UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

NEWSPAPER AND MAIL DELIVERERS' UNION

OF NEW YORK AND VICINITY 2-CB-21842
et al (CITY & SUBURBAN DELIVERY SYSTEMS, INC.)

and

NEWSPAPER AND MAIL DELIVERS' UNION
OF NEW YORK CITY AND VICINITY 2-CB-21740
et al (NY POST)

RESPONDENT'S REPLY BRIEF TO ACTING GC EXCEPTIONS TO ALJD

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II. Status of the Case

The ALJD in this case issued on February 8, 2012, finding certain unfair labor practices. The Respondent and the Acting General Counsel filed timely Exceptions and Supporting Briefs on April 6, 2012. Respondent files the instant Reply Brief to the Acting G.C.'s exceptions.

III. Industry-wide Priority Numbers

In her Exceptions and Brief in Support, Counsel for the Acting General Counsel alleges that the hiring preferences granted in this case were illegal because they were granted to Group 2 and Group 1 members, but denied to Group 3 and Group 4 members who were not Union members. From these facts, the Counsel concludes that the preferences run afoul of Section 8(b)(2) and (1)(A) of the Act. (pp. 29-38, 46- 47)

An examination of this rationale reveals its logical deficiency. The fact that most employees receiving benefits are union members, of course, does not mean that union membership was the basis of the receipt of benefits. This post hoc ergo propter hoc reasoning does not validate the conclusion reached. Rather, it must be determined whether the benefits are granted because employees were union members or because they were in Group 2 and Group 1 categories and, if the latter, whether the granting of employment benefits based on such categorization is violative of the Act.

In this case, it is not disputed that there were no union members who received the hiring preferences who were not in Group 2 or Group 1. Thus, even if one possessed a Union card, the member was granted no benefits of employment if not in the appropriate Group 2 or Group 1. Moreover, as the Acting G.C. concedes and the ALJ found, there were non-Union members in Group 2 and Group 1 who received the hiring preferences.[1] Based on these undisputed facts, it must be concluded that it was placement in Group 2 and Group 1 that was the determining factor in the receipt of benefits, not Union membership.

1 In his Brief, the Acting G.C. asserts that 4% of those receiving the benefit were non union members, hardly, as the ALJ and Acting GC assert, a "extremely rare exception," given that there is a union security clause in the relevant collective bargaining agreements. JD p. 15 note 11.

The critical question therefore is whether granting the benefits based on Group rather than Union membership is violative of the Act. This issue was extensively briefed in Respondent's initial submission and need not be repeated here. Suffice it to say that the group membership is based on time worked, which is a valid work related consideration and certainly within the legitimate and substantial business considerations for any union to seek to enforce. (Respondent's Brief in Support of Exceptions pp 10-11, 35-37)

IV. Failure to Elevate Group 3 and Group 4 Members

In a truly novel and far reaching allegation, the Acting G.C. alleges that the Respondent's refusal to upgrade individuals from Group 3 and Group 4 is violative of the Act. The Acting G.C. is essentially asserting that it is unlawful for a union to seek to protect long term bargaining unit members by asking employers not to add more employees to a group of employees receiving contractual benefits. This allegation, put forward without any legal support or, frankly, any analysis of its impact, can legitimately be characterized as extraordinary.

Group 3 and Group 4 members, by definition, do not have the work time commitment to the Employers as the employees in Group 1 and 2. These categories were put into place to eliminate the arbitrariness of shape-ups.[2] On what basis can it be alleged that a union seeking to protect the livelihood of its senior bargaining unit members is violating the NLRA by not adding more workers to Group 1? Surely freeze orders to prevent a rush of employees gaining preferences at other newspapers meet legitimate long-range objectives of employee security in a declining industry. Ryan v. New York Newspaper Printing Pressmen's Union No. 2 (New York Times Co. and New York News, Inc.) 590 F.2d 451 (C.A. 2 1979)

It should also be noted that the Acting General Counsel's position flies in the face of law developed under the duty of fair representation. Respondent was merely balancing the interests of interests of different classes of employees it represents. As the Supreme Court said in Ford Motor Co. v. Huffman, 345 US 330 (1953)

> Inevitably, differences arise in the manner and degree to which terms of a negotiated agreement affect individual employees and classes of employees. The mere existence of such differences

[2] See, "On the Waterfront".

