

**UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD  
REGION 8**

**GENERAL DIE CASTERS, INC.**

**and**

**TEAMSTERS LOCAL 24 a/w  
INTERNATIONAL BROTHERHOOD  
OF TEAMSTERS**

**CASES 8-CA-39211  
8-CA-39228  
8-CA-39252  
8-CA-39256  
8-CA-39272**

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S EXCEPTIONS TO  
ADMINISTRATIVE LAW JUDGE MARK CARISSIMI'S DECISION AND BRIEF IN  
SUPPORT OF EXCEPTIONS**

Counsel for the Acting General Counsel Gina Fraternali excepts to the following finding of facts and conclusions by Administrative Law Judge Mark Carissimi on Pages 23 through 27 in his Decision and Order issued in this matter on July 11, 2011 (JD-39-11).<sup>1</sup>

The ALJ erred by failing to draw a Conclusion of Law or to issue appropriate remedial relief that Respondent violated Sections 8(a)(1), (3), (4) and (5) of the Act with respect to the following undisputed facts: that employee Sam Tomsello worked the third shift commencing on November 8, 2010 at 11 p.m. to 7 a.m. on November 9, 2010; that Tomsello was subpoenaed to testify on November 9, 2010 as a witness for the Acting General Counsel; that approximately a week before his testimony he informed his supervisor Brian Ohler that he had been subpoenaed and was scheduled to testify on November 9, 2010; that Tomsello worked the third shift on November 8-November 9 and then appeared and testified at the hearing on the morning of November 9; that Tomsello took the November 9-November 10 third shift off without pay rather than taking a vacation day with pay; and that Respondent's witnesses were granted the third shift

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<sup>1</sup> Hereinafter, Judge Carissimi will be referred to as "ALJ". ALJD p. \_\_ will indicate the page in the ALJ's Decision, JD-39-11. The ALJD does not contain line numbers.

off, with pay, commencing on November 18, 2010, the night before they testified. (ALJD, pp. 23-24)

### **BRIEF IN SUPPORT OF EXCEPTIONS**

The ALJ erred by failing to conclude that Respondent General Die Casters, Inc. (“GDC”) violated Sections 8(a)(1), (3), (4) and (5) of the Act when it excused its third shift employees from working the third shift the night before they testified and did so without requiring its employee-witnesses to take a vacation day or day without pay. Its witnesses were paid regular wages for that shift even though they did not work the shift.

The following third shift employee witnesses testified on behalf of Respondent on November 19, 2010: Edward Dickerhoof (GC Ex. 3 at 1579), Walter Wood (GC Ex. 3 at 1592-93), Daniel Petrocini (GC Ex. 3 at 1609-1610), Matthew Gearhart (GC Ex. 3 at 1632), Frank Kovach (GC Ex. 3 at 1641-1642), Arthur Diecek (GC Ex. 3 at 1693) and James Holly (GC Ex. 1704). They each testified that they were released by the Respondent for the third shift the night before they testified but were being paid as if they had worked. They were notified of this benefit prior to testifying. *Id.* Pay records document these third shift employees were paid wages as if they had worked. (GC Exs. 19-24) There is no evidence that the employees were paid a witness fee. Witness testimony supports this conclusion. See, *supra*.

The crux of the allegation is that Respondent’s employees who testified in support of the Company received time off with pay, not that Respondent’s employees were paid a witness fee equal to their wage rate for a shift.<sup>2</sup> Contrary to the ALJ’s findings, the record evidence demonstrates that Respondent’s witnesses received a benefit, not having to work the third shift, that Acting General Counsel’s witness Sam Tomsello was denied.

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<sup>2</sup> Counsel for Acting General Counsel does not dispute that an employer may pay its witnesses any amount it chooses nor does she argue that witness fees are a mandatory subject of bargaining. However, the issue presented to the ALJ was not witness fees. The issue presented involved a benefit discriminatory applied and not bargained over.

