Oral Argument Not Requested

Nos. 11-9538 and 11-9542

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD

Petitioner/Cross-Respondent

And

KIRK RAMMAGE

Intervenor

v.

TEAMSTERS LOCAL UNION NO. 523, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS

Respondent/Cross-Petitioner

ON APPLICATION FOR ENFORCEMENT AND CROSS-PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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STATEMENT OF RELATED CASES

The previous decision by the two-member Board in this case, which reached the same result, was before this Court in Nos. 08-9568 and 08-9577. The Court issued a decision at 590 F.3d 849 (10th Cir. 2009), vacated and remanded, 131 S. Ct. 109, remanded to the NLRB by this Court at 624 F.3d 1321 (10th Cir. 2010).

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THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF JURISDICTION

No. 11-9538 is before the Court on the application of the National Labor Relations Board ("the Board") for enforcement, and No. 11-9542 is before the

Court on the cross-petition for review of Teamsters Local Union No. 523, affiliated with the International Brotherhood of Teamsters ("the Union"), of an Order issued by the Board. The Board's Decision and Order issued on June 30, 2011, and is reported at 357 NLRB No. 4. (A 1-13.) [1]

The Board had jurisdiction under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. § 151, 160 (a)) ("the Act"), which empowers the Board to prevent unfair labor practices affecting commerce. This Court has jurisdiction under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)), the unfair labor practices having occurred in Oklahoma. The Board's Order is a final order within the meaning of Section 10(e) and (f) of the Act. The Board filed its application for enforcement on July 6, 2011, and the Union filed its cross-petition for review on July 21, 2011. Section 10(e) and (f) of the Act place no time limits on the filing of applications for enforcement or petitions for review of Board orders.

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[1] "A" references are to the appendix attached to the Union's brief containing the Board's Decision and Order. "Tr" references are to the transcript of the hearing before the administrative law judge. "GCX" and "Co Exh." refer, respectively, to exhibits introduced at the hearing by the General Counsel and Interstate Bakeries Corporation ("the Company"). References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

STATEMENT OF THE ISSUE PRESENTED

Whether substantial evidence on the record as a whole supports the Board's finding that the Union violated Section 8(b)(2) and (1)(A) of the Act by causing the Company to reduce the seniority of employee Kirk Rammage, thereby resulting in Rammage's being bumped from his job and transferred to a job at a distant facility, because he was not previously a member of, or represented by, the Union.

STATEMENT OF THE CASE

On charges filed by Kirk Rammage (GCX 1(c), 1(g)), the Board's General Counsel issued a consolidated unfair labor practice complaint alleging, *inter alia*, that the Union had violated Section 8(b)(2) and (1)(A) of the Act (29 U.S.C. § 158(b)(2) and (1)(A)) by demanding that Rammage be "endtailed" on the employee seniority list, whereas all other employees added to the newly created bargaining unit were "dovetailed" on the seniority list, thereby causing Rammage to be bumped from his existing job and transferred to a job at a distant facility, all because he had not been a member of, or represented by, the Union. (GCX 1(i), 2.) On October 31, 2006, after a hearing, Administrative Law Judge Gerald A. Wacknov issued his decision, recommending that the foregoing complaint allegations be dismissed. (A 8-13.)

The General Counsel and Rammage filed separate exceptions to the judge's decision. On September 25, 2008, Chairman Schaumber and Member Liebman,

acting as a two-member quorum at a time when the Board had no other sitting members, issued the Board's decision. The decision, reported at 353 NLRB 122, reversed the administrative law judge and found that the Union had violated the Act as alleged in the complaint.

Following the Board's initial decision, the Union petitioned this Court for review, and the Board cross-applied for enforcement, of the Board's order. (Case Nos. 08-9568 and 08-9577). The case was briefed and then argued before Circuit Judges Tacha, Holloway, and Kelly. On December 22, 2009, the Court denied the Union's petition for review and enforced the Board's cross-application for enforcement. 590 F.3d 849. On March 1, 2010, the Court granted the Union's motion to stay the mandate pending the filing and disposition of a petition for writ of certiorari. On May 17, 2010, the Union filed a petition for a writ of certiorari, 2010 WL 2007736.

