United States Government

NATIONAL LABOR RELATIONS BOARD
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September 30, 2011

Lester A. Heltzer, Executive Secretary
Office of Executive Secretary
National Labor Relations Board
1099 14th Street, N.W., Room 5300
Washington, DC 20570-0001

Re: Hyundai Rotem USA Corporation and
Aerotek, Inc., Joint Employers
Case 4-CA-37657

Dear Mr. Heltzer:

Enclosed please find Counsel for the Acting General Counsel's limited Exceptions to the Administrative Law Judge's Decision and Brief in support of Exceptions in the above-captioned matter. Copies of these documents have this day been emailed to the persons below.

Very truly yours,

BARBARA C. JOSEPH
Counsel for the General Counsel

Enclosures:
cc:
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BCJ/lym

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

HYUNDAI ROTEM U.S.A. CORPORATION
AND AEROTEK, INC., JOINT EMPLOYERS,

and Case 4-CA-37657

TRANSPORTATION WORKERS UNION OF
PHILADELPHIA, LOCAL 234, AFL-CIO

COUNSEL FOR THE ACTING GENERAL COUNSEL'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

Pursuant to Section 102.46 of the Board's Rules and Regulations, Series 8, as amended, the undersigned Counsel for the Acting General Counsel respectfully files the following Exceptions to the Decision of Administrative Law Judge John T. Clark, which issued September 9, 2011 in the above-captioned matter.[1]

1. To the Administrative Law Judge's conclusion in the Remedy section regarding Aerotek's mailing the Notice to current and former employees under Aerotek's "Employment Agreement" found to contain the overbroad "Confidentiality" provision: "Based on the evidence the mailing shall be limited to current and former employees located in Southeastern Pennsylvania. That area encompasses Chester, Delaware, Philadelphia, Montgomery, and Bucks counties. (TR at 36.) (Cf id. at 744, fn.4.) (Respondent stipulated that the contract language was the same or similar for all employees.)" (ALJD page 12, lines 9-13)

2. To the Administrative Law Judge's inadvertent references in his recommended Order to Region 3 rather than Region 4. (ALJD page 13, lines 14 and 29)

3. To paragraph 2(c) of the Administrative Law Judge's recommended Order directing Aerotek to sign, duplicate and mail "Appendix B" only "..to the last known address of all current and former employees employed by the Respondent, since February 25, 2010, in the Southeastern Pennsylvania area. Respondent Aerotek shall also notify all current and former

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[1] Throughout these Exceptions, reference to the following will be designated as follows:

Transcript.....T (followed by page number)
General Counsel's Exhibit.....GCX (followed by exhibit number)
Respondent's Exhibit.....RX (followed by exhibit number)
Administrative Law Judge's Decision.....ALJD (followed by page and line number)
Respondents are referred to herein as Aerotek and Hyundai

employees in writing, what action it has been taken regarding the unlawful "Confidentiality" provision." (ALJD page 13. lines 30-33)

4. To the Administrative Law Judge's failure to require Aerotek to send copies of Appendix B to all of its current and former employees since February 25, 2010, wherever they may have worked for Aerotek and who were required to sign Aerotek's "Employment Agreement" containing the "Confidentiality" provision found unlawful by the Administrative Law Judge. (ALJD page 12, lines 9-12 and page 13, lines 30-33)

Dated: September 30, 2011

Respectfully submitted,

BARBARA C. JOSEPH
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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

HYUNDAI ROTEM U.S.A. CORPORATION
AND AEROTEK, INC., JOINT EMPLOYERS,

and Case 4-CA-37657

TRANSPORTATION WORKERS UNION OF
PHILADELPHIA, LOCAL 234, AFL-CIO

BRIEF BY COUNSEL FOR THE ACTING GENERAL COUNSEL IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

To: Lester A. Heltzer, Executive Secretary
National Labor Relations Board

Dated: September 30, 2011

Respectfully submitted,

BARBARA C. JOSEPH
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National Labor Relations Board
Fourth Region
One Independence Mall
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[2] Counsel for the General Counsel's Exceptions 1, 3 and 4

[3] Counsel for the General Counsel's Exception 2

I. STATEMENT OF THE CASE[4]

On August 26, 2010, Transportation Workers Union of Philadelphia, Local 234, AFL-CIO, herein the Union, filed an unfair labor practice charge in Case 4-CA-37657 alleging that Aerotek and Hyundai, Joint Employers, violated Section 8(a)(1) and (3) of the Act in several respects, at their two Philadelphia facilities.

