

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13

TEAMSTERS LOCAL UNION NO. 727,
Respondent

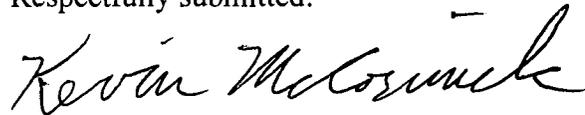
and

Case: 13-CB-073396

DAN DASPER, an individual

COUNSEL FOR THE GENERAL COUNSEL'S
ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Respectfully submitted:



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Now comes Kevin McCormick, Counsel for Acting General Counsel, who, pursuant to Section 102.46 of the National Labor Relations Board's Rules and Regulations, files this Answering Brief in response to Respondent's Exceptions to the Decision of Administrative Law Judge Margaret G. Brakebusch, dated December 18, 2012.¹

I. GENERAL COUNSEL'S RESPONSE TO RESPONDENT'S ASSERTIONS

Counsel for the Acting General Counsel submits that Respondent's Exceptions to the ALJ's Decision and her recommended order merely reprises the factual and legal arguments that Respondent presented in its post-hearing brief. The ALJ's findings of fact, credibility resolutions and conclusions of law appropriately rely upon the evidence contained in the record and are amply supported by legal precedent. Nothing contained within the Respondent's exceptions or its brief in support thereof detracts from the ALJ's factual findings, conclusions or legal analysis. Accordingly, the Exceptions should be overruled in their entirety.

A. The Respondent's Factual Exceptions.

Respondent raises 17 exceptions to the ALJ's factual findings and conclusions of law. Exceptions numbered 1 through 11 contend that there is no basis on the record for the ALJ's factual assertions and determinations. However, Respondent's exceptions are either of no significance to the case or clearly wrong. The General Counsel contends that these erroneous assertions should be rejected by the Board for the reasons set forth below.

¹ Hereinafter the Administrative Law Judge will be referred to as the "ALJ"; the National Labor Relations Board hereinafter is the "Board"; the National Labor Relations Act hereinafter is the "Act"; Teamsters Local Union No. 727, hereinafter is "Respondent"; citations to the Judge's decision will be referred to as "ALJD__"; citations to the transcript are designated as "Tr. __" the General Counsel's Exhibits are hereinafter referred to as "GC__"; Respondent's Exhibits are hereinafter referred to as "R__".

1. The ALJ Correctly Found that Seniority was Based on Union Membership.

At the heart of this case is whether the changes Respondent sought in the seniority system following the consolidation of GES's Roselle and Cicero employees into the Hodgkins facility complied with its duty to fairly, impartially, and in good faith represent all of the employees in the unit. The ALJ found that Respondent failed to comply with its duty of fair representation because it negotiated an agreement with GES which based seniority on the date upon which an employee became one of its members. ALJD 10. The ALJ was correct in finding that this agreement and its enforcement violated the Act. As the Board held in *Teamsters Local 435 (Super Value, Inc.)*, 317 NLRB 617 (1995) citing *Glass & Pottery Workers (Anchor Hocking Corp.)*, 255 NLRB 715 (1981), "We agree with the [Administrative Law Judge's] finding that the new system is unlawful since it is ... based on length of union membership.... A Union is free at any time to negotiate a change in a seniority system as long as in doing so it complies with its duty to fairly, impartially, and in good faith represent all of the employees in the unit."

In Exceptions 1, 2, 3 and 5, Respondent claims that the former Roselle employees were not given less seniority because of their length of employment in the Hodgkins bargaining unit in which the employees were represented by a different union. Respondent argues that Michael Jain, business representative, told Dan Kasper that the Roselle employees were at the bottom of the seniority list because their hire dates were January 31, 2012. However, contrary to Respondent's claims, the evidence fully supports the ALJ's factual findings and conclusions regarding the unlawful application of seniority at the Hodgkins facility.

The ALJ correctly found that Respondent and GES entered into an agreement in which an employee's seniority would be based on the date that they first become a member of the Respondent. ALJD 10. Specifically, Article 6.4 of the collective bargaining agreement between

Respondent and GES signed on March 1, 2012, and which was applied retroactively, states, “the seniority status of individual employees whose seniority has not been terminated under any of the circumstances described in the previous section shall be calculated on the basis of the employee’s date of union acceptance.” GC 7, 8. No other conclusion can be reached about this language.