On June 17, 2010, the United States Supreme Court issued its decision in *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010), holding that the two-member Board did not have authority to issue decisions when there were no other sitting Board members. On October 4, 2010, the Supreme Court granted the Union's petition for a writ of certiorari, and remanded the case to this Court for further considerations in light of *New Process*. 131 S. Ct. 109. The Board then

requested that this Court remand the case for further proceedings consistent with the Supreme Court's decision, which this Court granted on October 29, 2010.

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

The Company manufactures and distributes bakery products under various names, including Dolly Madison, Hostess, and Wonder Bread. Prior to late 2005, some of the Company's sales representatives sold and delivered only Dolly Madison products, while others sold and delivered only Hostess and Wonder Bread products. The two groups of employees were historically in separate bargaining units covered by separate contracts between the Company and the Union. The Dolly Madison contract, covering employees in Tulsa and Muskogee, Oklahoma, was effective from July 7, 2002, through November 5, 2005, while the Hostess/Wonder Bread contract covered sales representatives in six Oklahoma cities, including Ponca City, and was effective from August 19, 2001, through August 19, 2006. (A 1-2; Tr 43-44, 135-36, GCX 3, 4.)

Kirk Rammage worked for the Company as a Dolly Madison sales representative for nearly 15 years. He worked alone in a Ponca City warehouse until 1996 or 1997, when the Company acquired Wonder Bread and Hostess. Thereafter, he worked in the same warehouse as the Hostess/Wonder Bread sales representatives in Ponca City, but continued to sell and deliver only Dolly Madison

products. He was not included in either of the bargaining units represented by the Union; the Company treated him as an unrepresented employee and did not pay him contractual benefits. (A 2; Tr 42-43, 111, 142.)

Shortly before the Dolly Madison contract was due to expire, the Company decided to consolidate routes and have all sales representatives sell and deliver all of its products. In early November, representatives of the Company and the Union met and agreed that the two bargaining units would be merged; that the Dolly Madison contract would not be renewed; that all bargaining unit employees (except those in Muskogee, who would become part of a bargaining unit represented by another Teamsters local) would be covered by the existing Hostess/Wonder Bread contract; that the seniority of both groups of employees would be "dovetailed," that is, calculated on the basis of total length of employment with the Company; and that one Ponca City route would be eliminated. (A 2; Tr 32-36, 135, 137, GCX 5.)

During the discussions between the parties, the Company informed the Union of Rammage's employment at Ponca City. The Union had previously been unaware of Rammage's existence. The parties agreed that he should be included in the merged bargaining unit. Because Rammage was the most senior and, in the Company's view, the best Ponca City sales representative, the Company proposed that his seniority, like that of other former Dolly Madison sales representatives, be "dovetailed" with that of the former Hostess/Wonder Bread sales representatives.

The Union refused, asserting that such an arrangement would breach its duty of fair representation to the employees it had previously represented. It demanded that Rammage's seniority begin on the date he first became part of the bargaining unit, and the Company ultimately agreed. (A 2; Tr 137-38.)

Division Manager Rodney Roberts, Rammage's supervisor, told him that "union seniority" would be used in route bidding and vacation scheduling. In mid-December, Roberts told Rammage that the Ponca City sales representative whose route was being eliminated had exercised his option to bump Rammage in accordance with "union seniority."[2] Rammage asked Roberts to put that in writing. Roberts did so, attributing the bumping of Rammage to an agreement between the Company and the Union to use "Union Seniority for Route Bidding." Rammage asked why they were doing this to him. Roberts replied that it was because Rammage "was not in the Union." (A 2; Tr 54-55, 61-63, GGX 11.)

