

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

In the Matter of

CENTER CITY INTERNATIONAL TRUCKS, INC.

and

INTERNATIONAL ASSOCIATION OF  
MACHINISTS & AEROSPACE WORKERS, AFL-CIO,  
DISTRICT LODGE 54, LOCAL LODGE 1471

Cases 9-CA-45338  
9-CA-45402  
9-CA-45437  
9-CA-45820  
9-CA-45975  
9-CA-46081  
9-CA-46136  
9-CA-46183

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S**  
**MOTION TO STRIKE RESPONDENT'S MOTION**  
**TO REOPEN RECORD FOR REHEARING**

NOW COMES Counsel for the Acting General Counsel in opposition to Respondent's Motion to Reopen the Record for Rehearing with respect to the above-captioned matters. These matters are currently pending before the Board on exceptions filed by Respondent and cross-exceptions filed by the Acting General Counsel. It is respectfully submitted that Respondent's motion should be denied for the following reasons:

In support of its motion, Respondent represents it recently became aware that the Union did not produce all of its bargaining notes in response to subpoenas duces tecum that Respondent served on the Union's bargaining committeemen. In fact, Respondent maintains that the Union "sought to fraudulently conceal its [bargaining] notes from [Respondent] and encouraged members of the union's bargaining committee to lie, under oath, with respect to this concealment." Respondent asserts that during the first or second day of the trial, Grand Lodge Representative William Rudis instructed the Union's bargaining committeemen to deny that anyone other than Committeeman Joseph Gerchy took bargaining notes and that they should

testify as such if asked. Respondent contends that its cross examination of the Union's witnesses was prejudiced by the Union's failure to produce all of the bargaining notes and that a *de novo* hearing before an Administrative Law Judge is justified for that reason. However, to prevail upon its motion, Respondent must demonstrate that the evidence is truly "newly" discovered, i.e. evidence that existed unbeknownst to Respondent at the time of the trial; that it acted with reasonable diligence to uncover and present it and that this evidence would require a different result than that reached by the judge. See, *Fite/Lucent Technologies*, 326 NLRB 46 (1988). Respondent has made no such showing.

While noting the language in Section 102.48(d)(1) of the Board's Rules and Regulations (Rules) permits parties to move for a rehearing or a reopening of the record because of "extraordinary circumstances," Respondent disregards qualifying language in the section which requires that such motions be filed *after* a Board decision or order has issued. Thus, Respondent's attempted invocation of the foregoing provision is procedurally defective. Respondent, perhaps, intended to cite to Section 102.48(d)(2) of the Rules which permits parties to *promptly* file a motion for leave to adduce additional evidence upon discovery of such evidence.

Respondent did not properly file its motion. On November 17, 2011, Respondent filed a charge in Case 9-CB-069115, against the Union alleging that the Union was engaged in bad faith or surface bargaining in violation of Section 8(b)(3) of the Act. In support of that charge, Respondent presented Jeffrey Ward, a former union committeeman, from whom a Board affidavit was taken on December 5, 2011. Ward averred that all of the union committeemen were allegedly instructed by Rudis to take bargaining notes, but Rudis told Ward that he was to deny that anyone other than Gerchy took bargaining notes *if* this question was asked at the unfair

labor practice hearing. Following an investigation conducted under the supervision of the Regional Director, the charge was administratively dismissed on January 19, 2012. (An appeal of the dismissal is pending before the office of the Acting General Counsel.) (A copy of the dismissal letter is attached hereto as Exhibit A.)

As the foregoing demonstrates, Respondent was cognizant of Rudis' alleged instructions to the union committeemen concerning the bargaining notes after the trial and approximately 2 months before it filed the instant motion. It is noteworthy that Respondent did not raise this issue in its exceptions to the Administrative Law Judge's decision. Clearly, Respondent did not act promptly in advising the Board of its alleged recent discovery of additional evidence and its motion should be deemed untimely under the requirements set forth in Section 102.48(d)(2) of the Board's Rules.