The allegation that is the subject of the Exceptions was based on the Union's October 15, 2010, amended charge in Case 4-CA-37657, that Aerotek and Hyundai interfered with, restrained and coerced employees by maintaining an illegal rule subjecting employees to discipline for discussing their compensation and benefits with other employees. (GCX 1(i)

Almost all of the substantive issues were remedied by the parties in an informal settlement agreement that left for Judge Clark's consideration the remaining allegations of Case 4-CA-37657 relating to the maintenance and enforcement of the "Confidentiality" clause in Aerotek's "Employment Agreement". That Agreement's "Confidentiality" clause prohibits employees from discussing their compensation, "in any manner, with the client, the client's employees or any contract employee of the client." (GCX 2). At the February 10, 2011 hearing before Judge Clark, Aerotek stipulated that all of the jointly employed employees at Aerotek and Hyundai's two Philadelphia facilities were required to sign the Aerotek Employment Agreement involved herein when they became employed by Hyundai/Aerotek. (GCX 4) Aerotek also stipulated that Aerotek its Supervisor Phil Lee, Account Recruiting Manager for Aerotek, Inc. sent an email on June 24, 2010 to all Aerotek employees at the Philadelphia facilities discussing the confidentiality policy in the Agreement and attaching a copy of the Agreement to the e-mail. (GCX 4).

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[4] This statement is abbreviated because the Exceptions are focused only on the Remedy and Order in Administrative Law Judge Clark's Decision.

On September 9, 2011, Judge Clark issued his Decision finding that Aerotek and Hyundai, as joint employers, violated Section 8(a)(1) of the Act in all respect alleged by the Acting General Counsel as follows: (1) by maintaining or enforcing a provision in their employment agreement under the heading "Confidentiality" containing the following language.

> "YOU FURTHER AGREE NOT TO DISCUSS THE COMPENSATION STATED IN THIS AGREEMENT, OR THE COMPENSATION PAID TO YOU BY AEROTEK PURSUANT TO ANY PRIOR EMPLOYMENT AGREEMENT, IN ANY MANNER, WITH THE CLIENT, THE CLIENT'S EMPLOYEES OR ANY CONTRACT EMPLOYEE OF THE CLIENT"

(2) by "promulgating, maintaining, or enforcing an oral rule prohibiting employees from discussing their wages, hours, benefits and other terms and conditions of employment among themselves, with other employees or with nonemployees", and (3) by "threatening employees by email with discharge if they discussed their wages, hours and other terms and conditions of employment among themselves, with other employees, or with nonemployees and referencing the overly broad confidentiality provision in the email." (ALJD page 10, lines 35-5- and page 11, lines 5-11)

In the Remedy section of his Decision, Judge Clark ordered Aerotek and Hyundai to "revise or rescind" the confidentiality provision in its employment agreement and "to notify its employees, in writing, that it has done so." (ALJD , page 11, lines 18-23) The Judge required Respondents to post the notice at the two Philadelphia facilities involved herein. (ALJD page 11, lines 43-45) Judge Clark also ordered Aerotek to sign and mail a separate notice to all current and former employees who, when they began their employment, were required to agree with the overbroad confidentiality provision. (GC Exh. 2)" Judge Clark added,

> "In agreement with the Counsel for the Acting General Counsel, I find that this mailing is necessary because employees working

under the agreement work in widely scattered locations for a multitude of clients. *NLS Group*, 352 NLRB 744, 736 (2008), incorporated by reference in 355 NLRB No. 169 92010), enfd. 645 F.3d 475 (1st Cir. 2011)"

The specific date when the confidentiality provision became part of Aerotek's employment agreement was not established. Judge Clark accepted Counsel for the Acting General Counsel's suggestion that February 25, 2010, six months before the filing of the charge in this case was an appropriate starting date. (ALJD page 12, lines 609) However, with respect to Aerotek's required Notice mailing obligation, and contrary to the broader mailing sought by the Acting General Counsel, (T 12) Judge Clark restricted the mailing to current and former employees located in Southeastern Pennsylvania. That area encompasses Chester, Delaware, Philadelphia, Montgomery, and Bucks counties. (TR. at 36) (Cf.id at 744, fn. 4) (ALJD page 12, lines 9-12).

