UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

In the Matter of

CENTER CITY INTERNATIONAL TRUCKS, INC.

and	Cases	9-CA-45338
		9-CA-45402
INTERNATIONAL ASSOCIATION OF		9-CA-45437
MACHINISTS & AEROSPACE WORKERS, AFL-CIO		9-CA-45820
DISTRICT LODGE 54, LOCAL LODGE 1471		9-CA-45975
		9-CA-46136
		9-CA-46183

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

This case is before the Board on the Acting General Counsel's Limited Cross Exceptions to Administrative Law Judge Ira Sandron's decision which issued in the above matters on September 2, 2011. [1/] The Acting General Counsel excepts to the Judge's decision as it pertains to memos issued by Respondent (Center City International Trucks, Inc.) that the Acting General Counsel alleges are violative of Section 8(a)(1) of the Act and are indicia of Respondent's overall bad faith bargaining. Further exceptions are taken to the Judge's failure to grant certain remedial measures requested by the Acting General Counsel.

During the course of contract negotiations, Respondent gave its employees negotiation update memos dated March 12, April 2 and July 16, 2010. (ALJD p. 37; G.C. Exs. 14-16) The Acting General Counsel alleged that these memos were independently violative of Section 8(a)(1) of the Act and indicia of Respondent's bad faith bargaining in violation of Section 8(a)(1) and (5) of the Act. The Judge, holding otherwise, concluded that Respondent

---

[1/] References to the Administrative Law Judge's Decision are referred to herein as (ALJD p. _____, ll. _____); references to General Counsel's exhibits are referred to herein as (G.C. Ex. _____); references to the hearing transcript are referred to herein as (Tr. _____); and references to the Acting General Counsel's party hearing brief to the Administrative Law Judge are referred to herein as (G.C. Brief at p. _____).

indeed misrepresented the status of negotiations by stating in its memos that the parties, as of January 7, 2010, were only two issues apart when "the parties were several issues apart, rather than two, on January 7." (ALJD p. 38, ll. 1-2) Additionally, the Judge found that Respondent's statement in its July 16 memo that all the Union's unfair labor practice charges had been dismissed by the NLRB and withdrawn from the Union was inaccurate. (ALJD p. 38, ll. 3-4) However, he found that these misstatements "appear to have been inadvertent errors, at most exaggerations, as opposed to glaring falsehoods made to mislead employees." (ALJD p. 38, ll. 4-5) The Judge then analyzed whether these memoranda were derogatory in such a manner designed to undermine the Union as the employees' collective-bargaining representative and concluded that they were not. (ALJD p. 38, ll. 18-20, 23-25) Finally, he considered the Acting General Counsel's contention that the memos improperly interfered with internal union processes and found that they did not. (ALJD p. 38, ll. 38-41)

CROSS EXCEPTIONS 1, 2, 3, 4 and 5:

The Acting General Counsel respectfully excepts to the Administrative Law Judge's findings that the Respondent's memos issued to employees on March 12, April 2 and July 16, 2010 were not coercive in violation of Section 8(a)(1) and did not violate 8(a)(1) and (5) of the Act. Initially, the Acting General Counsel argues that each memo, read in its entirety, interferes with employees' free choice in contravention of Section 8(a)(1) of the Act, and evinces Respondent's goal of thwarting an agreement. The combination of Respondent's "misstatements," disparagement of the Union, and urging of employees to convince the Union to have a vote on Respondent's final offer is indeed coercive and clearly designed to abet tension between the employees and its chosen representative, thereby thwarting an agreement. It appears Judge Sandron analyzed each memo to determine whether there were unlawful mischaracterizations, then if there were unlawful derogatory comments, and then if the memos unlawfully interfered with the Union's internal process. However, because the memos were

issued as a whole document, when considering whether the memos are unlawful each memo should be considered in its totality. Therefore, even assuming, for example, that the language of the memos is found not to be unlawfully derogatory, each memo read in its entirety is unlawful inasmuch as the misstatements, degrading comments and interjection in the ratification process, taken together, undermine employee support for the Union and are coercive.

