UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

REPUBLIC SERVICES, INC.

and

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL UNION NO. 150, AFL-CIO, a/w INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO

Cases 25-CA-31683
25-CA-31708
25-CA-31709
25-CA-31813

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for the General Counsel.
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for the Respondent.
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for the Charging Party.

SUPPLEMENTAL DECISION FOLLOWING REMAND

ARTHUR J. AMCHAN, Administrative Law Judge. Respondent is a large nationwide company engaged in waste collection and disposal. It operates the Countyline Landfill near Argos, Indiana, the only facility at issue in this case. The Union began representing unit employees at the Countyline Landfill in 1994. On January 1, 2009, Respondent merged with Allied Waste and began operating the landfill. It recognized the Union and agreed to abide by the collective bargaining agreement between Allied Waste and the Union.[1] That agreement ran from January 1, 2008 until December 31, 2010.

On November 9, 2010, Respondent terminated the employment of 3 of the 7 bargaining unit members at that site, Travis Pugh, Mike Fairchild and Jason Wiegand.[2] The Union filed grievances regarding all three discharges on November 10. As of November 11, 2010, Respondent had received notification from three of the four remaining bargaining unit members that they no longer wished to be represented by the Charging Party. On November 11, 2010, Respondent withdrew recognition of the Charging Party Union as the exclusive collective bargaining representative of its equipment operators and mechanics at the Countyline Landfill.

[1] The agreement was more technically between the Union and the Countyline Landfill Partnership.
[2] In my initial decision I stated that Respondent terminated 3 of the 6 bargaining unit members on November 9. Dennis Jaeger, who had been laid off in October 2010 and was recalled on November 9, must also be considered to be a member of the unit as of November 11.

On November 12, Respondent began the process of transferring Wayne "Mike" Miller from its non-union Wabash facility to Countyline. Respondent characterized this as a temporary transfer.[3] Miller worked at Countyline at least until May 11, 2011. Respondent states in its remand brief that Miller transferred back to Wabash and that another employee Bobby Arnold transferred to Countyline at some unspecified date since May. In my initial decision I found that Respondent did not violate its collective bargaining agreement with the Union by transferring Miller instead of utilizing the union hiring hall to replace the discharged employees.

The General Counsel contends that Respondent violated Section 8(a)(5) and (1) of the Act in withdrawing recognition and refusing to meet and bargain with the Union for a successor collective bargaining agreement to the contract that expired on December 31, 2010.[4]

On June 21, 2011, I issued an initial decision in this matter. I concluded that the Act did not prohibit Respondent from refusing to meet and bargain with the Union for a successor agreement.[5] I also found that Respondent did not violate the Act by making unilateral changes in unit employees' conditions of employment after the expiration of the collective bargaining agreement. However, I stated that if the arbitration resulted in the reinstatement of the three discharged employees, Respondent would be obligated to resume recognition of the Union and bargain for a successor contract.

During 2011 arbitrators found that Respondent did not have just cause to discharge Travis Pugh, Mike Fairchild and Jason Wiegand. Pugh and Fairchild were reinstated with full backpay and benefits. Wiegand was reinstated subject to a 90 day suspension, with correspondingly reduced backpay and benefits.

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[3] It is unclear as to when Miller actually began working at Countyline, however, it was not prior to November 12. November 11 is the date that Respondent withdrew recognition and which controls the issue as to whether Respondent could legally do so. Therefore, Miller can not be considered in determining whether the Union represented a majority of employees for purposes of this case, *Levitz Furniture Co. of the Pacific,* 333 NLRB 717, 725 (2001). As noted in my initial decision at slip opinion page 10, n. 8, this case is not an anticipatory withdrawal case. Respondent herein withdrew recognition on November 11, G.C. Exhs. 8, 30 and 31. Moreover, Respondent never treated Miller as a bargaining unit member. It did not deduct union dues from his paycheck prior to the expiration of the collective bargaining agreement as it did belatedly with other unit members, nor did it pay into the union fringe benefit funds for Miller, Tr. 270-71.

[4] In October 2010, Union Business Agent James Gardner sent a letter to Holly Ann Georgell, Respondent's Midwest Region Labor Relations Director, requesting bargaining for a successor agreement. On October 22, Georgell responded, asking Gardner to suggest dates in November 2010 for bargaining sessions.