> does not make them invalid. … A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents subject always to complete good faith and honesty of purpose in the exercise of its discretion. Seniority rules governing promotions, transfers, layoffs and similar matters may, in the first instance, revolve around length of competent service. Variations acceptable in the discretion of bargaining representatives, however, may well include differences based on such matters as the unit within which seniority is to be computed, the privileges to which it shall relate, the nature of the work, the time at which it is done, the fitness, ability or age of the employees…(at pp 338-9)

Nor can it be doubted that preservation of the interests of its senior bargaining unit members is a legitimate interest of the Union. This objective is similar to work preservation objectives, which are recognized as valid under Section 8(e) of the Act. National Woodwork Mfr. Assn v. NLRB, 366 US 612 (1967). Indeed, even a union that threatens, coerces or restrains an employer to obtain such protections is not in violation of Section 8(b)(4)(A). Hudson Insulation Contractors Ass'n v. NLRB,386 US 664 (1967).

The Board cannot interpret Section 8(b)(2) without regard to the provisions of other sections of the Act. NLRB v. Radio & Television Broadcast Eng. Union, 364 US 573, 584 (1961). The Acting General Counsel's attempt to hold illegal longstanding, valid union actions to protect the members of the units it represents must be rejected.

The Acting General Counsel's reliance upon Seafarers' International Union (American Barge Lines), 244 NLRB 641 (1979) is misplaced. In that case, applicants for positions through the union-operated hiring hall were only given credit for time worked in a unit in which the union was the bargaining representative. In this case, there is no evidence of employees being denied a higher placement on the industry-wide seniority list because the employee was not given credit for work at non-signatory employers. As the Second Circuit said in Ryan, supra, speculation is not sufficient to prove an effect on union membership. It should also be noted- that the rationale of Seafarers' has been routinely rejected by every Circuit Court that has considered the issue.[3] Further,

[3] NLRB v. United Mine Workers of America, 921 F.2d 645 (C.A. 6 1990); NLRB v. Whiting Milk Corp, 342 F.2d 8 (CA 1 1965)

the Board in Interstate Bakeries Corporation, 357 NLRB No. 4 (2011) implicitly overruled the holding in Seafarers where in it held that providing seniority credit for employees who worked under a CBA is perfectly lawful as long as such credit was not denied to unrepresented employees. This, as noted, is the situation in this case.

V. Acting GC's Request to Extend Rochester Mfg. Co.

In Rochester Manufacturing Co., 323 NLRB 260 (1997) the Board ordered the Union involved to reimburse nonmember unit employees who filed a Beck objection with the Union for all non-representational activities within the six month statute of limitation period. Here, the GC asks the Board to extend that remedy to all employees even if they were obligated to pay dues outside the six month period. The sole rationale offered by the Acting GC in asking the Board to overrule precedent contrary to its position is that it would make a "more effective remedy." Capital punishment may be a more effective remedy, but the Board must act with reason considering the many objectives of the Act. Section 10(b) was established to require those who believe a ULP has been committed to come forward promptly.

The circumstances in this case indicate why such additional remedy is not justified. Here, notices to employee/members were posted in all plants. No employee came forward to be a financial core member or to request Beck reimbursement. To provide another opportunity for employees to come forward at this point would be inconsistent with the purposes of Section 10(b). To pile on additional financial burdens on unions will only continue to undermine the statutory objective of creating equality in bargaining power and will, as the statute states, lead to aggravated recurrent business depressions by depressing wage rates and purchasing power of wage earners. The Board should reject the invitation to broaden the rule in Rochester Manufacturing Co.

VI. Beck and General Motors Notice

The Brief for the Acting GC states that there is no evidence that the Respondent provided notice of General Motors and Beck rights to any employee. The statement is contrary to the record and should be rejected by the Board. The ALJ properly found that in 2003 the Union circulated a bulletin providing notice of such rights. (ALJD p23) There was undisputed testimony that the Notice was posted in all shops. The Acting General Counsel failed to show

that such Notices were removed. (Tr. 821-823; 881, line 4; 883, line 12) The statement by Counsel for the Acting GC on the record that the notice that was sent to all shops was not provided in response to a subpoena is simply incorrect. As the record makes clear, what were posted were copies of the bulletin that the General Counsel admits receiving.

It is respectfully submitted that there is there is simply an absence of evidence that the Respondent failed to comply with its obligations to provide proper notice to employees.

VII. Acting GC Suggestion on Seniority Dates

Stepping away from his role of enforcing the statute, Counsel for the Acting G.C. asks the Board to require the parties to use a "sensible" seniority date of the made steady date for the employer involved. The statute, however, does not permit the Board to tell parties what they should agree to. The Acting GC would apparently like the parties to use seniority limited to one employer. The Employers and Union involved thought otherwise.

VIII. Conclusion and Recommendation

Based on the foregoing and the Brief in Support of Respondent's Exceptions, the Acting General Counsel's Exceptions should be overruled and the Complaints should be dismissed.

Respectfully submitted,

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April 19, 2012