In concluding that the memos did not violate the Act, the Judge seemingly failed to consider that these memos were issued in the context of significant unfair labor practices committed by Respondent. In particular, Respondent was engaging in bad faith bargaining at the time it issued these update memos. (ALJD p. 42, ll. 17-18) The Judge relied upon *Adolph Coors Company,* 235 NLRB 271 (1978), among other cases, in finding that the misrepresentations did not constitute an 8(a)(1) violation because it did not contain a threat or promise. However, in *Adolph,* the Board adopted the findings of the administrative law judge that the employer's letter to employees that misrepresented bargaining was not violative because it did not contain threats, promises **"nor did they occur in a context of unfair labor practices**." (Emphasis added) Further, in concluding that the letters were not violative of Section 8(a)(1) and (5), it particularly noted that there was no evidence of bad faith by the employer during negotiations. *Adolph Coors,* at 276, 277. In fact, the Board agreed with administrative law judge in *Adolph* that an employer's noncoercive communication to employees during negotiations is unlawful where it serves an unlawful bargaining strategy. In the instant matter, Judge Sandron held that Respondent unlawfully disciplined an employee, terminated an employee, threatened an employee, unilaterally changed working conditions, failed to provide the Union with relevant information and, most notably, engaged in behavior that strongly suggested that Respondent's "intent was not to reach an agreement with favorable economic terms but to discourage the Union from continuing to represent unit employees." (ALJD p. 42, ll. 2-4, 24-40) These memos clearly were in service of Respondent's unlawful bargaining strategy.

The Acting General Counsel respectfully excepts to the Judge's finding that Respondent's inaccurate claim that the parties were only two issues apart as of January 7 was an inadvertent error or at most an exaggeration not designed to mislead employees. In this regard, the Judge failed to present his reasoning for imputing an honest motive to Respondent's mischaracterization. Attributing a lawful motive for this (and other) mischaracterizations is surprising given the Judge's conclusions that Respondent's overall bargaining strategy was for the purpose of preventing an agreement with the Union, that Respondent terminated an employee because of his union activity and repeatedly expressed antipathy for the Union.

The inaccurate statements by Respondent were intentional and undoubtedly designed to undermine the Union and present Respondent, not the Union, as the true protector of employees' concerns. In this regard, Respondent wrongly stated that the only two issues blocking an agreement, and a wage increase to employees, were union security and dues check off. (G.C. Ex. 14) This misstatement was obviously purposeful because Respondent repeated this incorrect assertion several times in the March 12 memo and in subsequent memos issued on April 2 and July 16. (G.C. Exs. 14-16) It is clear from the manner in which Respondent used this incorrect information, that the memos were designed to undermine the Union. Respondent, relying on its inaccurate assertion that the parties were only two issues apart, stated that its last and final offer with regard to wages and benefits is **"more than what the Union was willing to accept on January 7 . . . [e]very day that goes by, is a day for those who are not yet vested in the plan to ever get your money out of it. Every day that goes by is yet another day of the entire work force losing the wage increase we are proposing."** (Emphasis added) (G.C. Ex. 14)

Indeed, Respondent's language in this March 12 memo is strikingly similar to language the Board found unlawful many years ago. In *Texas Electric Coop, Inc.*, 197 NLRB 10 (1972), an employer informed employees that it was willing to offer a greater wage increase than the union requested and in exchange the employer sought to eliminate dues check-off. It told

employees that its offer was more advantageous to employees than that sought by the union. It also urged the employees to encourage the union to accept its proposal. The judge, with Board approval, held that the fact that the employer's presentation of information had occurred in *noncoercive* terms was immaterial, that "what is important is that it was placed in a context of offering the employees a benefit described as being more advantageous to them than that sought by the Union. By emphasizing that Respondent, not the Union, was the source of this benefit [r]espondent was undermining the Union." *Id* at 14. Likewise, here, Respondent pointed out, with intention, that it was offering more in money and benefits that the Union was willing to take on January 7, again, based on its mischaracterization of the status of bargaining as of January 7. Respondent further manipulated this misstatement to warn employees that, "you need to understand that the Union was willing to accept the proposal except for these two issues. If you go out on strike you will really be striking over these two issues. Do not be fooled into thinking it is over anything else." (G.C. Ex. 15) Respondent's "misstatement" is the gravamen to nearly every assertion Respondent makes in this March 12 memo. Undoubtedly, Respondent was intentionally misleading the employees into believing that Respondent wanted to grant employees more wages, and employees would be enjoying increased wages but for the actions of the employees' chosen representative. At the same time, Respondent is using this misstatement to mischaracterize the Union's motivation in any future strike. This memo, and the subsequent two, are inextricably linked to Respondent's overall bad faith bargaining and attempt to discourage support for the Union by driving a wedge between the employees and its collective-bargaining agent. See *Armored Transport,* 339 NLRB 374 (2003).

