

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

RESPONDENT'S REPLY TO ACTING GENERAL COUNSEL'S OPPOSITION TO
RESPONDENT'S MOTION TO DISMISS

NOW COMES RESPONDENT and replies to Acting General Counsel's
Opposition to the Respondent's Motion to Dismiss.

A. Status of Case: Basis of Motion to Dismiss

The Respondent moved to dismiss the Section 8 (b)(1) (A) and (2) Complaints because the undisputed facts demonstrate that the benefits provided by the Employers herein were based on time employees worked in collective bargaining **units**, not on time they spent as **union** members. Because NLRB law clearly holds that such preference is not unlawful discrimination under the Act, Respondent seeks to avoid a time consuming and costly trial on a complaint that is not based on any unlawful discrimination.

B. Acting General Counsel's Opposition to Motion to Dismiss

1. NY POST

The Opposition to the Motion to Dismiss filed by the Counsel for the Acting General Counsel (AGC) does not deny the factual basis upon which the Motion to Dismiss was based. In its Opposition Counsel for the AGC essentially cites four bases to support its position.

First, AGC asserts that Sections 4-A.4(a), (b) and (j) of the collective bargaining agreement between the Post and the Respondent give a hiring preference to non-**unit** individuals based on their "membership in Respondent NMDU and/or their employment with an employer that has a collective-bargaining relationship with Respondent." (emphasis added)

These Sections provide as follows:

Section 4-A.4:

(a) All persons not on the list of regular situation holders as herein before defined shall be known as extras and shall be hired for extra work in accordance with the following rules and sequences:

(b) The Order of hiring by groups for the Publisher shall be:

Group 1. Unemployed Extras – All persons listed in Group 1 as of March 31, 1965 (except those holding regular situations elsewhere in the industry) and former regular situation holders in the industry who have lost such regular situations through merger, consolidation, or permanent suspension of a newspaper or company in the industry as herein defined; or whose application for listing in this group is approved by the Adjustment Board by reason of loss of such regular situation because of illness, physical incapacity or for other such good and sufficient cause.

Group 2. Industry Extras – Regular situation holders and Group 1 extra elsewhere in the industry in industry-wide seniority order.

Group 3. Regular Extra – Steady shapers listed on the Publisher's list in Group 3 as of March 31, 1965, thereafter, persons who signify their intention to and do shape steadily.

Group 4. Casuals – Persons who are not connected with the industry but who wish to shape a delivery department from time to time.

(j) A situation holder in the industry shall have the right to apply for Group 1 listing with a [signatory] publisher subject to the following limitations:

(1) Such situation holder must have held continuously such situation for a period of at least five (5) years prior to the date of making application for the transfer.

(2) The number of application which may be approved for transfer to any [single signatory] Publisher shall not exceed two percent (2%) of the total number of situations in the

delivery room of the said Publisher as of January 1 of the year in which the application for the transfer is made.

- (3) Transfers of regular situation holders from non-signatory employer to Group 1 listing with a [signatory] Publisher shall not exceed on their (1/3) of the maximum allowance of two percent (2%) in any one calendar year. Such transfers from [signatory] Publisher shall not exceed two thirds (2/3) of such maximum allowance in any one calendar year.

Secondly, the AGC asserts in his Opposition that paragraph 12 of the Complaint alleges that “Respondent unlawfully required NYP to assign work to non-**Unit** employees ahead of NYP **Unit** employees.” (emphasis added)

Thirdly, the AGC asserts that paragraph 13 of the Complaint alleges that “Respondent by letter dated July 10, 2008 unlawfully refused NYP’s request to elevate certain employees to fill vacancies in accordance with the collective-bargaining agreement.”