It appears that the ALJ's refusal to find that by this conduct Respondent violated the Act is predicated solely on his conclusion that the payment of 8 hours of wages to employees who were also excused from working the third shift scheduled for the evening before they were to give testimony for the Company is a payment that constitutes nothing more than a witness fee under the analytical framework laid out in the Board's *General Electric Co.* decision. *See*, 230 NLRB 683, 686 (1977). Accordingly, based on this conclusion that the issue is a witness fee rather than the grant of benefits, the ALJ further reasoned that no violation of Section 8(a)(5) could be made because it is settled law that the payment of witness fees is not itself a mandatory subject of bargaining.

Counsel for the Acting General Counsel submits that on this question the ALJ missed the forest for the trees. By focusing exclusively on the question of witness fees the ALJ ignored the fact that third shift employees who testified for Respondent received not only a payment of 8 hours of wages but the additional benefit of time off from a work shift that had nothing to do with their appearance at the hearing. In stark contrast, General Counsel witness Sam Tomsello was given no such time off benefit but rather was required to work his third shift before giving testimony on November 9.<sup>3</sup> (See, generally, ALJD at pp. 26-27)

Viewed in this light, not only did Respondent violate 8(a)(5) by granting a benefit to employees without notice to or bargaining with the Union but it also violated 8(a)(3) and (4) because it failed and refused to grant the same benefit to General Counsel witness Sam Tomsello, a similarly situated employee who was accorded disparate treatment solely because he testified for the General Counsel and the Union rather than the Company.

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<sup>3</sup> Tomsello testified he would have been too tired to work his third shift after testifying. When Tomsello was forced to choose between using a vacation day or time off without pay, he chose to take the shift off without pay. Tr. 67-68.

The ALJ hung his hat on *General Electric*, but in doing so, he glossed over the distinction between a witness fee and an employment related benefit. *General Electric* was itself a panel decision (Penello, Murphy; Chairman Fanning dissenting). Although he dissented from the result reached by his colleagues on the particular facts of the case, Chairman Fanning accurately characterized the critical distinction drawn by the majority, a distinction with which he agreed but would have extended to cover the facts of the case:

My colleagues also assert that the situation is different, where, apart from the witness fees, the witnesses called by an opposing party are additionally denied the benefit of a term and condition of employment which the employer's witnesses receive, such as the perfect attendance awards denied employees in *Electronic Research I and II*; they reaffirm that the denial of such awards is clearly a violation and conclude that:

"Consequently, the prospect of being treated in such a disadvantageous manner concerning their employment relationship makes employees reluctant to testify against their employer, or for an opposing party, thereby obstructing the Board's process irrespective of proof of a discriminatory motive or union animus."

See, *General Electric Co.*, 230 NLRB 683, 687. (internal quotations added)

Counsel for the Acting General Counsel submits that distinction drawn above is clearly applicable to the instant case and that, under any reading of *General Electric* a violation is made out.

Thus the issue at hand is simple: Respondent's third shift employees who testified in support of the Company received the benefit of compensation for time not worked, while Sam Tomsello who testified for the General Counsel did not receive the same benefit.

An employer violates Sections 8(a)(1) and (4) when it treats the appearance of employees who testified on its behalf at an unfair labor practice hearing as being at work, while the appearance of employee who testified under subpoena for another party as an absence from work. *Electronic Research Co. I*, 187 NLRB at 737. It is a violation of Section 8(a)(1)

irrespective of any proof of discrimination or union animus as the conduct obstructs Board processes. *Id.* See also *NLRB v. Western Clinical Laboratory, Inc.*, 225 NLRB 725 (1976), *enfd.* 571 F.2d 457 (9th Cir. 1978) (Charging an employee who testified under a Board subpoena with vacation time absent any evidence that it was in reprisal for his having testified at the hearing or to discourage him from participating at the hearing is still a violation of Sections 8(a)(1), (3) and (4) of the Act.).

In *Wimpey Minerals USA, Inc.*, 316 NLRB 803 (1995), the Board upheld the Administrative Law Judge's conclusion that the employer violated Sections 8(a)(1) and (3) because those who supported the employer received additional compensation while union-supporting employees were not afforded an opportunity for additional compensation. Denying union-supporting employees benefits because they assisted the union was found to be discriminatory. *Id.* at 806. See also *Jewish Home for the Elderly*, 343 NLRB 1069, 1114-1115 (2004).

