the firefighters contains "baseless accusations." (GCX 10) Respondent hired a large contingent of firefighters shortly thereafter. This document epitomizes the animus held by Respondent, contrary to Respondent's suggestion that it harbored no animus.

B. CGC Cross-Exceptions Regarding the Surveillance Cameras

CGC filed cross-exceptions regarding the ALJ's failure to find that Respondent's relocation of the surveillance cameras was a unilateral change in violation of Section 8(a)(5) and that the ALJ's failure to order Respondent to remove the surveillance cameras after

finding that the initial installation of those cameras violated Section 8(a)(5) of the Act was erroneous.

Respondent contends that it was established in the hearing that Respondent did give notice to the Union of the relocation of the surveillance cameras as a result of Respondent's e-mail of February 11, 2009, to all employees. The e-mail advised employees that the cameras were placed incorrectly and were going to be moved. Respondent further argues that the cameras were not turned on.

Respondent ignores the findings of the ALJ that at no time was the Union provided notice or an opportunity to bargain over the installation of the cameras in the stations or the living quarters. (ALJD at 14) Therefore, the appropriate remedy for that unilateral change would be the removal of the cameras from the stations upon the request of the Union. The installation was a unilateral change and the appropriate remedy is to restore the status quo ante -- no cameras.

Respondent also argues that it would be denied due process if the Board found that the relocation of the cameras was also a Section 8(a)(5) violation as it was not specifically plead in the Complaint. Respondent's argument has no merit. Respondent was given full notice that the cameras and their installation were alleged to be a violation. Respondent then presented a zealous defense to such allegations, including, by presenting evidence of the relocation of the cameras and evidence, through its witnesses, that the cameras were not turned on. This issue was fully litigated before the ALJ, and Respondent's argument that it did not have an opportunity to defend the allegation is without merit and should be disregarded.

C. CGC Cross- Exceptions Regarding the Removal of the Blackberry

CGC filed cross-exceptions regarding the ALJ's failure to make a finding on whether the removal of the Blackberry from the Union's president constituted a violation of Section 8(a)(3) of the Act and the failure to order that the Blackberry to be returned to the Union's president for his use. Respondent argues that CGC is requesting a "superfluous" action by requesting that the remedy include a return to the status quo ante.

CGC's request is not superfluous. The appropriate remedy for an unlawful unilateral change is to return the parties to the status quo ante upon request of the Union. An action has been taken by Respondent, mandatory for collective bargaining, without notice to the Union. Therefore, the appropriate remedy is to return conditions, as Respondent is able, to as they existed prior to the unilateral change. In this case, a Blackberry was taken from the Union's president without bargaining and in violation of the parties' Memorandum of Understanding. The appropriate remedy is for that item to be returned.

Further, despite his failure to make a specific finding that Respondent violated Section 8(a)(3) by such conduct, the ALJ's order appears to provide a remedy based on Section 8(a)(3) elements by his recommended order that Respondent "cease and desist from discontinuing employees' use of PMT's electronic communication devices because employees engaged in union activity." (ALJD at 25) This language suggests a violation of Section 8(a)(3) in the removal of the Blackberry devices yet no finding was made on this point.

D. CGC Cross-Exceptions Regarding Sign-Up Sheet

CGC filed cross-exceptions regarding the ALJ's failure to find that a sign-up sheet, asking employees to state whether they objected to their information being given to the

Union, was not unlawful interrogation. The ALJ found this to be direct dealing in violation of Section 8(a)(5). (ALJD at 10) Instead of addressing CGC's cross-exceptions, Respondent repeats its argument from its Exceptions, i.e., that the sign-up sheet is barred by Section 10(b). That argument was soundly and specifically rejected by the ALJ. (ALJD at 10) The ALJ credited the testimony of the witnesses with regard to the date the sign-up sheet was placed and remained on the bulletin board and found those dates to be within the Section 10(b) period.