Rammage continued to work in Ponca City until January 12, 2006, when Sales Manager Kirk Summers told him that if he wanted a job, he would have to work as a sales representative out of the Bartlesville, Oklahoma, terminal. Summers said he did not want to lose Rammage, who was one of his best men. He also said several times that Rammage "would have to join the Union" and, when

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[2] The Hostess/Wonder Bread contract permitted a sales representative whose route was eliminated to bump the least senior sales representative. (GCX 3, p. 5, par. B1.)

Rammage asked why this was happening to him, replied that it was because Rammage was not in the Union. Rammage accepted the position at Bartlesville, which required a daily commute of more than 70 miles each way from his home. (A 2; Tr 64-66.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Chairman Liebman and Members Becker and Pearce) found, contrary to the administrative law judge, that the Union, violated Section 8(b)(2) and (1)(A) of the Act (29 U.S.C. § 158(b)(2) and (1)(A)). The Union had insisted that Rammage's seniority be "endtailed" while the seniority of other former Dolly Madison employees, who differed from Rammage only in having been previously represented by the Union, was "dovetailed." By so insisting, the Union caused the Company to reduce Rammage's seniority, bump him from his job in Ponca City, and transfer him to Bartlesville, all because he had not been previously represented by the Union. (A 3-5.) [3]

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[3] The Board also found, contrary to the administrative law judge, that the Company violated Section 8(a)(3) and (1) of the Act by engaging in the foregoing conduct, and adopted, in the absence of exceptions, the judge's finding that the Company violated Section 8(a)(1) by telling Rammage that he would have to join the Union as a condition of continued employment and that he had lost his seniority because he had not previously been represented by the Union. (A 3-4, 11.) But these findings are not in issue before the Court because the Company is complying with the order to the satisfaction of the Board and, as a result, the Board has not filed with this Court an application for enforcement against the Company.

The Board ordered the Union to cease and desist from the conduct found unlawful and from in any like or related manner restraining or coercing employees in the exercise of their statutory rights; to credit Rammage with unit seniority based on the length of his employment with the Company and grant him any other rights and privileges to which he would have been entitled absent the discrimination against him; to notify the Company and Rammage in writing that it has no objection to the "dovetailing" of Rammage's seniority or to allowing him to bid on a route, and awarding him the route to which he would have been entitled, on the basis of such "dovetailed" seniority; to make Rammage whole, jointly and severally with the Company, for any losses suffered as a result of the discrimination against him; to post copies of appropriate remedial notices at its business offices and meeting halls; and to sign and return to the Board's Regional Office additional copies of such notices for posting by the Company. (A 6-7.)

STATEMENT OF STANDARD OF REVIEW

Section 10(e) of the Act (29 U.S.C. § 160(e)) makes the Board's factual findings conclusive if supported by substantial evidence on the record as a whole. This standard is satisfied if "it would have been possible for a reasonable jury to reach the Board's conclusion." *Allentown Mack Sales and Service, Inc. v. NLRB*, 522 U.S. 359, 366-67 (1998). Thus, "it requires not the degree of evidence which satisfies the [reviewing] *court* that the requisite fact exists, but merely the degree

that *could* satisfy a reasonable fact finder." *Webco Industries, Inc. v. NLRB*, 217 F.3d 1306, 1311 (10th Cir. 2000) (quoting *Allentown Mack*, 522 U.S. at 377; emphasis in Supreme Court's opinion, but omitted by this Court).

Questions of statutory interpretation are reviewed under a two-part test set forth in *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984). If "Congress has directly spoken to the precise question at issue," then the Board, as well as any reviewing court, "must give effect to the unambiguously expressed intent of Congress." 467 U.S. at 842-43. However, if "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the [Board's] answer is based on a permissible construction of the statute." *Id.* at 843. "For the Board to prevail, it need not show that its construction is the *best* way to read the statute; rather, courts must respect the Board's judgment so long as its reading is a reasonable one." *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 409 (1996). *Accord Four B Corp. v. NLRB*, 163 F.3d 1177, 1182 (10th Cir. 1998).

