

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

DOUGLAS AUTOTECH CORPORATION,

Respondent,

and

Case No. GR-7-CA-51428
Hon. Paul Buxbaum

INTERNATIONAL UNION, UNITED
AUTOMOBILE, AEROSPACE AND
AGRICULTURAL IMPLEMENT WORKERS
OF AMERICA (UAW), AFL-CIO, AND ITS
LOCAL 822,

Charging Union.

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**UNION'S REPLY TO RESPONDENT'S
ANSWERING BRIEF TO UNION'S CROSS-EXCEPTIONS**

I. The Company Repudiated the Bargaining Relationship.

On August 4, 2008, the Company discharged the entire bargaining unit -- 114 former strikers and 33 employees on layoff or sick leave. Beginning August 14, 2008, the Company refused to meet with the Union -- “We’re not going to come and bargain. All the employees have been terminated.” (R. 138)

In its Answering Brief, the Company contends that it did not repudiate the bargaining relationship because: (1) on August 25, 2008, the Company provided information to the Union; and (2) on August 14, 2008, the Company attorney said the Company would bargain “effects.” This argument is without merit.

First, the information provided to the Union is meaningless. The so-called information consists of a Company statement: (1) that the Company does not want any more information from the Union; (2) that the replacements are “temps”, referring to the Company website; (3) that the Company is not advertising for new hires; and (4) that the Company accuses the Union of “condoning racial epithets.” (GC Ex. 31) That “information” is not an acknowledgment of a bargaining relationship. There is nothing left to bargain about. As a matter of law, the Union does not represent the “temps.” *Goldsmith Motors Corp.*, 310 NLRB 1279, fn. 5 (1993).

Second, the existence of a bargaining unit is the prerequisite *for* a bargaining relationship. See, e.g., *NLRB v. Borg-Warner Corp.*, 356 U.S. 342 (1958). And here, the Company terminated the entire bargaining unit.

- “The entire bargaining unit has been discharged.” [Director of Finance Kirk -- CP Ex. 4]
- “Douglas terminated the bargaining unit August 4, 2008.” [Director of Operations Viar -- GC Ex. 51]

Without a bargaining unit, there is no bargaining under the Act about *any* term or condition of employment, including effects of termination. The Company not only refused to bargain with the Union beginning August 14, 2008, as the ALJ correctly found, but also eliminated the bargaining relationship. As both a practical matter and a legal matter, terminating the entire unit was a death blow to the bargaining relationship. See, e.g., *Cliff-Golman Baking Co.*, 207 NLRB 1063 (1973); *Borg-Warner*, *supra*.

II. The Remedy in this Case Should Include the General Counsel's and the Union's Litigation Costs and Attorneys Fees.

The Company contends that attorney fees are not appropriate under *Hecks, Inc.*, 215 NLRB 765 (1974); because the Company's legal argument regarding the meaning of §8(d) (which the ALJ rejected and the Board should too) is "debatable" and not "frivolous."¹ This contention misses the mark.

It is the Company's adherence to factual arguments, presented through the testimony of Viar, Kirk and Lillie, that is frivolous. As the Board noted in *Unbelievable, Inc., d/b/a Frontier Hotel & Casino*, 318 NLRB 857, 861 (1995):

¹ The Company's argument regarding the meaning of §8(d) is debatable, though meritless. But the Company's mischaracterization of established Board precedent is not debatable. *For example*, the Company claims that the Board in *Boghosian Raisin Packing Co.*, 342 NLRB 383 (2004) found that the union made an unconditional offer to return and the employees were locked out by the employer. That is not true. The *Boghosian* Board found that the union made a "conditional" offer to return and continued its illegal strike until the employer discharged the employees. In its Answering Brief, the Company cites the GC's argument in *Boghosian* that the union made an unconditional offer and the employees were locked out. (Company Answering Brief p. 1) But the GC's argument in *Boghosian* was *rejected* by the Board, which found that the union did *not* make an unconditional offer to return to work and the illegal strike continued until the employees were terminated. *For example*, the Company argues that the difference between a "conditional or unconditional offer to return to work... is a distinction without a difference." (Company Answering Brief p. 1) That is contrary to hornbook NLRB law -- only an unequivocal *un*conditional offer to return ends a strike. See, e.g., *Boghosian Raisin, supra*; *Pan American Grain Co.*, 347 NLRB 318 (2004).

Although this case required the judge to state credibility findings regarding the conflicts between Keiler's testimony and that of the union representatives, it is clear from the judge's decision that his assessment of Keiler's credibility presented no real issue and bears little resemblance to the kind of credibility resolution contemplated in *Heck's*. Instead, the defense here rests on the transparently untruthful testimony of an attorney whose words and demeanor demonstrated unmistakably that he was not to be believed.

* * *

To the extent that *Heck's* may be interpreted as precluding the reimbursement of litigation expenses even where only *pro forma* credibility resolutions are made, we modify that policy to make clear that the Board may find a respondent's defense frivolous and order reimbursement of litigation expenses where, as here, the defense relies on testimony that presents no legitimate issue of credibility. In such exceptional circumstances, reimbursement of these costs effectuates the policies of the Act by keeping the Board's docket available for meritorious cases and by compensating charging parties and the general counsel for their needless expenditures caused by the respondent's adherence to a clearly meritless defense.

Indeed, in support of its Exceptions, the Company *still* contends that the Union did not make an unconditional offer to return to work. The Company *still* contends it merely confirmed the May 5, 2008 "status" (and did not discharge) all the employees on August 4, 2008. The Company *still* contends that it did not refuse to bargain on August 14, 2008 and is still waiting for the Union to request negotiations regarding temporary replacements. (Company Brief pp. 3-5, 7, 8)

The Board's findings regarding the respondent's factual defenses in *Frontier* fit hand-in-glove with the ALJ's findings regarding the Company's factual defenses in this case. In this case, as in *Frontier Hotel*, the Board should award litigation expenses..

For the foregoing reasons, the Union requests that the Board find that the Company violated §8(a)(1) and (5) of the Act by repudiating its collective bargaining relationship with the Union. The

Union also requests that the Board issue a remedial order that includes reimbursement of litigation expenses/attorneys fees to the Union and the General Counsel.

Respectfully submitted,

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Dated: June 23, 2010

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STATEMENT OF SERVICE

The undersigned states that on June 23, 2010, he served the Union's Reply to Respondent's Answering Brief to Union's Cross-Exceptions upon the following parties by electronic mail:

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