Respondent argues that CGC's position that the sign-up sheet constitutes interrogation amounts to a "hyper technical, overly harsh" interpretation of the Act. To the contrary, CGC appropriately applied the *Bourne v. NLRB*, 332 F. 3d 17, 28 (2d Cir. 1964) factors in its cross-exceptions. The sign-up sheet was placed on the bulletin board in a time of heated contract negotiations; sought to know which employees would allow the Union to have their personal information; such employee responses were sought by the scheduling department, which was responsible for whether the employees would get hours; and was done in a public place. Inasmuch as these factors establish unlawful interrogation, the appropriate remedy is a provision in the Notice to Employees stating the employees will not be asked about their union sympathies. This is not a hyper-technical or overly-harsh interpretation of the Act -- it is simply the appropriate remedy for the violation.

E. CGC Cross-Exception Regarding the "Take It or Leave It" Contract Proposal

CGC filed cross-exceptions on the ALJ's failure to find that a presentation of a contract proposal with a cover letter informing the Union that they had to "accept or reject the contract in its entirety," was bad-faith bargaining in violation of Section 8(a)(5) of the Act. Respondent argues that this was merely a "bargaining ploy" by Respondent and CGC's effort

to attach a “sinister gloss” to the comment is contrary to the Board’s traditional approach of examining all of the facts and circumstances surrounding bargaining. Respondent’s proffered description of collective bargaining that had occurred up to that point is made through rose-colored glasses.

At the time this “take it or leave it” contract proposal was provided to the Union, the Union had just been forced to file an unfair labor practice charge because Respondent had refused to come to the bargaining table for a period of five months. (Tr. 244-245) It was only at that point, to get rid of the unfair labor practice charge, that Respondent agreed to begin bargaining. Respondent’s first order of business was to send the Union this “take it or leave in” contract proposal. Respondent now argues that it is the Union’s conduct that makes this proposal lawful.

Contrary to Respondent’s assertions, it is well-settled that a party must not enter bargaining with a “take it or leave it” attitude, and “must demonstrate a serious intent to adjust differences and to reach an acceptable common ground.” *General Electric Co.*, 150 NLRB 192 (1964), *enfd.* 418 F. 2d 736 (2d. Cir. 1969); *American Meat Packing Co.*, 301 NLRB 835, 836 (1991); *Excelsior Pet Products, Inc.*, 276 NLRB 759, 761-762 (1985). Respondent had no intention of negotiating over the specific terms within this “take it or leave it” proposal and only acquiesced when the Union pushed back.

F. CGC Cross-Exceptions Regarding Overall Bad-Faith Bargaining

CGC filed cross-exceptions to the ALJ’s failure to find that Respondent’s overall conduct constituted bad-faith bargaining. Not mentioned by Respondent in its Answering Brief is the ALJ’s attempts to grapple with this issue. The ALJ stated that the issue was a “close one.” (ALJD at 23) The ALJ then listed the specific violations of bad-faith bargaining

he had found, yet stated that such violations collectively did not rise to the level of overall bad-faith bargaining. In so doing, however, the ALJ failed to list several violations² -- violations that provide yet further support and bases upon which to find that Respondent engaged in overall bad-faith bargaining.

Instead, Respondent regurgitates its litany of alleged conduct by the Union, arguing that the Union's conduct excuses its' own bad-faith. Despite Respondent's efforts to defend its conduct by pointing to alleged conduct of the Union, the ALJ only finding in such a vein was that the Union was responsible for "some delay (in bargaining) initially as it found its footing." (ALJD at 23)

G. CGC Cross-Exceptions Regarding the Promulgation of an Overly-Broad and Discriminatory Rule

CGC filed cross exceptions to the ALJ's failure to find that a rule prohibiting employees from posting anything that is "divisive, inflammatory or derogative towards employees [or the] management of the Company" is overly-broad and discriminatory. CGC argues that the ALJ based this finding on his determination that there is no statutory right for the Union to post materials. Absent from the ALJ's decision and from Respondent's Answering Brief is any discussion concerning Respondent's admission in the letter (GCX 22) that the Union has a right to post materials on Respondent's bulletin boards. CGC is not arguing that the Union has a statutory right to post materials—this right was conferred upon them by Respondent. Respondent's attempts to limit the Union from publicly speaking about divisive subjects when the parties are in the throes of heated contract negotiations is an attempt to chill the employees' Section 7 rights and violates Section 8(a)(1) of the Act.