SUMMARY OF ARGUMENT

The Union violated Section 8(b)(2) and (1)(A) of the Act by insisting that the Company "endtail" the seniority of employee Kirk Rammage while "dovetailing" the seniority of other former Dolly Madison sales representatives. Both Rammage and the other former Dolly Madison sales representatives were

employees who had been outside the bargaining unit, but became part of the unit at the same time. The only difference was that Rammage, unlike the others, had not previously been a member of, or represented by, the Union. Thus, the different treatment of Rammage was based, not on his current or prior exclusion from the bargaining unit, but solely on his having exercised his statutory right to refrain from union representation. This Court should follow the decisions of two courts of appeals that have upheld Board findings that different and unfavorable treatment on that ground constitutes unlawful discrimination.

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE UNION VIOLATED SECTION 8(b)(2) AND (1)(A) OF THE ACT BY CAUSING THE COMPANY TO REDUCE THE SENIORITY OF EMPLOYEE KIRK RAMMAGE, THEREBY RESULTING IN RAMMAGE'S BEING BUMPED FROM HIS JOB AND TRANSFERRED TO A JOB AT A DISTANT FACILITY, BECAUSE HE WAS NOT PREVIOUSLY A MEMBER OF, OR REPRESENTED BY, THE UNION

A. Applicable Principles

Section 8(b)(1)(A) of the Act (29 U.S.C. § 158(b)(1)(A)) makes it an unfair labor practice for a union to "restrain or coerce" employees in the exercise of rights guaranteed by Section 7 (29 U.S.C. § 157), including the right to refrain from union membership or representation. Section 8(b)(2) (29 U.S.C. § 158(b)(2)) makes it unlawful for a union to "cause or attempt to cause" an employer to

discriminate against an employee in violation of Section 8(a)(3) (29 U.S.C. § 158(a)(3)), which in turn prohibits discrimination "in regard to hire or tenure of employment or any term or condition of employment" that encourages or discourages union membership.

Section 8(a)(3) does permit a union and an employer to agree to require, as a condition of continued employment after 30 days, to maintain union "membership" to the extent of paying required dues and initiation fees.[4] They cannot, however, permit nonmembers to remain employed and discriminate against them with respect to other terms and condition of employment, such as seniority. *See Radio Officers v. NLRB*, 347 U.S. 17, 26-27, 42 (1954) (reduction of employee's seniority because he was late in paying union dues); *cf. NLRB v. American Can Co.*, 658 F.2d 746, 753-57 (10th Cir. 1981) (granting superseniority to union officers). Because encouragement of union membership is a natural and foreseeable consequence of such discrimination, both the union and the employer

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[4] The Hostess/Wonder Bread contract had a union-security clause. (GCX 3, p.1, Article 1.) However, the Board noted (A 10 n.6) that the clause only required employees who were members of the Union on the effective date of the contract to maintain such membership, and that those who were not already members, including Rammage, were therefore under no obligation to join the Union (A 10 n.7).

Oklahoma voters subsequently added a "right-to-work" provision to the state constitution. However, the Board's decision was not in any way based on that provision.

must be presumed to have intended such encouragement. *See Radio Officers v. NLRB*, 347 U.S. at 52.

