

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FIRST REGION

In the Matter of

CAREER SYSTEMS DEVELOPMENT
CORPORATION

and

MAINE EDUCATION ASSOCIATION

CASE 01-CA-046727

ACTING GENERAL COUNSEL'S REPLY TO
RESPONDENT'S OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

NOW COMES Robert J. DeBonis, Counsel for the Acting General Counsel of the National Labor Relations Board ("Board") who, pursuant to Section 102.24 of the Board's Rules and Regulations, files this Reply to Respondent's Opposition to Motion for Summary Judgment that was filed on November 2, 2011, and, in support of this Reply, states the following:

1. On July 22, 2011, the Charging Party filed a Motion for Summary Judgment in this case. On September 15, 2011, the Acting General Counsel filed a Motion in Support of Charging Party's Motion for Summary Judgment. On October 19, 2011, the Board issued an Order transferring Proceeding to the Board and Notice to Show Cause. On November 2, 2011, the Respondent filed its Opposition to Motion for Summary Judgment. On November 15, 2011, the Charging Party filed its Reply to Respondent's Opposition to Motion for Summary Judgment.

2. In its Opposition, Respondent states that “its decision to reduce what became the Unit by four employees was in response to a Department of Labor mandate, and it was made prior to its knowledge of any organizing activity by the Union, let alone the Union’s certification. Hence, this decision was not and (and could not be) a mandatory subject of bargaining.” The Acting General Counsel does not disagree with these statements and, in fact, the Complaint does not allege the decision to eliminate four bargaining-unit positions to be a violation. Rather, the Complaint and the underlying first amended charge, allege a violation of Section 8(a)(5) for Respondent’s “failure to bargain over the implementation and effects of the layoff of four unit employees.” In other words, Respondent violated Section 8(a)(5) of the Act by failing to bargain with the Union about the discretionary aspects of the implementation of its initial decision, such as the identity, or selection of the particular employees to be laid off, the timing of the layoffs, and other effects subjects. Indeed, in both its Opposition and its Answer to the Complaint, Respondent acknowledges that it failed to bargain about the effects of the layoff.

3. Except for the issues raised in paragraphs 12 and 14 of the Complaint, the pleadings and filings in this case establish that the sole matter in dispute in this case is the appropriate remedy for Respondent’s failure to bargain over the implementation and effects of the layoff. Respondent argues that the appropriate remedy involves “only limited backpay and no reinstatement,” and cites *Transmarine Navigation Corp.*, 170 NLRB 389 (1968) in support of its argument. Counsel for the Acting General Counsel disputes the application of this limited remedy and instead, submits a make-whole remedy is the appropriate one. The Respondent in *Transmarine* had shut down its operations making it impossible to reestablish a situation equivalent to that which would have prevailed had the Respondent more timely fulfilled its statutory bargaining obligation. In contrast, the Respondent in this case is still in operation and

has not shut down its facilities. Therefore, unlike in *Transmarine*, it is not "impossible to reestablish a situation equivalent to that which would have prevailed had the Respondent more timely fulfilled its statutory bargaining obligation." Id. at 389.

4. In order for the Charging Party to meaningfully bargain about the discretionary effects of Respondent's decision to eliminate four bargaining-unit positions, make-whole relief is needed to restore the status quo ante. Only then can Respondent and the Charging Party bargain on an even playing field as to the determination of the individual employees to be laid off and other effects. Therefore, Counsel for the Acting General Counsel submits the appropriate remedy under these circumstances should be an order that Respondent make-whole the employees laid off by paying them their normal wages from the date of their layoffs until the earliest of the following conditions are met: (1) reinstatement of the laid-off employees; (2) mutual agreement as to the manner, method, and effects of the layoffs; (3) good-faith bargaining resulting in a bona fide impasse; (4) the failure of the Union to commence such negotiations within 5 days of the Employer's notice of its desire to bargain with the Union; or (5) the subsequent failure of the Union to bargain in good faith. *Intersystems Design Corp.*, 278 NLRB 759, 760 (1986).¹

Conclusion

ACCORDINGLY, Counsel for the Acting General Counsel respectfully renews its request:

¹ In *Intersystems Design*, the Employer was found to have violated Section 8(a)(5) by unilaterally laying off employees without notifying the union of the decision to layoff and without first giving the union an opportunity to bargain over the effects of that decision.

1. That the factual allegations in paragraphs 1-11, 13, and 15-16 of the Complaint be found to be admitted to be true, as set forth in Respondent's Answer;
2. That the Board find that Respondent committed unfair labor practices within the meaning of Sections 8(a)(5) and (1) of the Act, as alleged in paragraphs 1-11, 13, and 15-16 of the Complaint, without the taking of evidence in support of these allegations;
3. That an appropriate remedial order be issued requiring that Respondent, *inter alia*, post a Notice to Employees, rescind the unlawful changes, and make-whole the laid off employees; and
4. With regard to the issues raised by Respondent's denials in paragraphs 12 and 14, that the matter be remanded to the Regional Director of Region 1 for further appropriate action.

Dated at Boston, Massachusetts this 7th day of December, 2011.

Respectfully submitted,



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