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1 December 2010

Executive Secretary, NLRB
1099 14th Street N.W.
Washington D.C. 20570

UPS Overnite

In re: *Interstate Bakeries/Teamsters and Rammage*
17-CA-23404, 17-CB-6146

Dear Secretary:

Enclosed herein please find original and nine copies of Supplemental Brief on Remand of Teamsters Local 523, to be considered in conjunction with the remand of this case from the U.S. Supreme Court and United States Court of Appeals for the Tenth Circuit. Please file same of record and return a file stamped copy in the enclosed, stamped, self-addressed envelope.

Thank you for your assistance in this matter.

Sincerely,

FRASIER, FRASIER & HICKMAN, LLP

By: Steven R. Hickman

SRH/vls

Enclosures

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

INTERSTATE BAKERIES CORPORATION	)	
	)	
and	)	Case No. 17-CA-23404
	)	
KIRK RAMMAGE, an individual;	)	
	)	
TEAMSTERS LOCAL UNION 523,	)	
	)	
and	)	Case No. 17-CB-6146
	)	
KIRK RAMMAGE, an individual.	)	

SUPPLEMENTAL BRIEF ON REMAND OF TEAMSTERS LOCAL 523

COMES NOW Teamsters, Local 523 ("Union"), and submits this supplemental brief on remand and would show the Board as follows:

GENERAL INTRODUCTION

The Company made a decision to merge two groups of employees represented by the Union and then added one employee, Rammage, not represented by the Union. The Union, feeling it was inappropriate to prefer someone it did not represent (the one employee) over people it did represent (persons in bargaining units represented by the Union) allowed the two groups that Union represented to be dovetailed in seniority into the merged bargaining unit. Rammage, who was in neither bargaining unit, was end-tailed.

The undisputed evidence is that these actions were not taken because Rammage was in some way anti-union or had incurred the Union's wrath. Rather, the issue, from the Union's perspective, came simply down to one of whether the Union should go out of its way to disadvantage the people that it has the legal duty to represent to prefer someone that it does not represent, and the Union answered no.

The ALJ ruled in favor of the Union. A two-member NLRB ruled contrary. The U.S. Court of Appeals for the Tenth Circuit gave deference to the NLRB on both the issue of its ability to act as a two-member board and on the merits, and affirmed. The U.S. Supreme Court granted certiorari, vacated the decision of the Tenth Circuit, and remanded on the grounds that the two-member board was without power under *New Process Steel, LP v. NLRB,* 560 U.S. _ (2010). The Supreme Court did not address the merits of the case, although they were raised. The Tenth Circuit then remanded to the NLRB for a new decision.

The purpose of this supplemental brief is to address legal issues and authorities raised since the Union filed its Answering Brief herein in December, 2006. The Union submits that the authorities relied upon to hold the Union responsible do not, when properly read, support that position.

PROPOSITION: Teamsters Was within Its Duty in Requesting the Company Dovetail Bargaining Unit Seniority Between the Units It Represented and End-tailing Rammage Who Was Not in Its Bargaining Units.

In *NLRB v. Whiting Milk Corporation,* 342 F2d 8 (1st Cir. 1965), the First Circuit held that a union does not have a duty to treat people it represents equally with those not represented. As stated in *Whiting Milk,* 342 F2d at 11:

> It is simply a case where the Union bargained for benefits for all employees within the units it represented without at the same time bargaining for similar benefits for employees for whom it had no authority to speak. If this be an unfair labor practice, on the same reasoning so also would it be an unfair labor practice for a Union to bargain for increase in wages for employees in a unit it represented without at the same time bargaining for an increase in wages for employees in a similar unit it did not represent. The long and short of this case is that the Union bargained for and obtained a benefit for employees in the units it represented. This is not illegal discrimination against employees in other units not represented by the union but only a normal and natural incident of union representation.

Later, in *Riser Foods, Inc.,* 309 NLRB 635 (1992), this Board held that a union had not breached its duty of fair representation by preferring those it represented over those it did not yet represent.

Cases relied upon by Rammage and the Board are not to the contrary.

In *Woodlawn Farm Dairy Co.,* 162 NLRB 48 (1966), the distinction was between members of the union and non members of the union. Here, however, there is not a whiff of distinction between those who are members and those who are non-members of a union; the distinction is between those who are in bargaining units represented by the Union (who may or may not be

members) versus those who are not in the represented bargaining units. Clearly, preferring union members over non-union members is discrimination based upon union relation; representing bargaining unit members to the detriment of non-bargaining unit members is, on the other hand, merely fulfilling the legal duty of representation. In *Woodlawn,* there was no duty to prefer the union members over the non-union members; in this case there is a duty to prefer bargaining unit members over non-bargaining unit members.

Teamsters Local 480 (Hilton D. Wall), 167 NLRB 920 (1967), turned upon the fact that the person at issue was not in a union. There, the union said that if the person had been in a union, it would have given consideration to dovetailing. Again, the distinction is whether the union is discriminating in favor of unions generally, or is only preferring the people it represents because it has such a duty. In *Hilton D. Wall* the union showed a discriminatory animus by saying that it would have preferred the individual if he had been in a union, even though it would have been a different union. This clearly is discrimination based upon union relation. In the instant case, however, the Union did not base its decision upon whether people were in the Union, or a union, but only whether they were in one of the two bargaining units that it did have a duty to represent.

In *Stage Employees Local 659 (NPO-TV)*, 197 NLRB 1187 (1972), the current union preferred employees coming into it because they had been previously represented by a separate union. Again, this is discrimination

based upon union relation without regard to whether the union was duty-bound to represent its own members. In the instant case, however, the two bargaining units that were dovetailed were both represented by the same local union: the Union had the duty of representation to both. It cannot be punished for fulfilling its duty.

Thus, *Riser* and the Court of Appeals decision in *Whiting* support the Union's position here. The cases cited against that position, *Hilton D. Wall, Stagecraft* and *Woodlawn,* are all distinguishable because in those cases the union was preferring people it did not represent over others that it did not represent, the preference being based upon union relationship; in this case, the Union only preferred people for whom it did have the duty of representation.

For the foregoing reasons as well as those set forth in the previous briefing, Teamsters, Local 523, submits that the decision of the ALJ as it relates to the Union is valid and that the exceptions of the General Counsel and Rammage are not meritorious and should be denied.

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify that on the 15 day of December, 2010, a true and correct copy of the above and foregoing was deposited in the United States mail with the proper postage affixed thereto and addressed to:

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