Finally, the AGC asserts that paragraphs 14 and 15 of the Complaint allege that “Respondent, by Adjustment Board Orders dated February 10, 2009 and August 6, 2009, unlawfully elevated non-**Unit** employee above **Unit** employees. (emphasis added)

The AGC argues that the above actions were violative of the Act because “Respondent has caused and attempted to cause the Post to discriminate against Post employees by maintaining and enforcing the specified provisions of the collective-bargaining agreement in a manner in which individuals receive employment preference based on their prior employment with Union signatories outside the bargaining unit to the detriment of individuals in the NYP Unit.” Page 10 AGC Opposition.

Respondent does not deny that the employees who worked in collective bargaining units other than the Post received preference over employees who worked at the Post for certain promotional opportunities. There is no factual dispute on this issue. The sole issue to be decided by the Board is whether the granting of benefits based on out-of-Post-unit seniority is lawful if the seniority used is based on work in other collective bargaining units, but not based on time as a union member. As the attached affidavit of James DeMarzo states, preference was given solely on the basis of unit seniority, whether or not the employee was a member of the Respondent. There is nothing in the collective bargaining agreement or otherwise stated in the AGC’s Opposition to the Motion to Dismiss that conflicts with the DeMarzo affidavit. Case law, including Interstate Bakeries, Inc. 357 NLRB No. 27 (June 30, 2011), clearly indicates that the preference based on time an employee worked in a collective bargaining unit, as in this case, is not violative of

Section 8(b)(1)(A) or (2). The AGC is not, therefore, substantially justified in litigating these Complaint allegations because they are based on a theory that is directly contrary to established Board precedent.

Accordingly, there are no factual issues warranting a hearing. The Motion to Dismiss this allegation should be granted to avoid a time consuming and expensive trial for all parties including Respondent, a small labor organization with limited resources.

2. C&S

The Complaint regarding the C&S unit alleges in paragraphs 12 through 18 that “Respondent violated Section 8(b)(1)(A) and (2) of the Act by selecting certain C&S employees for a buyout or transfer to the Times in accordance with employees’ industry-wide priority numbers.” The use of industry-wide priority numbers for employment benefits, the AGC asserts, is unlawful because it grants “a preference to C&S unit employees based on their membership in Respondent and/or their prior employment with an employer that has or had a collective bargaining relationship with Respondent.” To distinguish Interstate Bakeries, *supra*, the AGC states that that case “does not sanction non-unit individuals or C&S or NYP Unit employees receiving an employment preference for time in units other than the C&S or NYP Unit.” Because Respondent believes that this is precisely what Interstate sanctions, it asks the Board to dismiss the Complaints.

The AGC’s attempt to fudge the question of whether there is a factual dispute in this matter should not be allowed. Thus, the AGC’s disingenuous assertion that preference “may” have been given on the basis of union membership is directly contrary to the documentary evidence. Significantly, there is not even an allegation in the Complaint that preference was given based on union membership. Moreover, the AGC clearly sets forth the basis of the Complaint by asserting that the Respondent’s analysis is flawed because it does not distinguish among different bargaining units. We again state, Respondent’s action was totally lawful under NLRB precedent. In a curious tautological statement, Counsel for the AGC states that it has never alleged that seniority was based on time in collective bargaining unit. The absence of an allegation that Respondent acted lawfully is not sufficient to create a factual dispute where the documentary and other evidence clearly supports the legitimacy of Respondent’s actions.

3. Conclusion

Because there are no genuine issues of fact, the Board should grant the Motion to Dismiss Sections 10(b), 11 (b) 12 (b) 13 (e), 13 (f), 14 (b) and 15 (d) of the Complaint in case 2-CB-21740 et al (NY Post) and Sections 16 and 18 in case 2-CB21842 and in case 2-CB-21842 (City and Suburban Delivery Systems, Inc.) based on a flawed interpretation of existing precedent. In the alternative, the Board should issue an Order to Show Cause to all parties asking whether there is anything other

than mere speculation to contest Respondent's assertion that union membership was irrelevant to the employment benefits granted in this case.

Respectfully submitted,

Daniel Silverman

August 26, 2011