Respondent, in the same March 12 memo, proceeds to tell employees that the standard practice for a union is to conduct a ratification vote on an employer's last and final offer but that the Union has "advised us that it does not intend to allow you to vote on this contract. We think that encouraging you to strike without giving you an opportunity to vote on this contract is

wrong . . . [p]lease let the Union know you want to vote on this Agreement. We sincerely believe the best alternative to a strike is to allow you to vote on our proposal in the hope you will see this contract as a far better alternative than the strike option the Union is currently placing before you." (G.C. Ex. 15) Thus, Respondent's memo goes beyond simply encouraging employees to discuss negotiations and to participate in the ratification process. Rather, Respondent disparages the Union by implying to employees that the Union's lawful decision of not holding a vote on Respondent's final offer was a deviation from standard practice; and by presenting a ratification vote in the context of a false dilemma -- wrongly implying that a strike is the resulting consequence if the employees failed to convince the Union to hold a ratification vote. Certainly, this was an attempt to interfere with the Union's internal process in violation of the Act. See *Armored Transport, Inc.* 339 NLRB 374, 378 (2003) (Board held that by statements in a letter telling employees they could demand the union sign the employer's proposal or demand that the union let employees vote on the proposal, the employer "interjected itself into an internal union matter . . . and that [r]espondent's interference further violated Section 8(a)(1) of the Act." See also, *Sheridan Manor Nursing Home*, supra.; *London Chop House, Inc.*, 264 NLRB 638, 639 (1959); *Wire Products Manufacturing Corporation*, 329 NLRB 155 (1999).

In his decision, the Judge highlighted the fact that there was no evidence in this case, as there was in *Sheridan Manor*, supra, that Respondent's conduct in fact disrupted the process -- but this violation does not hinge on whether Respondent was successful in its unlawful pursuits. See *Wire Products Manufacturing Corporation*, 329 NLRB 155 (1999) (Board held that in analyzing whether respondent's actions violated the Act, it was sufficient to consider whether the statement had the reasonable tendency to interfere with employees' protected right to engage in collective bargaining through their exclusive representative); *American Freightways Co.*, 124 NLRB 146 (1959). It is patently clear from the content of each memo that Respondent is misleading employees regarding the Union and the status of negotiations, soliciting employees to

demand a vote and denigrating the Union and its conduct in order to undermine employee support for the Union during the bargaining process in violation of the Act.

Respondent's April 2 memo, is very similar to the March memo and for the reasons asserted above contravenes Section 8(a)(1) and (5) of the Act. Respondent again repeatedly mischaracterizes the status of negotiations as of January 7 and additionally misrepresents the status of bargaining by asserting that the Union had not addressed the issues over elimination of pension, contract duration and wages before January 7, [2]/ and warns employees that "every day that passes, can be for those not vested in the Union pension plan another day when you see no benefit from the $2.55 that is paid if the plan is terminated . . . every day that goes by is a day where the 1.4% increase in pay in our last and final proposal is also lost by everyone." Respondent disparages the Union by stating that the Union's proposals place the parties further away from an agreement and that, "this clearly seems to be the Union's plan." Respondent further pressures employees to demand a ratification vote by implying that the Union is doing a disservice to its customers by denying members a chance to vote on Respondent's final offer. (G.C. Ex. 15)

Likewise, Respondent's July 16 memo again mischaracterizes the status of negotiations as it had in the prior memos, and it inaccurately informed employees that all NLRB charges filed by the Union had been dismissed and later withdrawn by the Board. (ALJD p. 38; G.C. Ex. 16) Additionally, by this July 16 memo, Respondent declared that there was nothing on the table because the Union had withdrawn all of its tentative agreements - without mentioning that Respondent had previously withdrawn its last and final offer on May 25. (G.C. Ex. 16; Tr..727-

[2] / This was cited in the Acting General Counsel's post-hearing brief to the Administrative Law Judge, (G. C. brief at p. 86), but Judge Sandron did not make a factual finding on this point.

