

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

EMBARQ CORPORATION, a wholly-owned Subsidiary of CENTURYTEL, INC. d/b/a CENTURLINK,

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION #396, AFL-CIO,

Case No. 28-CA-22804  
28-CA-22849  
28-CA-23021  
JD(ATL)-18-10

**RESPONDENT'S REPLY BRIEF IN SUPPORT OF RESPONDENT'S EXCEPTIONS**

**ARGUMENT**

**A. The Union Agreed to the Layoffs**

There is no doubt, and the judge found, that Union agent Jessie Newman, at the end of the September 15 bargaining session, "asked if the Company could make its official announcement [of the layoff] to the affected employees prior to the ratification vote on the contract." (JD p. 7, lines 5-7). Counsel for General Counsel, in her answering brief, asserted that Newman's request was "within the context of Respondent asking the Union on about August 27, to keep mention of the potential layoff confidential from the membership." She then dismissed Newman's request as simply part and parcel of the Union's cooperation with Respondent's confidentiality request made weeks earlier, and noted, as did the judge, that there was "no precedent holding that cooperation regarding procedural matters constitutes waiver of substantive and statutory rights." (GC Answering Brief, page 8).

Strange, neither Jessie Newman nor Charles Randall testified that the Union made such request as part of a "procedural matter" arising from Respondent's request made in August to keep the layoff confidential. Indeed, they never testified why they made such

request. In fact, they never acknowledged that such a request was made.

It should again be noted that Newman and Randall initially testified that at the August 26 bargaining session they were alerted to a possibility of a layoff of the retail cashiers and after that they never had any other conversation with Respondent about the retail cashier layoff issue until they received the October 1 written notification that the retail cashiers would be laid off December 4. (TR pp. 74, 111-112)

Their testimony was deliberately false. They knew they had to establish that they did not waive their opportunity to bargain over the decision to lay off the employees. In order to do that, they had to establish that they made a timely demand to bargain over the decision to lay off the employees once they had notice of the decision. It is simply inconceivable that the detailed discussions of the retail cashier layoff that took place on September 15, as found by the judge, together with the request for expedited written notification of the layoffs, could have evaporated from the memory banks of the two union witnesses.

After the testimony of Christy Gray, and the introduction of her notes into the record, together with the submission of documents detailing the e-mails that were generated by the Union's request for an expedited notification to employees, it was clear to the Union witnesses that they had to modify their testimony. They then produced their alleged notes of the September 15 meeting which acknowledged discussion of the retail cashier layoffs. The bargaining notes were clearly doctored to nevertheless support the Union's positions. The Union's notes reflect that Joseph Basile stated that the company did not know when anything would happen and requested that the Union keep the matter confidential. That simply was not said. Gray's notes reflect that Basile said that the layoffs would be around the end of November. The Judge specifically found that Gray's

notes more accurately reflect what was said at the bargaining session. (JD p. 6, line 52).

Counsel for General Counsel also notes, almost as an afterthought, that the Union's notes for September 15 reflect that Newman allegedly repeated his August 26 alleged statement that if there were any changes he would send a letter to request bargaining over the decision and effects. (GC Answering Brief p. 12). The judge never found that such statement was ever made at the September 15 meeting. In fact, the statement was never made, and the entry of such alleged statement in the alleged notes leads to the inescapable conclusion that the notes were doctored. According to Randall, he took the notes as he was sitting at the bargaining table. According to the notes, not only was Respondent notified of the Union's eventual request to bargain over the decision and effects of the layoff, such notification was pontificated in detail, with a sermon concerning mandatory subjects of bargaining:

I would remind you as I previously did that any changes, including the possibility of a layoff is a mandatory subject of bargaining. At such time the company notifies us that in fact that they are, or were going to be any changes or otherwise we would be sending you a letter to bargain the decision effects of whatever those changes would be.

(TR p. 310, GC Exh. 40)

Such statement clearly was never made. It simply does not fit into the detailed conversations that occurred at the bargaining table concerning the retail cashier layoffs, the request for expedited notification to the employees of the layoffs, or the subsequent action taken by Respondent. Indeed, no one testified that such a statement was made. Newman and Randall never proffered any testimony as to what occurred or what was said at the September 15 bargaining session. Both testified that after reviewing Randall's notes of the meeting that they had no independent recollection of the discussions at the September 15 meeting. (TR pp. 309, 317-18). How convenient.