The "newly" discovered evidence would not require a different result than that found by Judge Sandron. Respondent maintains that a different trial outcome would have been reached had the Administrative Law Judge considered the Union's bargaining notes in their entirety. In this regard, Respondent avers that a portion of Ward's notes, not presented as evidence due to the Union's alleged cover-up scheme, would have shown that the Union, rather than Respondent, was engaged in bad faith bargaining. <sup>1/</sup> In fact, Respondent's obsession with the Union's bargaining notes is legally inconsequential given the Administrative Law Judge's finding that the bargaining notes proffered by Respondent and Union Committeemen Gerchy and Russ Mason appeared to be both accurate and consistent. <sup>2/</sup> (ALJD p. 3) The Judge further noted the content

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<sup>1/</sup> This argument fails for several reasons. First, the Union's bargaining conduct was not the subject of the consolidated complaint upon which the Administrative Law Judge's decision was based. Second, all of the bad faith bargaining charges that Respondent has filed against the Union have been administratively dismissed.

<sup>2/</sup> References to the Administrative Law Judge's decision are referred to here is (ALJD p. \_\_\_\_).

compatibility of Respondent's and Gerchy's notes during sessions in which negotiations were intense and somewhat heated. (ALJD p. 3)

The fallacy of Respondent's argument is clearly manifested by the Administrative Law Judge's reliance on factors other than the parties' negotiations to support a finding that Respondent engaged in bad faith or surface bargaining. In considering the totality of the circumstances, including the Union's own bargaining conduct, the Administrative Law Judge's conclusion that Respondent engaged in bad faith or surface bargaining was based to a large extent on Respondent's commission of other Section 8(a)(1), (3) and (5) violations. (ALJD pp. 40-42) The Judge particularly noted such conduct as Respondent's threat to discipline a union committeeman, its subsequent discipline of that committeeman and the discharge of another, its rejection of an informal offer when acceptance would have promoted Respondent's asserted business or operational objectives, its unilateral revision of health insurance benefits and a concomitant failure to produce requested health insurance information in a timely manner and its failure to credibly justify its union dues proposal. (ALJD pp. 41-42) Given the Administrative Law Judge's rationale, it is evident that he would have reached the same result even if additional bargaining notes had been offered into evidence for his consideration. Given the foregoing, as reinforced by the Board's decision in *API Logistics, Inc.*, 341 NLRB 994 (2004), Respondent's quest to have the record reopened is clearly non-meritorious since the production of the alleged newly discovered evidence would not result in a different trial outcome.

Respondent could have included this "newly" discovered evidence at the trial if it had acted with reasonable diligence. Although Respondent maintains that its effective cross examination of the Union's witnesses was prejudiced by the Union's failure to produce all of the

bargaining notes that were taken by its committeemen. Respondent had the opportunity to call each of the committeemen, including Ward, as a witness and inquire about the notes produced pursuant to its subpoenas.<sup>3/</sup> Respondent failed to do so at hearing. Had Respondent taken this course of action, it could have possibly discovered the existence of notes other than Gerchy's notes without relying on the Union's representation concerning the matter in question. In short, Respondent's belated finger pointing at the Union is nothing more than a smoke screen to conceal its own litigation faux pas.

Aside from Gerchy, Mark Chema, who was the Union's lead negotiator at one point, is the only union witness who was asked by Respondent's counsel if he took bargaining notes. (Tr. 976) He denied taking such notes on cross examination. Again, Chema's denial, in light of Ward's representation that other union committeemen took notes, is obviously inconsequential given the Administrative Law Judge's rationale in finding a bad faith or surface bargaining violation. Additionally, Ward's belated revelation does not necessitate a finding that Chema testified falsely because he was the lead negotiator rather than a union committeeman. (Tr. 664)

In support of its motion and within the context of presenting newly discovered evidence, Respondent now presents a copy of bargaining notes allegedly taken by Ward that were recently found in his vehicle. That collection of documents includes a December 15, 2009 summary of the Union's alleged bargaining strategy. That document does not address what occurred at the bargaining table and refers to discussions prior to the January 20, 2010 date set forth in the consolidated complaint as the commencement of Respondent's bad faith or surface bargaining. Respondent has improperly attempted to introduce irrelevant material. Finally, there is nothing in Ward's purported bargaining notes which reflects that the Union's witnesses testified falsely.