² Respondent's unlawful withdrawal of recognition and unilateral changes to healthcare benefits. (ALJD at 15-16)

H. CGC Cross-Exceptions Regarding the *Transmarine* Remedy

CGC filed cross-exceptions to the ALJ's failure to order, as a remedy for the closing of two stations, the remedy provided pursuant to *Transmarine Navigation Corp.*, 170 NLRB 389 (1968). Respondent argues that because the employees did not lose their jobs and there was allegedly no loss of hours, there is no liability. Respondent argues that to order a *Transmarine* remedy would punish Respondent.

This argument has been made -- and rejected -- in numerous Board cases. In *Live Oak Skilled Care*, 300 NLRB 1040, 1042 (1990), after the administrative law judge refused to order a *Transmarine* back-pay remedy as the employees had not suffered actual losses, the Board reversed the judge, ordering a *Transmarine* remedy as an appropriate remedy for all such effects bargaining violations, regardless of loss. See also *Sea-Jet Trucking Corp.*, 327 NLRB 540 (1999).

I. CGC Cross-Exceptions Regarding Compound Interest

CGC filed cross-exceptions to the ALJ's failure to order that interest on backpay be compounded on a quarterly basis. Despite Respondent's argument that it is longstanding Board precedent that interest on backpay be simple interest, CGC urges that the only way to make adjudged discriminatees fully whole for their losses is to compound the interest on a quarterly basis. CGC has provided ample legal authority for such a remedy in her brief in support of cross-exceptions.

III. CONCLUSION

Based upon the foregoing and the entire record in this matter, it is respectfully submitted that the Board should grant CGC's cross-exceptions and find that Respondent further violated Section 8(a)(1), (3), and (5) of the Act as described in such cross-exceptions.

Further, it is respectfully submitted that the Board should amend the ALJ's recommended order to provide the appropriate remedies, including a *Transmarine* remedy, for affected employees; order that interest on all backpay be compounded on a quarterly basis; adopt the ALJ's recommended order in all respects other than those cross-excepted to by the General Counsel; and order other remedies deemed appropriate.

Dated at Phoenix, Arizona, this 28th day of January 2010.

/s/ Sandra L. Lyons

Sandra L. Lyons
Counsel for the General Counsel
National Labor Relations Board, Region 28
2600 North Central Avenue, Suite 1800
Phoenix, AZ 85004-3099
Telephone: (602) 640-2133
Facsimile: (602) 640-2178
Sandra.Lyons@nlrb.gov

CERTIFICATE OF SERVICE

I hereby certify that a copy of GENERAL COUNSEL'S REPLY BRIEF in PROFESSIONAL MEDICAL TRANSPORT, INC., Cases 28-CA-22175, et. al. was served by E-Gov, E-Filing, E-mail, and Overnight Delivery via Federal Express, on this 28th day of January 2010, on the following:

Via E-Gov, E-Filing

Lester A. Heltzer, Executive Secretary
Office of the Executive Secretary
National Labor Relations Board
1099 14th Street, NW, Room 11602
Washington, DC 20570-0001

Via Electronic Mail

Robert J. Deeny, Attorney at Law
Sherman and Howard, LLC
1850 North Central Avenue, Suite 500
Phoenix, AZ 85004
E-mail: bdeeney@shermanhoward.com

Via Federal Express:

Professional Medical Transport, Inc.
2495 Industrial Park Avenue
Tempe, AZ 85282

Independent Certified Emergency
Professionals, Local No.1
11417 East Decatur Street
Mesa, AZ 85207
E-mail: coachjbar@yahoo.com

Independent Certified Emergency
Professionals, Local No.1
1143 East Palo Verde Drive
Phoenix, AZ 85014
E-mail: tlo9530@yahoo.com

/s/ Sandra L. Lyons

Sandra L. Lyons
Counsel for the General Counsel
National Labor Relations Board, Region 28
2600 North Central Avenue, Suite 1800
Phoenix, AZ 85004-3099
Telephone: (602) 640-2133
Facsimile: (602) 640-2178
Sandra.lyons@nlrb.gov