Further, because time off is a term and condition of employment, the Employer had a duty to bargain over this matter.<sup>4</sup> In *Verizon New York, Inc.*, 339 NLRB 30 (2003), the Board found that the “the issue of whether employees will be paid while they engage in nonwork activities is a mandatory subject of bargaining. Employer policies that pay employees during these nonwork activities directly affect wages.” *Id.* at \*\*6.

The facts in *Verizon New York, Inc.* and those presented to Judge Carissimi are essentially on all fours. Third shift employees who testified on behalf of the Company were paid

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<sup>4</sup> In *U-Haul Company of Nevada, Inc.*, JD-65-05 (Sept. 30, 2005), the Administrative Law Judge held that time off was a mandatory subject of bargaining because it rises to the level of a term and condition of employment. The employer rewarded employees with paid time off if production increased. The employer's failure to give the union notice to bargain about time off violated Section 8(a)(5) of the Act. *Id.* at 369-370. While this is not a Board decision, Counsel for the Acting General Counsel urges that the rationale be followed in this matter. In the instant case, paid time off was a reward for employees to testify on behalf of the Employer. As such, Respondent had a duty to bargain over it.

while they engaged in nonwork activities, specifically, the “activity” of not having to work at all. The Employer violated Section 8(a)(5) of the Act by not bargaining over paid time off for nonwork activities. *Cf. Pepsi America, Inc.*, 339 NLRB 986 (2003) (the unilateral discontinuance of an attendance policy permitting employees with good attendance to have paid time off was found by the Board to be an employee benefit and a mandatory subject of bargaining).

Respondent violated the Act by denying Sam Tomsello a term and condition of employment, being excused from the third shift, with pay, the day of his testimony. Tomsello had given Respondent ample prior notice of the fact that he had been subpoenaed by General Counsel and would be testifying at the hearing. Respondent granted a new benefit to third shift employees it called to testify.

Accordingly, it is respectfully requested that the Board reverse the Administrative Law Judge and find that Respondent violated Sections 8(a)(1), (3), (4) and (5) of the Act by denying Sam Tomsello the benefit of time off with pay.

It is further requested that the Board order the Respondent to cease and desist from engaging in such conduct and that it bargain over such benefits. Counsel for the Acting General Counsel requests that the Board revise the ALJ’s recommended Order and Notice to conform to the exception described above and attaches a proposed Order and Notice to Employees.

Dated at Cleveland, Ohio, this 8th day of August 2011.

/s/ Gina Fraternali

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Gina Fraternali  
Counsel for the Acting General Counsel  
National Labor Relations Board  
Region 8

**RECOMMENDED NOTICE TO EMPLOYEES POSTED PURSUANT TO AN ORDER  
OF THE NATIONAL LABOR RELATIONS BOARD**

**FEDERAL LAW GIVES YOU THE RIGHT TO**

- Form, join or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities

**WE WILL NOT** require any employee to take part in an interview where the employee has reasonable grounds to believe that the matters to be discussed may result in his/her being the subject of disciplinary action, and where we have refused the employee's request to be represented at such interview by a labor organization.

**WE WILL NOT** discriminate against our employees in regards to granting paid time off because of their activities on behalf of Teamsters Local 24 and/or because they provided testimony at an unfair labor practice hearing adverse to us.<sup>5</sup>

**WE WILL NOT** institute new work rules or modify existing rules regarding paid time off for acting as a witness without giving notice to and affording the Union an opportunity to bargain over such changes.

**WE WILL NOT** in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

**WE WILL** rescind the work rule regarding paid time off for acting as a witness.

**WE WILL** make whole Sam Tomsello who took time off, without pay, to testify in support of the General Counsel and the Union at unfair labor practice hearings.

**GENERAL DIE CASTERS, INC.**  
(EMPLOYER)

DATED \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: [www.nlr.gov](http://www.nlr.gov)  
477 Michigan Avenue, Room 300, Detroit, MI 48226-2569  
(313) 226-3200, Hours: 8 a.m. to 4:45 p.m.

**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**  
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (313) 226-3244.

<sup>5</sup> Underlined paragraphs are proposed language not contained in the original Notice and Order.

**PROOF OF SERVICE**

Copies of the foregoing Brief of Counsel for the Acting General Counsel were sent to the following individuals by electronic mail on August 8, 2011:

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