The credited testimony of Gray and Gray's notes reflect a series of discussions at the September 15 bargaining session that are totally inconsistent with the discredited notes of Randall. Indeed, Gray's notes reflect that the Union initiated the conversation about the retail cashiers. As the parties were discussing certain issues in the contract negotiations Jessie Newman asked: "What about those cutting?" (Resp. Exh. 3, page 18) To this Basile responded that they would occur around the end of November and that Respondent was not interested in doing anything beyond what was set forth in the contract. The parties then began their detailed discussion of the retail cashiers, including a re-hash of the reasons for the layoffs and a detailed discussion of the impact of the layoffs. (Resp. Exh. 3).

The fact that Newman phrased the initial inquiry - "about those cutting" - establishes that the Union, on September 15, already was well aware that the layoffs were going to occur. The prior conversations concerning the layoffs, in the August 26 meeting, were more than a statement of some nebulous possibility in the future, as characterized by the General Counsel. Basile's reference on August 26 that the matter had not been 100% decided, referred to a decision as to the timing of the layoffs. He emphasized that that there was clear direction for the layoffs, and only the timing of such was unclear.

General Counsel's argument that there was no clear notification of the potential layoffs until the October 1 written notification is simply unfounded. On September 15 all nine of those that were going to be laid off were named and the impact of the layoff on each employee was discussed in detail. Furthermore, the date of the layoff was narrowed down to around the end of November, which was certainly imminent.

If the Union wanted to bargain over the decision to lay off the employees (any

more than they already had on August 26 and September 15) it should have demanded to do so on September 15 at the least. Instead, it chose to request that Respondent proceed with the notification of the decision to lay off the employees, and to do so expeditiously. As the judge noted, this request was for the “official announcement” of the layoff (JD p. 7, line 6). The actual decision for the layoff had already been made, with the Union’s full knowledge and acquiescence. The only issue for the Union, which it expressed at the bargaining session on September 15, was not the decision to layoff the employees, but “how to stay out of trouble with the membership regarding the lay-off.” (TR p. 254, Resp. Exh. p. 25)

The Union never denied that Jessie Newman, at the September 15 bargaining session, during the detailed discussion of the nine retail cashiers to be laid off, stated that they were “trying to figure out how to stay out of trouble with the membership regarding the lay-off. How do we address?” Not only did the two Union witnesses not deny such statement was made, they never explained it away. As noted, Newman and Randall never testified to any statement made by anyone at the September 15 bargaining session. Furthermore, Robert Herrera, who was present throughout the hearing in this matter (TR p. 15), and was present at both the August 26 and September 15 bargaining sessions, never testified concerning any issue in the proceeding. (Newman, as Charging Party’s representative, also was present throughout the entire hearing.)

The logical inference from Newman’s statement that he was trying to figure out a way to stay out of trouble with his membership regarding the lay-off, and even asking how he could address the membership on the issue, is that Newman was aware that the decision had been made to lay off the employees, that the Union accepted the decision, and that the only issue for the Union was how to present the issue to its membership.

Furthermore, the logical inference from Newman's request at the end of the session that Respondent expedite the official announcement of the layoff was, again, that the Union was aware of the decision to layoff the employees, that it accepted the decision, and that the only issue was how to present the issue to its membership.

For the General Counsel and the judge to simply dismiss these logical inferences by asserting that the Union's conduct was part of its cooperation with Respondent and that such cooperation is not a waiver of rights, is simply nonsensical. This is especially true in view of the fact that three Union officials that were present at the September 15 meeting never testified to rebut the logical inferences of their statements, and simply ducked the issues by asserting that, despite reviewing their notes of the bargaining session, they had no independent recollection of any discussion concerning the layoffs at that meeting. It should also be remembered that two of them initially testified that after the August 26 meeting they never had any further discussions with Respondent's officials concerning the layoffs until receiving the October 1 written notification. Such testimony was clearly knowingly false. The facts clearly reveal that they knew about the layoffs for a substantial length of time and agreed to the layoffs. The facts also reveal that well after receiving the written notification of the layoff, they changed their minds for purely face-saving purposes.