B. The Union Caused the Company To Discriminate Against Rammage

The facts in this case are both undisputed and uncomplicated. Once the Company decided to have all of its sales representatives sell and deliver all of its products, the parties decided that neither the bargaining unit of the Dolly Madison sales representatives nor the bargaining unit of the Hostess/Wonder Bread sales representatives would continue to exist. Instead, they created a new, merged bargaining unit that was covered by the Wonder Bread/Hostess collective-bargaining agreement. The Company proposed the same treatment for all the employees in the new unit: calculating their seniority on the basis of time previously worked for the Company. (Tr 137.) However, the Union successfully insisted that such "dovetailing" of seniority be limited to the Dolly Madison sales representatives it had previously represented, and that Rammage, the one Dolly Madison sales representative it had not previously represented, but otherwise indistinguishable from the others, be treated as a newly hired employee for seniority purposes. (Tr 137-38.) As a result, Rammage, who had worked for the Company for nearly 15 years (Tr 42) and was its best Ponca City sales representative (Tr 99, 144), was bumped from his job by an employee with 5 years less service with the Company. (GCX 17.) These facts fit the classic definition of

discrimination: treating like cases differently. *See Four B Corp. v. NLRB*, 163 F.3d 1177, 1183 (10th Cir. 1998). The tying of seniority to union status plainly encourages union membership. *See Radio Officers v. NLRB*, 347 U.S. 17, 26-27, 42 (1954) (discrimination against Boston); *NLRB v. American Can Co.*, 658 F. 2d 746, 754-57 (10th Cir. 1981).

Contrary to the Union's contention (Br 5), the Board's decision does not hold that the Union was obligated to favor Rammage over the former Dolly Madison workers, but only that it was obligated to treat him the same way--that is, to calculate his seniority in the same manner. That such "dovetailing" would have made Rammage the most senior unit employee is coincidental. What the Act requires is the use of union-neutral criteria in determining terms and conditions of employment, including seniority. Instead, as the Board found, the Union treated Rammage differently and unfavorably because "he had *not* been previously represented by the Union." (A 4 (emphasis in original).) This it could not lawfully do.

Also contrary to the Union's contention (Br 5, 6-7), this is not a case of its preferring employees within a bargaining unit over those outside the unit. Prior to the Union's insistence on "endtailing" Rammage, it had already agreed with the Company that *all* former Dolly Madison sales representatives, including Rammage, would henceforth be included in the merged bargaining unit. (Tr 34,

151.) Thus, as the Board found (A 4), there was no difference between Rammage and the other former Dolly Madison sales representatives. All were now in the same bargaining unit, and the Union had the same obligation to represent all of them, without discriminating against any on the basis of prior union status.

The Board, with the approval of two courts of appeals, has consistently reached the same conclusion. In *Stage Employees Local 659 (MPO-TV)*, 197 NLRB 1187, 1188-91 (1972), *enforced mem.*, 479 F.2d 450 (D.C. Cir. 1973) ("*MPO*"), the union referred cameramen for employment from a roster it maintained. In determining whether an employee was eligible for placement on the roster, only his work experience with employers having a contract with the union was considered. The union refused to allow two employers with which it had contracts to hire cameramen who had extensive experience, but with employers who did not have contracts with the union. The Board found that the union's actions were unlawful, as they "penalize[d] employees for having exercised their statutory right to refrain from bargaining collectively through [the union] in the past, while rewarding those employees who have chosen to work in units represented by [the union]." 197 NLRB at 1189.[5] The Board also concluded

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[5] The Board distinguished *Teamsters Local 729*, 185 NLRB 631 (1970), upholding the "endtailing" of seniority of employees newly transferred into a bargaining unit, on the ground that the affected employees in *MPO* were denied employment altogether. 197 NLRB at 1189. We note, in addition, that *all* the

that, since the union made other employees aware of its discriminatory conduct, that conduct "created an impact on other employees, the natural consequence of which was to restrain and coerce them in the exercise of their Section 7 rights, in violation of Section 8(b)(1)(A) of the Act." *Id.* at 1191. The D.C. Circuit enforced the Board's order in an unpublished opinion.