II. ISSUES PRESENTED

1. Whether the Board should Modify the Administrative Law Judge's Recommended Remedy and Order to Require Aerotek to send copies of the Notice, designated Appendix B, not only to employees in Southeastern Pennsylvania, but also to others who were required to sign and work under Aerotek's overbroad "Employment Agreement"

2. Correcting inadvertent references to Region 3 rather than Region 4.

III. EXCEPTIONS AND ARGUMENT

1. The Administrative Law Judge erred by not requiring Aerotek to send the Notice designated Appendix B to all of its employees who were required to sign and abice by Aerotek's overbroad "Employment Agreement".[5]

In *Northeastern Land Services, LTD. d/b/a the NLS Group*, 352 NLRB 744 (2008), incorporated by reference in 355 NLRB No. 169 (2010), enf'd 645 F. 3d 475 (1st Cir. 2011), the

[5] Counsel for the Acting General Counsel's Exceptions 1,3 and 4

Board found that a temporary employment agency supplying right of way agents to companies, violated Section 8(a)(1) of the Act by maintaining an overbroad confidentiality provision in its employment contracts. NLS' confidentiality clause provided that an employee's disclosure of his terms of employment to other parties could constitute grounds for dismissal, and NLS stipulated that this language or similar language was present in all of its right-of-way agents' contracts. NLS Group at 747 n.4. In the Remedy Section of its decision, however, the Board did not limit Respondent's notice sending remedy just to right-of-way agents, but instead expanded that remedy by requiring NLS to send the notice to any other NLS employees who may have been employed under the same employment contract with the unlawfully overbroad language. The Board stated as follows:

> In addition, **because the Respondent's right-of-way agents—and possibly other employees employed under the Respondent's temporary employment agreement—work in widely scattered locations,** it is unlikely that a notice posted at the Respondent's Providence, Rhode Island facility would sufficiently inform those employees about the Board's Order in this case. Accordingly, in addition to our standard notice-posting remedy, we shall also require mailing of the notice. See *Technology Service Solutions,* 334 NLRB 116 (2001) (requiring employer to mail notices to employees who did not regularly report to one of its facilities). **Specifically, we shall order the Respondent to mail copies of the notice to all current and former employees employed by the Respondent under its temporary employment agreement (including but not necessarily limited to its right –of- way agents) since July 23, 2001, the date from which the complaint alleged and we have found that the Respondent maintained the overbroad confidentiality provision in its temporary employment agreement**. (Emphasis added)

NLS Group at 746.

The Board's remedy in NLS is consistent with the Board's general policy that the scope of the remedy must be coextensive with the violation found. *Teamsters Local 282 (Twin County Transit Mix, Inc.), 137 NLRB 858 (1962); In Re Pacific Micronegra Corp.*, 337 NLRB 469, 475

(2002). The Board has "broad discretionary" authority under Section 10(c) to fashion appropriate remedies that will best effectuate the policies of the Act." *Indian Hills Care Center*, 321 NLRB 144 n. 3 (1996), quoting *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 262-263 (1969). "In exercising that authority, the Board crafts its posting requirements to ensure that a respondent employer actually apprises its employees of the Board's decision and their rights under the Act." *Technology Service Solutions*, 334 NLRB 116, 117 (2001). Aerotek, like *NLS Group* is in the staffing business, providing employees to all types of employers throughout the United States. These employees work at many different sites . The Board has concluded that the most effective way to notify them that a finding has been made that their employment contract contains unlawfully overbroad provisions is to require their employer to send them a Board Notice. Id. Administrative Law Judge Clark, in the instant case, correctly ordered Aerotek to revise or remove the overbroad confidentiality language from its employment contracts with its employees. It would seem obvious that wherever this language appears in an Aerotek employment agreement, it must be removed, whether in Pennsylvania or anywhere else where such language is contained in Aerotek's contracts with its employees.

