

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SUPPLY TECHNOLOGIES, LLC

and

TEAMSTERS LOCAL 120

Case 18-CA-19587

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

On February 10, 2011, Administrative Law Judge George Aleman heard the above-captioned case, which concerned the lawfulness of a mandatory arbitration agreement known as the Total Solution Management program or "TSM." On July 11, 2012, Respondent filed a Motion to Reopen the Record. Counsel for the Acting General Counsel opposes Respondent's Motion to Reopen the Record in the above-captioned case.

Respondent's Motion seeks to put the following post-hearing evidence into the record: 1) that three former employees invoked a separate dispute resolution program of Respondent known as the "DRA" to mediate their terminations; and 2) that the DRA is substantively identical to the TSM agreement, which was at issue in the above-referenced hearing. In support of its motion, Respondent also appends to its brief the evidence which, through its motion to reopen, it seeks to have received.

Section 102.48(d)(1) of the Board's Rules and Regulations provides that a party may move to reopen the record if "extraordinary circumstances" exist and if the motion demonstrates why the proffered evidence "would require a different result." However, Respondent fails to satisfy these criteria because Respondent's motion is premised on a misunderstanding of the relevant Board law.

Under Section 8(a)(1) of the National Labor Relations Act, an employer cannot interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. 29 U.S.C. § 158(a)(1). To determine whether an employer's rule violates those rights, the Board relies on a two-part *objective-person standard* to analyze whether reasonable employees would interpret the rule as prohibiting protected conduct. Martin Luther Memorial Home, Inc., 343 NLRB 646, 646 (2004) (emphasis added). First, the Board will analyze whether the rule explicitly restricts protected activity. *Id.* at 646. If the rule does, it is unlawful. *Id.* Second, if the rule does not explicitly prohibit protected activity, the Board will analyze, among other things, whether reasonable employees would construe the language to prohibit Section 7 activity. *Id.* at 647. Any ambiguities will be resolved against the employer who promulgated that rule. D.R. Horton, Inc., 357 NLRB No. 184 (2012) (affirming ALJ's findings).

In the instant case, the administrative law judge found that Respondent's rule was unlawful because reasonable employees could construe the TSM's language to prohibit protected activity. The new evidence Respondent proffers would not compel a different result because the evidence is irrelevant. In its motion, Respondent's argument is predicated on the assumption that the test is whether the conduct had the *actual* effect of interfering with employee rights under Section 7 of the Act. That is a

subjective test. Respondent cites no case law in support of its argument and is unable to do so precisely because none exists.

The TSM and DRA are two separate agreements. Notwithstanding the substantive similarities between the agreements and the reliance of three employees on the DRA, the TSM, when analyzed from an objective-person standard, remains unlawful. It is an ambiguous agreement that employees could reasonably interpret to be the exclusive method of resolving disputes against the company. As the Board has consistently held, the TSM's ambiguity should be resolved against Respondent.

In sum, Respondent's proffered evidence fails to meet the criteria set forth in the Rules. The new evidence does not present or create any extraordinary circumstances; and, because the proffered evidence is irrelevant, it demonstrably does not compel a different conclusion than the one reached by the administrative law judge. Counsel for the Acting General Counsel respectfully requests that the Board deny Respondent's Motion to Reopen the Record.

Dated: July 23, 2012

Respectfully submitted,

/s/ Catherine L. Homolka

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of Counsel for the Acting General Counsel's Opposition to Respondent's Motion to Reopen the Record was filed via e-filing and served on the following parties by e-mail on July 23, 2012.

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