[5] Also, the General Counsel alleged that Respondent violated Section 8(a)(5) and (1) by unilaterally implementing a 401(k) program and changing its health insurance program, by giving unit employees a wage increase and changing the manner in which vacation benefits were accorded to unit employees. The import of my initial decision was that changes Respondent made after the expiration of the collective bargaining agreement were not illegal. As a result of this decision I conclude that all unilateral changes in the terms of employment of unit employees violated Section 8(a)(5) and (1) of the Act.

On December 29, 2011, the Board granted the General Counsel's motion to remand this case to me to consider the affect of the arbitration awards. It ordered me to prepare this supplemental decision. In a conference call on January 5, 2012, the parties agreed that no further live testimony was necessary. The next day, I issued an order receiving the arbitration awards into the record and set a briefing schedule. I also granted the parties leave to move for the admission of other documentary evidence.[6]

On February 10, 2012, Respondent sent Travis Pugh, Mike Fairchild and Jason Wiegand offers of reinstatement. On February 13. 2012, all three accepted Respondent's offer.

The General Counsel, Respondent and the Charging Party filed briefs regarding the remand issue on March 5, 2011.

Unilateral Changes after the expiration of the collective bargaining agreement

After the expiration of the contract on January 1, 2011, Respondent implemented several unilateral changes in wages and working conditions of unit employees. In February 2011 it changed its vacation pay policy to comport with that at other non-union locations. In March, it raised unit employees' wages.

Analysis

In order to withdraw recognition from an incumbent union, an employer must show that the Union had actually lost its majority status when the Respondent withdrew recognition, *Levitz Furniture Co. of the Pacific,* 333 NLRB 717 (2001). In *Levitz,* the Board overruled the line of cases permitting withdrawal of recognition from an incumbent union on the basis of the employer's good faith doubt as to the union's majority status.

An employer may not lawfully withdraw recognition while a collective bargaining agreement is in effect, because an incumbent union enjoys a conclusive presumption of majority status during the life of the contract (up to 3 years), *Auciello Iron Works, Inc. v. NLRB,* 517 U.S. 781, 187 (1996). However, under the "anticipatory withdrawal" cases, an employer faced with evidence that an incumbent union has lost majority support during the term of collective-bargaining agreement may lawfully refuse to negotiate a successor agreement and announce that it will not recognize the Union after the contract expires, *Abbey Medical,* 264 NLRB 969 (1982), enfd. Mem. 709 F.2d 1514 (9th Cir. 1983). The loss of majority support on which the employer relies cannot be the result of unfair labor practices. Moreover, such an employer must continue to recognize and bargain with the union until the collective bargaining agreement expires.

On November 11, 2010 Respondent had evidence that the Union had lost majority status in the Countyline unit, assuming that it was entitled to exclude the three terminated employees from its calculation of the number of employees in the bargaining unit. The General Counsel argued in its initial brief that Respondent was not entitled to withdraw recognition until the grievances filed by the three discharged employees were resolved.

[6] The Charging Party did not move for the admission of Respondent's offers of reinstatement and the acceptance of the offers by the three discharged employees. It attached these documents as exhibits to its brief. The documents certainly appear to be authentic and I will assume they are accurate.

I rejected this argument. However, now that the arbitrations have been decided in favor of the three terminated employees, I conclude that Respondent illegally withdrew recognition from the Union and must be ordered to bargain for a successor contract.

In *Levitz,* the Board stated that an employer who *withdraws* recognition from an incumbent union, in the honest but mistaken belief that the union has lost majority support, should be found to violate Section 8(a)(5). It further observed that an employer with objective evidence that the union has lost majority support…withdraws recognition at its peril. If the union challenges the withdrawal in an unfair labor practice proceeding, the employer will have to prove that the union in fact had lost majority support at the time it withdrew recognition, 333 NLRB at 725. Applying this logic to the instant case, I find that Respondent violated the Act by withdrawing recognition from the Charging Party on November 11, 2010. As the results of the arbitrations establish, the Union had not lost majority support as of that date.

Respondent in its brief argues that the Board should not issue a bargaining order because Jason Wiegand would have still been on his suspension when the collective bargaining agreement expired on December 31, 2010 (90 days from November 9). I reject this argument. Wiegand's situation is best analogized to that in Board cases determining the eligibility of employees, who have been laid off or terminated, to vote in a representation election. From those cases I conclude that Wiegand has been a member of the bargaining unit at all times material in this case. Thus, the Union represented 4 of the 7 unit employees when Respondent withdrew recognition on November 11.