Employees who have worked or are currently working under this confidentiality provision found unlawful in their employment contracts with Aerotek have a right to be notified that this language has been found unlawfully overbroad and that Aerotek is being required to remedy this violation by revising or rescinding the unlawful provision in the employees' employment contracts. If Respondent Aerotek has not used this type of employment contract with the subject overbroad confidentiality clause when hiring employees at other locations around the country during the relevant time period, then requiring Aerotek to send copies of the

Notice to affected employees outside the southeastern Pennsylvania area will present no burden whatsoever.

It is true that Aerotek did not stipulate that the overbroad confidentiality language or language similar to it appears in its employment contracts used throughout the country, its witness claiming that he was unaware whether this is the case. However, the likelihood that Aerotek, a nationwide temporary staffing company, would not require its employees to sign an employment contract with a confidentiality clause identical or similar to the one found unlawful in Pennsylvania appears slim based on the testimony and arguments made at trial and in Aerotek's brief regarding the purported "trade secret' nature of employee wages.

Aerotek's Director of Business Operations in the Philadelphia market, Michael Burke, testified that the staffing business is a very competitive business, and that contracts with all kinds of employers and employees exist. (T. 33-34, 41) Burke testified that Aerotek has its own wage rate and benefits for its employees and stated that Aerotek employees are required to sign the Employment Agreement in evidence before they start working for Aerotek. (T. 42)

When asked by Aerotek's counsel for the overall purpose of the Aerotek Employment Agreement, Burke replied, "It's to protect trade secrets." (T. 42) Burke also agreed with his counsel that the Employment Agreement covered the employment relationship between Aerotek and the employees. (T. 43) He acknowledged that the Employment Agreement's confidentiality provision prohibits its employee from discussing any of this in any manner. (T. 53) Further, Burke testified that the purpose of the confidentiality clause found unlawfully overbroad by the Judge was "to protect us for our trade secrets." (T. 43) Burke explained that if Aerotek's wages became known to competitors, then Aerotek can be underbid on future projects and lose work. Burke added that the client could learn their margin and try to squeeze Aerotek

financially and, further, if the client's employees learned what Aerotek employees earned, this could upset employees and clients and not be good for business. (T. 44)

Burke was not aware of any contractor asking for certain terms to be included in Aerotek's employment agreement between Aerotek and its employees. (T49) Burke testified that he had nothing to do with drafting Aerotek's employment agreement in evidence and, knew nothing about the notation that the Agreement was revised July 11, 2008. When asked if it was revised in Philadelphia, he testified "We have legal counsel, which would confirm everything, which is based in Baltimore." (T. 34-35) In the Philadelphia area where Burke operates, he testified that since the 1990s, the overbroad confidentiality provision of Aerotek's employment agreement has appeared in all the contracts that he has had anything to do with. (T. 39) He stated further that there are hundreds of locations in southeastern Pennsylvania where this Aerotek form contract is used in multiple industries, including pharmaceuticals, life sciences, energy, environmental, engineering, and aviation with roughly 1100 employees now covered by this Aerotek employment contract. (T. 38)

Burke's testimony that Aerotek considers its employees' wages and benefits to be "trade secrets" thereby necessitating the inclusion of the disputed confidentiality provision in Aerotek's employment agreements in Pennsylvania makes it highly unlikely that Aerotek would not try to guard those "trade secrets" in its employment contracts with employees in other locations outside Pennsylvania. The importance to Aerotek of including such language in its employment agreements with its employees is supported by the fact that since the 1990s this language has appeared in every employment contract in the southeastern Pennsylvania area where Aerotek has provided employees to employers.

2. **Correction to inadvertent references to Region 3**

Counsel for the Acting General Counsel requests that the Board correct the obvious inadvertent references to Region 3 rather than Region 4 in the Judge's recommended Order.

IV. CONCLUSIONS AND REMEDY

Based on all of the above, Counsel for the Acting General requests that the Board correct the Judge's inadvertent reference to Region 3 rather than Region 4 in his Order and expand the Administrative Law Judge's notice provision remedy to require Respondent Aerotek to send copies of the Judge's Notice designated Appendix B to all employees who have worked under this specific overbroad unlawful "Confidentiality" clause in their employment contracts with Aerotek during the period February 25, 2010 to the present. Without such an expansion, it is submitted that the Judge's Order that Respondent Aerotek revise or rescind the offensive language from its Employment Agreement with its employees cannot be fully remedied.

Respectfully submitted,

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