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<sup>3/</sup> References to the transcript are referred herein as Tr. \_\_\_\_; references to Acting General Counsel Exhibits are referred to herein as G.C. Ex. \_\_\_\_; reference to Respondent's Exhibits are referred to herein as Resp. Ex. \_\_\_\_).

In short, Respondent's January 27, 2012 motion appears to be nothing more than a supplemental brief in which it either raises arguments that have already been made or should have been asserted at an earlier stage. It is clear from the Administrative Law Judge's decision that he found Respondent's bargaining conduct to be legally objectionable because of factors that were unrelated to the Union's bargaining conduct. As such, Counsel for the Acting General Counsel submits that Respondent's motion for a rehearing is procedurally defective and substantively groundless and, accordingly, should be denied. Finally, the Board is urged to make an expedited ruling on this matter because the Region has a pending 10(j) petition in the instant matter and before the District Court involving Respondent.

Dated at Cincinnati, Ohio this 8<sup>th</sup> day of February 2012.

Respectfully submitted,



Eric V. Oliver  
Counsel for the Acting General Counsel  
National Labor Relations Board, Region 9  
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550 Main Street  
Cincinnati, Ohio 45202

Attachment



UNITED STATES GOVERNMENT  
NATIONAL LABOR RELATIONS BOARD

REGION 9  
550 MAIN ST  
RM 3003  
CINCINNATI, OH 45202-3222

Agency Website: [www.nlr.gov](http://www.nlr.gov)  
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January 19, 2012

RONALD L. MASON, ATTORNEY AT LAW  
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Re: INTERNATIONAL ASSOCIATION OF  
MACHINISTS & AEROSPACE  
WORKERS, AFL/CIO, DISTRICT  
LODGE 54, LL 1471 (Center City  
International Trucks, Inc.)  
Case 09-CB-069115

Dear Mr. Mason:

We have carefully investigated and considered your charge that INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO, DL 54, LL 1471 has violated the National Labor Relations Act.

**Decision to Dismiss:** Based on that investigation, I have decided to dismiss your charge for the reasons discussed below.

The charge alleges that the Union is engaged in a concerted strategy to harass the Employer and avoid reaching an agreement by adhering to predictably unacceptable proposals by burdening it with unnecessary expenses, thereby engaging in bad faith and/or surface bargaining in violation of Section 8(b)(3). The investigation failed to support the allegations of the charge.

The Employer asserts that the Union is ostensibly adhering to a comprehensive proposal submitted to the Employer on June 4, 2010 ("June 4 proposal"), rather than bargaining based upon the terms of the parties' expired contract, as a "ruse" to stall negotiations. Moreover, the Employer maintains that many terms of the June 4 proposal, such as the Union's proposals relating to attendance, wages and job classifications, are predictably unacceptable and, thus, evince the Union's intent to avoid reaching an agreement. Finally, the Employer asserts that the Union has shown bad faith by harassing the Employer with OSHA and EPA complaints, and submitting exhaustive and redundant requests for information.

The Employer's assertion regarding the Union's adherence to the June 4 proposal, as opposed to bargaining from the expired contract, is based upon the Union's withdrawals from various previously-reached tentative agreements to carry certain terms of the expired contract into the new contract. However, these withdrawals occurred beyond the scope of the Section

10(b) period, having begun about February 2010 and culminating in the Union's submission of the June 4 proposal. I determined in Case 9-CB-12393, that the Union's withdrawal from the tentatively agreed-to items and its submission of the June 4 proposal did not violate the Act. The investigation failed to establish that the Union's adherence to its June 4 proposal within the 10(b) period has violated the Act. At most, the evidence establishes that the Union has sought favorable contractual terms, that may be unacceptable to the Employer, but do not independently establish bad faith or surface bargaining. Adhering to such terms in a strategic effort to attain certain desired provisions does not constitute bad faith or surface bargaining absent sufficient evidence of an intent to avoid reaching an agreement. The Union's alleged desire for certain provisions of the expired contract, including the pension, does not render its current bargaining posture unlawful.

