

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATION BOARD

NEWSPAPER AND MAIL DELIVERERS' UNION
OF NEW YORK AND VICINITY
(CITY & SUBURBAN DELIVERY SYSTEMS, INC.)

2-CB-21842 et al

and

NEWSPAPER AND MAIL DELIVERS' UNION
OF NEW YORK CITY AND VICINITY
(NY POST)

2-CB-21740 et al

NOW COMES RESPONDENT and moves to dismiss the Complaints in the above entitled cases insofar as they allege that Respondent violated the Act by agreeing with the Employers to utilize time working in a bargaining units represented by the Respondent as a basis for certain employment benefits. The hearing in the above cases is scheduled for September 19, 2011.

FACTS

The following facts are not in dispute:

- 1- Respondent represented many employees in the newspaper delivery industry in New York and vicinity for many years.
- 2- All the employees involved herein work or formerly worked for an employer that was at one time a member of a multi-employer bargaining unit or is a successor to an employer who was a member of the multi-employer bargaining unit.
- 3- Employees in the units in which the employees worked earned "Industry-wide-seniority" (IWS) for time worked in the unit.
- 4- After the break-up of the multi-employer unit, employees in the units continued to earn IWS.
- 5- C & S purchased the routes of many of the employers in the industry and continued to recognize the Respondent as the collective bargaining representative and continued to allow employees to earn IWS.
- 6- In November, 2008, C & S went out of business and the routes were transferred to the NY Times, which owned C & S.

- 7- IWS was utilized for placing employees in positions at the Times and for offering employees financial remuneration for agreement to retire.
- 8- Union members and non-members accrued IWS based solely on time in the bargaining units, not on time as a member of the Respondent.
- 9- There are no allegations or facts to support an allegation that IWS was denied to any employees who worked in the industry but were unrepresented or represented by a union other than Respondent.
- 10- Employees at the NY Post earned eligibility rights to permanent positions based on IWS.

COMPLAINTS

The Complaints alleged that Respondent violated Section 8(b)(2) and 1(A) by agreeing with the Employers herein to utilize IWS for employees ' receipt of employment benefits.

LEGAL ANALYSIS

The Board has made clear that utilizing seniority based on time in a collective bargaining unit other than the employer involved is not discrimination within the meaning of Section 8(a)(3). As the Board stated in Interstate Bakeries, Inc. 357 NLRB No. 27 (June 30, 2011):

The Board has drawn a clear distinction between discrimination based on unit seniority and that based on union seniority. A union and an employer do not discriminate in a manner prohibited by the Act by contracting to vest certain employment rights based on seniority in a represented unit. Nor do the parties to a collective-bargaining agreement engage in unlawful discrimination by placing a single employee or a group of employees hired or merged into the unit at the end of the seniority list on the grounds that they lacked seniority in the unit.

The Region has taken the position that Interstate Bakeries is not controlling because that case involved a merger of units. See attachment. This distinction is not consistent with the rationale of Interstate Bakeries or the principles of the NLRA. Moreover, Interstate Bakeries cannot validly be distinguished on this basis because, as noted in the factual recitation above, the case involving C & S does involve a merger of units. These points will be discussed seriatim.

Interstate Bakeries makes clear that what is unlawful under the Act is for an employer and a union to place employees at the end of the seniority list because they were unrepresented by a particular union or any union in their prior

employment. (at p. 3) The Board further noted that, in the context of a unit merger, a union and an employer are not lawfully permitted to discriminate against all or, as in that case, some of the merged employees on the basis of their previously unrepresented status. (at p. 4)

In the instant case, the Employers and the Respondent are not discriminating against any employees because they were unrepresented or represented by another labor organization. The industry-wide seniority was earned because of time in a bargaining unit, not on membership in the Respondent. Employees who were in the bargaining units represented by Respondent earned the same industry-wide seniority whether or not they were members of the Respondent. On these factual issues, there is no dispute.

The Acting General Counsel's attempt to distinguish Interstate Bakeries on the ground that that case involved a merger of unit cannot withstand scrutiny. Unless the Acting General Counsel can establish unlawful 8(a)(3) discrimination, there can be no 8(b)(2) finding, and, the Board has made clear that UNIT preference is not discriminatory if it does not involved UNION preference. There is patently no discrimination cognizable under the NLRA involved in this case.

Further, as the factual recitation above reveals, the relevance of industry-wide seniority came about precisely because of the merger of units. It was established when employers were part of a multi-employer unit. After the break up the multi-employer unit, the system of earning seniority for time in the industry continued. There is no allegation or evidence that any employee was entitled to additional seniority because he or she worked for a company that did not have a contract with Respondent or had a contract with another labor organization. (If there were any such employee, a remedy may be available for that person; it would not warrant the allegation that any reliance on any industry- wide seniority is unlawful, as alleged in the instant Complaints.)

Based on the foregoing, it is respectfully requested that the Board grant the Motion to Dismiss the Complaints insofar as they allege that granting employment preferences to employees based on time they worked under a collective bargaining agreement is not violative of Section 8(b)(2) and (1)(A) of the Act.

Respectfully submitted,

Daniel Silverman
Counsel for Respondent

DATED: August 2, 2011

cc:

BY EMAIL

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July 28, 2011

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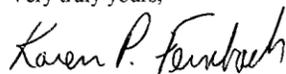
Re: Newspaper and Mail Deliverers' Union
(NYP Holdings Inc., d/b/a The New York Post)
Case Nos. 2-CB-21740, et al.
and
Newspaper and Mail Deliverers' Union
(City & Suburban Delivery Systems, Inc.)
Case Nos. 2-CB-21842, et al.

Dear Mr. Silverman:

This is in response to your motion to dismiss, which we view as a motion for reconsideration of the decision to issue the Complaints on various 8(b)(1)(A) and 8(b)(2) allegations. You contend that "industry seniority" is at issue in these cases, and that such industry seniority is defined as time spent working under a collective bargaining agreement with employers in the distribution industry in the NYC area. You contend that such a designation is lawful because it is based on "unit seniority," citing *Interstate Bakeries*, 357 NLRB No. 4 (June 30, 2011). Your reliance on that case is misplaced. In *Interstate* the Board was dealing with the merger of two units and considering under what circumstances dovetailing or endtailing seniority was permissible. It was in its analysis of that context that the Board noted that a union and an employer do not violate the Act by contracting to vest certain employment rights based on seniority in a represented unit. The instant matter does not involve the merger of two units. Rather it involves the maintenance and enforcement of provisions in NMDU's collective-bargaining agreement with the New York Post and the closing agreement with C & S that favor certain individuals with respect to terms and conditions of employment based on their prior employment with an employer that had a collective-bargaining relationship with NMDU.

Based on the foregoing your motion for reconsideration is denied.

Very truly yours,

A handwritten signature in black ink that reads "Karen P. Fernbach". The signature is written in a cursive style with a large, prominent initial "K".

Karen P. Fernbach
Acting Regional Director