728, 1325, 1327, 1337) [3]/ The whole content and tenor of this memo is to posit the Union's conduct as questionable or unlawful further serving to undermine the Union. Again, this memo read in its entirety, and in the context of Respondent's many unfair labor practices -- particularly, its surface bargaining with the Union, interferes with employees' Section 7 rights and is an indicia of Respondent's bad faith.

CROSS EXCEPTIONS 6 and 7:

The Acting General Counsel also respectfully excepts to the Judge's failure to grant certain requested remedial measures. The Judge declined to issue an order prohibiting Respondent from stating to any employer, prospective employer, or responding to any credit reference or similar inquiry that Russell Mason was discharged for cause. He also declined to issue an order requiring reimbursement of amounts equal to the difference in taxes owed upon receipt of a lump sum payment and taxes that would have been owed had there been no discrimination, and the submission of appropriate documentation to the Social Security Administration, so that when backpay is paid, it will be allocated to the appropriate periods. (ALJD p. 43, ll. 1-5) In declining to compel either, the Judge held that the Acting General Counsel's position may be meritorious but that without Board precedence, he was unwilling to grant these remedies. (ALJD p. 42, ll. 5-7)

Regarding reimbursement of taxes and the submission of appropriate documentation, ordering those requested remedies are necessary in order to properly effectuate the remedial purposes of the Act – that is, to make the employee whole for any losses incurred as a result of the unlawful discrimination. Presently, the Internal Revenue Service and the Social Security Administration consider backpay awards to be wages in the year paid. Thus, discriminatees who receive lump sum backpay awards covering a multi-year period are often placed in a higher tax

[3] / This was cited in the Acting General Counsel's post-hearing brief to the Administrative Law Judge (G.C. brief at p. 86) but Judge Sandron did not make a factual finding on this point.

bracket and, therefore, pay a greater amount in taxes than they would have had they been retained and paid wages in due course. Likewise, the Social Security Administration credits backpay awarded to an individual's earning record in the year reported by the employer and it is not credited to the proper year in which it would have been earned absent the discrimination, which could result in lower social security benefits or a failure to meet the requirements for benefits. Consequently, to achieve the Act's goal of making Russell Mason whole and returning him to the state he would have been in absent Respondent's unlawful termination of him, the Judge's remedy should be modified according to the complaint as amended at hearing.

In addition, modifying the Judge's order to specifically prohibit Respondent from stating to any employer, prospective employer, or when responding to any credit reference or similar inquiry that Russell Mason was discharged for cause helps to ensure that Mason will not endure any further suffering because of Respondent's unlawful discharge and is consistent with the recommended order which presently requires Respondent to assure Mason that the discharge will not be used against him in any way. (ALJD p. 44) In responding to the Judge's concern about the absence of case law on this matter, the Board, in *Penn Industries, Inc.*, 233 NLRB 928 issued an Order containing the same language sought in the present matter. Thus, there is precedent for granting this remedial measure, and the Acting General Counsel respectfully requests the Board impose this remedial measure.

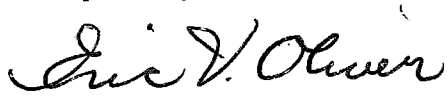
Finally, the Administrative Law Judge noted in the Conclusions of Law that Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally changing its practice of re-employing mechanics who reacquired their CDL, but neglected to specifically include such in the Remedy and Order. Given this apparent oversight, the Board is urged to correct same by having the foregoing matter included in the Remedy and Order.

CONCLUSION:

Based on the foregoing the Board should decline to adopt the findings and conclusion of the Administrative Law Judge as discussed herein, and issue a Order finding that Respondent violated the Act as alleged, and further grant the Acting General Counsel the remedial relief requested.

Dated at Cincinnati, Ohio this 18th day of January 2012.

Respectfully submitted,



Eric V. Oliver
Counsel for the Acting General Counsel
Region 9, National Labor Relations Board
3003 John Weld Peck Federal Building
550 Main Street
Cincinnati, Ohio 45202-3271