With respect to the Union's alleged tactics of filing safety related complaints with various governmental agencies and submitting detailed information requests in order to harass the Employer, I note that the Union has a legal right to file complaints over safety, which is a mandatory subject of bargaining, and to request information in furtherance of its duties as a collective bargaining representative. The investigation disclosed that both OSHA and the EPA found merit to certain of the safety complaints. Finally, the Employer failed to proffer specific and sufficient evidence showing that the Union's information requests were made solely to avoid reaching an agreement.

**Your Right to Appeal:** You may appeal my decision to the General Counsel of the National Labor Relations Board, through the Office of Appeals. If you appeal, you may use the enclosed Appeal Form, which is also available at [www.nlr.gov](http://www.nlr.gov). However, you are encouraged to also submit a complete statement of the facts and reasons why you believe my decision to dismiss your charge was incorrect.

**Means of Filing:** An appeal may be filed electronically, by mail, or by delivery service. Filing an appeal electronically is preferred but not required. The appeal MAY NOT be filed by fax. To file an appeal electronically, go to the Agency's website at [www.nlr.gov](http://www.nlr.gov), click on **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions. To file an appeal by mail or delivery service, address the appeal to the General Counsel at the National Labor Relations Board, Attn: Office of Appeals, 1099 14th Street, N.W., Washington D.C. 20570-0001. Unless filed electronically, a copy of the appeal should also be sent to me.

**Appeal Due Date:** The appeal is due on February 2, 2012. If you file the appeal electronically, we will consider it timely filed if you send the appeal together with any other documents you want us to consider through the Agency's website so the transmission is completed by **no later than 11:59 p.m. Eastern Time** on the due date. If you mail the appeal or send it by a delivery service, it must be received by the Office of Appeals in Washington, D.C. by the close of business at **5:00 p.m. Eastern Time** or be postmarked or given to the delivery service no later than February 1, 2012.

INTERNATIONAL ASSOCIATION OF  
MACHINISTS & AEROSPACE  
WORKERS, AFL/CIO, DISTRICT LODGE  
54, LL 1471 (Center City International  
Trucks, Inc.)  
Case 09-CB-069115

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January 19, 2012

**Extension of Time to File Appeal:** Upon good cause shown, the General Counsel may grant you an extension of time to file the appeal. A request for an extension of time may be filed electronically, by fax, by mail, or by delivery service. To file electronically, go to [www.nlr.gov](http://www.nlr.gov), click on **File Case Documents**, enter the NLRB Case Number and follow the detailed instructions. The fax number is (202)273-4283. A request for an extension of time to file an appeal **must be received on or before** February 2, 2012. A request for an extension of time that is mailed or given to the delivery service and is postmarked or delivered to the service before the appeal due date but received after the appeal due date will be rejected as untimely. Unless filed electronically, a copy of any request for extension of time should be sent to me.

**Confidentiality:** We will not honor any claim of confidentiality or privilege or any limitations on our use of appeal statements or supporting evidence beyond those prescribed by the Federal Records Act and the Freedom of Information Act (FOIA). Thus, we may disclose an appeal statement to a party upon request during the processing of the appeal. If the appeal is successful, any statement or material submitted with the appeal may be introduced as evidence at a hearing before an administrative law judge. Because the Federal Records Act requires us to keep copies of case handling documents for some years after a case closes, we may be required by the FOIA to disclose those documents absent an applicable exemption such as those that protect confidential sources, commercial/financial information, or personal privacy interests.

Very truly yours,

  
Gary W. Muffley  
Regional Director

Enclosure

cc GENERAL COUNSEL, OFFICE OF APPEALS, FRANKLIN COURT BUILDING,  
NATIONAL LABOR RELATIONS BOARD, 1099 14<sup>TH</sup> STREET, NW,  
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