In *MPO,* 197 NLRB at 1189 n.8, the Board cited *Teamsters Local 480 (Hilton D. Wall),* 167 NLRB 920 (1967), *enforced*, 409 F.2d 610 (6th Cir. 1969). The union there "endtailed" the seniority of an employee who had previously worked for a newly-acquired employer that had no union contract, but indicated that it would have "dovetailed" his seniority if he had possessed seniority rights under a collective-bargaining contract. The Board found this unlawful, noting that "the existence of a collective-bargaining contract connotes representation by a labor organization" (167 NLRB at 923) and concluding that the "endtailing" was therefore motivated by the employee's lack of prior union representation. 167 NLRB at 920 n.1, 923-24. The Sixth Circuit upheld the Board's findings as supported by substantial evidence. *NLRB v. Teamsters Local 480*, 409 F.2d 610, 610-11 (6th Cir. 1969).

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transferred employees in *Teamsters Local 729* had previously been represented by the same local; no distinction was made between previously represented and previously unrepresented employees.

The Union relies (Br 5, 6-7) on *NLRB v. Whiting Milk Corp*., 342 F.2d 8 (1st Cir. 1965). The employer there acquired a competitor that had five facilities. Four of them were covered by the same multiemployer contract applicable to the acquiring employer, and, by the terms of that contract, the seniority of their employees was "dovetailed." However, the fifth plant had been nonunion, and its employees were given seniority only from the date of acquisition and were subsequently laid off because of this "endtailing." A divided court reversed the Board's finding of a violation. The majority held that seniority was not a statutorily protected term and condition of employment of the formerly unrepresented employees, who could obtain seniority rights only by contract; that they were free to bargain individually with their new employer for seniority rights; and that it was not unlawful discrimination for the union to bargain for benefits for all employees in the bargaining unit it represented, while declining to bargain for similar benefits for employees outside the unit. 342 F.2d at 10-11. The dissent viewed the difference in seniority, not as a permissible distinction based on membership in the bargaining unit, but as an impermissible distinction among unit employees based on prior union membership. *Id.* at 11-12.

As the Board stated (A 4), it has declined to follow the First Circuit's holding in *Whiting*. *See MPO,* 197 NLRB at 1189 n.8; *Teamsters Local 480,* 167 NLRB at 924 n.12; *Woodlawn Farm Dairy Co*., 162 NLRB 48, 50 n.2 (1966).

Having said that, the Board noted that the Union did not even base its treatment of Rammage on the rationale offered by the First Circuit in *Whiting*. The First Circuit suggested "that parties do not unlawfully discriminate by respecting preexisting, enforceable seniority rights (usually, if not necessarily, linked to union representation), but not simple length of service not linked to any enforceable employment rights." (A 4 (footnote omitted).) But the distinction the Union drew in this case was not between unit and nonunit employees. As representatives of both the Company and the Union testified (Tr 125-27, 132, 141-42, 151-53), once the separate bargaining units were merged, Rammage was part of the combined unit and was covered by the collective-bargaining agreement.[6] He was no different in this respect from the other former Dolly Madison sales representatives.

Nor is this a case where a union distinguishes between employees who have always been part of a particular bargaining unit and employees joining that unit for the first time. All of the former Dolly Madison sales representatives fell into the latter category. Rammage differed from the others only in not having previously been a member of, or represented by, the Union. It does not follow from the First

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[6] This was also the case in *Whiting*. As the Board's opinion there makes clear, after the acquisition of one employer by another, the formerly unrepresented employees of the acquired company were treated as an accretion to the existing unit of employees of the acquiring company. *See Whiting Milk Corp.*, 145 NLRB 1035, 1036 (1964). The First Circuit was therefore wrong in viewing them as nonunit employees.

Circuit's view that, even if a union were free to distinguish between unit and nonunit employees, or between old and new unit employees, it is also free to pick and choose among new unit employees on the basis of their prior union status. That is, even if the Union could lawfully have "endtailed" the seniority of all former Dolly Madison sales representatives, it does not follow that it was entitled to single out one of them for "endtailing" on that basis.