In this regard, one final point should be made. In the prior NLRB proceeding in *Embarq Corporation*, JD(SF)-10-09, Charles Randall received notification of the employer's decision to close a call center in Las Vegas, and he immediately prepared a letter that was mailed and e-mailed to the employer the same day, requesting to bargain over the decision to close the call center. However, in this case, the Union waited almost two weeks after receiving the October 1 notification before it made its demand to

bargain. The Union witnesses never explained why they waited so long. The logical inference, taken together with their statements made at the September 15 bargaining session, is that the Union officials took some heat from their membership and they changed their mind and decided to show their membership they were going to fight the layoffs. Indeed, why did the Union not respond that same day, as they did in the prior case, and demand that Respondent cancel their notification of the layoffs to the employees planned for the next day? If the Union had really informed Respondent at a prior time that they would send a letter demanding to bargain over any decision to lay off employees if such changes were contemplated, they would have been geared up to respond immediately when the notice came. The Union's entire representation of the facts in this case is knowingly false.

**B. The Appropriate Standard**

This case presents the perfect example of why the Board should adopt the contract-coverage waiver analysis to determine whether Respondent was privileged to unilaterally decide to lay off the retail cashiers. As noted in Respondent's opening brief in support of exceptions, the judge interpreted the contract to not allow Respondent to lay off all of the employees in any given classification, no matter what the circumstances. There is no case law to support such a conclusion, and General Counsel, in her answering brief, did not even attempt to adopt or support the judge's assertion. The General Counsel also asserted that the contract language does not allow Respondent to change work duties of retail sales consultants, and simply dropped a footnote to support this by noting that the right to re-assign work (which is set forth in the management rights clause) "does not contemplate reassigning work as the result of the elimination of a classification." (GC Answering Brief, page 7 and footnote 4). General Counsel also

incorrectly asserted that no Respondent witness cited lack of work as a reason for laying off the retail cashiers, again simply dropping a footnote asserting that the decrease in volume of work did not privilege a layoff under the terms of the contract. (GC Answering Brief, page 7 and footnote 2). The General Counsel also did not address the fact that Respondent had always made decisions concerning layoffs without having to bargain over the decision, noting instead the self-serving testimony of a Union agent concerning bargaining over a proposal for different contract language that took place in 2004. General Counsel never responded to the argument that no one testified concerning the original drafting of the contract language concerning layoffs that has existed in the past several collective bargaining agreements. The General Counsel also never responded to the fact that the contract permits Respondent to make decisions concerning any reduction in force, but instead blithely continued with the argument that the matter did not involve a lay off, but instead involved an elimination of a classification. In this regard, General Counsel never responded to the fact that the classification of retail cashier remains in the current negotiated contract, which was agreed upon on the same date that the Union requested an expedited notification of the layoffs of the nine affected employees.

These are the types of issues that should be resolved by an arbitrator. The parties addressed the issues in the collective bargaining agreement, and any disputes concerning

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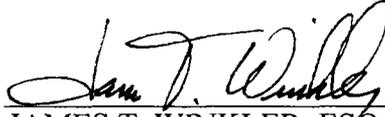
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the issues should be addressed through the procedures set forth in the collective bargaining agreement.

Dated: November 1, 2010

Respectfully submitted,



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JAMES T. WINKLER, ESQ.  
LITTLER MENDELSON

Attorneys for Respondent

**PROOF OF SERVICE**

I am a resident of the State of Nevada, over the age of eighteen years, and not a party to the within action. My business address is 3960 Howard Hughes Parkway, Suite 300, Las Vegas, Nevada 89169. On November 1, 2010, I served the within document(s):

**RESPONDENT'S REPLY BRIEF IN SUPPORT OF RESPONDENT'S EXCEPTIONS**

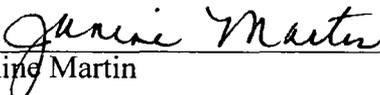
- By Overnight Delivery – by depositing a true copy of the same enclosed in a sealed envelope, with delivery fees provided for, in an overnight delivery service pick up box or office designated for overnight delivery, and addressed as set forth below.

Jesse Newman  
International Brotherhood of  
Electrical Workers  
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I am readily familiar with the firm's practice of collection and processing correspondence for mailing and for shipping via overnight delivery service. Under that practice it would be deposited with the U.S. Postal Service or if an overnight delivery service shipment, deposited in an overnight delivery service pick-up box or office on the same day with postage or fees thereon fully prepaid in the ordinary course of business.

I declare under penalty of perjury that the foregoing is true and correct. Executed on November 1, 2010 at Las Vegas, Nevada.

  
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Janine Martin

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ORDER SECTION