In *Grand Lodge Int'l Association of Machinists,* 159 NLRB 137, 142 (1966), the Board ordered that employees seeking reinstatement pursuant to the LMRDA be allowed to vote subject to challenge. In *Ms. Desserts,* 299 NLRB 236 (1990), the Board ordered that a terminated employee's ballot be counted after the arbitrator had ruled that he was unjustly terminated. In *Red Arrow Freight Lines,* 278 NLRB 965 (1986) the Board held that an employee on sick leave was eligible to vote absent evidence that the employee had been terminated or resigned. Laid-off employees are eligible to vote if they have a reasonable expectancy of recall in the near future, *Higgins, Inc.,* 111 NLRB 797 (1955). Clearly, Jason Wiegand, justifiably suspended for 90 days on November 9, had a reasonable expectation that he would be reinstated in the near future.

Therefore, this record establishes that the Union had not lost majority support when Respondent withdrew recognition from it on November 11. Respondent therefore violated Section 8(a)(5) and (1) of the Act and must be required to bargain with the Union for a successor collective bargaining agreement and if the Union so requests, rescind all unilateral changes in the terms and conditions of unit members' employment.

CONCLUSIONS OF LAW (INCLUDING THOSE CONTAINED IN THE INITIAL June 21, 2011 DECISION)

Respondent, Republic Services, Inc. has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a) (5) and (1) by the following conduct:

1. Withdrawing recognition of the Union on November 11, 2010.

2. Denying union officials access to Respondent's facility on November 12, and December 13, 2010.

3. Requiring Respondent's agents to accompany union representatives while at Respondent's facility on December 16, 2010.

4. Temporarily ceasing the deduction of union dues from employee's paychecks.

5. Unilaterally offering unit employees 401(k) and health insurance benefits during the life of its collective bargaining agreement with the Union.

6. Unilaterally providing health insurance benefits to Carleen Condon during the life of the collective bargaining agreement.

7. Making unilateral changes in the terms and conditions of unit employees' employment after the expiration of its collective bargaining agreement with the Union.

8. Refusing to bargain for a successor agreement with the Union.

Respondent also engaged in unfair labor practices within the meaning of Section 8(a)(1) on December 16, 2010 by engaging in the surveillance of employees' union activities and in interrogating them as to whether they wished to speak to union representatives.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[7]

ORDER

The Respondent, Republic Services, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating any employee about union support or union activities.

(b) Placing under surveillance the union or other protected activities of employees.

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Failing to adhere to all the terms of the collective bargaining agreement with the Union that expired on December 31, 2010 until it has negotiated a successor collective bargaining agreement with the Union or has negotiated to impasse.

(d) Dealing directly with employees when they are represented by a labor organization.

(e) Refusing to bargain with the Union for a successor agreement to its collective bargaining agreement with the Union.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Bargain with the Union as the exclusive representative of its equipment operators and mechanics concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(b) At the Union's request rescind all unilateral changes made in the terms and conditions of bargaining unit members' employment and return these conditions to the status quo that existed when the collective bargaining agreement expired on December 31, 2010.

(c) Make unit employees whole for any loss of earnings and/or other benefits sustained as a result of Respondent's unlawful withdrawal of recognition and unilateral changes.

(d) Within 14 days after service by the Region, post at its Argos, Indiana landfill copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 11, 2010.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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8 If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Dated, Washington, D.C., March 9, 2012.

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Arthur J. Amchan
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain with International Union of Operating Engineers, Local No. 150 as the exclusive collective bargaining representative of our equipment operators and mechanics at the Countyline Landfill.

WE WILL NOT coercively question you about your union support or activities.

WE WILL NOT place your union or other protected activities under surveillance.

WE WILL NOT deal with you directly when you are represented by a labor organization, including International Union of Operating Engineers, Local No. 150.

WE WILL NOT unilaterally offer or provide you benefits during the life of any collective bargaining agreement we have with any labor organization, including International Union of Operating Engineers, Local No. 150.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit.

WE WILL adhere to all the terms and conditions of any collective bargaining agreement that we had with International Union of Operating Engineers, Local No. 150, until we either negotiate a successor collective bargaining agreement or negotiate to impasse.

WE WILL make bargaining unit members whole for any loss of earnings or other benefits resulting from our illegal withdrawal of recognition from International Union of Operating Engineers, Local No. 150, and/or illegal unilateral changes in the terms and conditions of their employment.

REPUBLIC SERVICES, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

575 North Pennsylvania Street, Room 238, Indianapolis, IN 46204-1577
(317) 226-7381, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (317) 226-7413.