In addition, contrary to the First Circuit's assumption in *Whiting*, it is settled that seniority is a term and condition of employment and is therefore a mandatory subject of bargaining within the meaning of Section 8(d) of the Act (29 U.S.C. § 158(d)). *See Ford Motor Co. v. Huffman*, 345 U.S. 330, 337 (1953); *Facet Enterprises, Inc. v. NLRB*, 907 F.2d 963, 983 (10th Cir. 1990). Thus, once Rammage was included in the combined bargaining unit, the Union was his exclusive bargaining representative, and the Company could not deal directly with him concerning seniority. *See Facet Enterprises, Inc. v. NLRB*, 907 F.2d at 969. Accordingly, the First Circuit's suggested alternative (342 F.2d at 10-11)--to a requirement that employees in Rammage's position receive nondiscriminatory treatment--is itself inconsistent with the Act.

The Union also relies (Br 3, 5-6) on *Riser Foods, Inc.*, 309 NLRB 635 (1992). As the Board here noted (A 4 n.11), its opinion in *Riser* did not mention or purport to overrule its prior decision in *Whiting*. In *Riser*, the General Counsel

conceded that "a union may lawfully insist on the endtailing of new bargaining unit employees' seniority when it is based on unit rather than union considerations." (309 NLRB at 636.) However, he alleged that the union, by "dovetailing" the seniority of new unit employees whom it had previously represented but insisting on "endtailing" the seniority of other new unit employees previously represented by another local, had breached its duty of fair representation towards the latter. The Board found that the union's insistence on "endtailing" commenced prior to the inclusion of the "endtailed" employees in the bargaining unit. Accordingly, the Board found, the union "refused to dovetail the . . . employees' seniority at a time when '[it] owed no statutory collective bargaining duty of fair representation to any of [them].'" 309 NLRB at 636.[7]

The rationale of *Riser* is inapplicable here, since, as shown above, Rammage was already in the bargaining unit when the Union insisted that his seniority be "endtailed." Moreover, as the Board pointed out (A 4 n.11), this case, unlike *Riser*, does not involve an allegation of a breach of the duty of fair representation. Rather, the General Counsel alleged discrimination, pure and simple. The

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[7] The Board in *Riser* relied heavily on the fact that the "dovetailed" employees had previously been covered by contracts with "successorship" clauses (*cf. Lone Star Steel Co. v. NLRB*, 639 F.2d 545, 553-56 (10th Cir. 1980)), requiring any successor employer to "dovetail" their seniority, while the "endtailed" employees had no such provisions in their prior contracts. 309 NLRB at 636. Here, nothing in the Dolly Madison or Hostess/Wonder Bread contracts (GCX 3, 4) required the "dovetailing" of seniority in the event of a merger of bargaining units.

obligation not to discriminate on the basis of union status, unlike the duty of fair representation, is owed to all employees, whether or not they are in a particular bargaining unit. *See, e.g.*, *Allied Trades Council*, 342 NLRB 1010, 1012-13 (2004) (attempt to apply contract with union-security clause to nonunit employees constitutes attempted causation of discrimination in violation of Section 8(b)(2)).

CONCLUSION

For the foregoing reasons, the Board respectfully submits that Board's Order against the Union should be enforced in full and the Union's cross-petition for review should be denied.

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STATEMENT REGARDING ORAL ARGUMENT

Although this case presents a legal issue of first impression for this Court, the Board is of the view that the record and briefs adequately frame the issue for court review without the need for oral argument. If, however, the Court concludes otherwise, the Board stands ready to present oral argument.

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UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD	)	
	)	
Petitioner/Cross-Respondent	)	Nos. 11-9538, 11-9542
	)	
and	)	
	)	
KIRK RAMMAGE	)	
	)	
Intervenor	)	
	)	Board Case No.
v.	)	17-CA-23404
	)	
TEAMSTERS LOCAL UNION NO. 523, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS	)	
	)	
Respondent/Cross-Petitioner	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that on November 1, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ten Circuit by using the appellate CM/ECF system.

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this 1st day of November, 2011