Respondent’s contention that the ALJ erred is based on an incomplete and misleading explanation of the terms of the collective bargaining agreement pertaining to seniority. Respondent’s arguments rely predominantly on its reading of Article 6.1 which refers to seniority as meaning the relative status of an employee to other employees within the bargaining unit. However, Respondent completely ignores the rest of the contract’s language and does not even address Article 6.4 which clearly modifies the text in Article 6.1. Respondent also ignores John Coli’s testimony that, “Seniority is the length of time in which you've been working for the employer as a member of the union according to the contract.” Tr. 191.

Respondent raises John Coli’s out of context testimony that GES has the right to use supplemental employees to cover work and these supplemental employees can become members of Respondent after they have worked a certain number of hours. Tr. 191-92. The evidence, however, is devoid of any indication that the Roselle employees were supplemental employees. GES consolidated both the Roselle and Cicero employees into the Hodgkins facility. Respondent can no more claim that the Roselle employees are supplemental than it can the Cicero employees. Both groups were moved into the Hodgkins facility thereby making them both parts of the new unit. Even if the Roselle employees were supplemental employees under the contract, Coli admitted their seniority would be the day they are accepted by Respondent. Tr.

192. This would violate the Act as well. See *Teamsters Local 435*, supra. Thus, Coli's testimony regarding supplemental employees further damages the Respondent's case.

Although Respondent excepts to the ALJ's finding that Michael Jain told Dan Kasper the Roselle employees were at the bottom of the seniority list because their hire dates was January 31, 2012, the brief does not directly explain why this finding was erroneous. Michael Jain did not refute this statement attributed to him at trial. Respondent simply claims the ALJ's finding is incorrect because it believes the Roselle employees were new to the Cicero unit which it claims took over at the Hodgkins facility. However, Respondent's claim does not directly refute the statement made by Jain to Kasper. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Drywall Products*, enfd. 188 F.2d 362 (3d Cir. 1951). Since Respondent presented no direct relevant evidence that the ALJ was incorrect, this exception should be rejected.

2. The ALJ's Findings Regarding the Bargaining Unit were Appropriate.

Respondent argues in Exception 4, 7, 8 and 9 that the ALJ erred in finding that the Hodgkins unit was a new unit. Essentially, Respondent claims that the Hodgkins unit was identical to the Cicero unit, and the Roselle unit was dissolved. Because the Cicero unit, now the Hodgkins unit, was so specialized in its work, Respondent claims the Roselle and Cicero units were divergent entities with a distinct jurisdictional friction like that found in *Schick v. NLRB*, 409 F.2d 395 (1969). Without pointing to any evidence, the Respondent claims that the work being performed at the Hodgkins facility was the work comparable to the Cicero unit and not the former Roselle unit. Regarding the work that was done at the Cicero facility, the unit's work included loading and unloading trucks that delivered show site supplies and materials to

exposition shows held at McCormick Place, Navy Pier, and/or various hotels hosting shows. The Respondent points out that some members had commercial driver's licenses. Under *Schick* supra, Respondent believes this fact makes its seniority list and agreements nondiscriminatory.

The ALJ addressed this argument in her decision. ALJD 9-10. While the Cicero unit did perform some additional duties while at the Cicero facility, as the ALJ stated, these additional duties did not create a distinct jurisdictional friction as was the case in *Schick*, supra, the main case relied on by Respondent.² *Schick* is distinguishable from the facts of the instant case in that the two units described in *Schick* had a very long dispute regarding work jurisdiction. The Board relied on the fact that Local 705 had constantly protested the 710 drivers' infringement on its unit's jurisdiction. Such protests preserved the status of the two locals along unit lines. In the *Schick* case, the petitioners were placed at a disadvantage, not because they were members of another union, but because they were members of another unit. In the instant case, unlike the circumstances involved in *Schick*, the work performed by the two bargaining units was not an issue of a long time dispute between the two unions. The only time the work was ever disputed was after the first seniority list was posted on January 3, 2012, by Michael Jain. GC 12. As the ALJ stated, Jain's objection was not analogous to the long-standing jurisdictional dispute between the unions in *Schick*. ALJD 9-10. Additionally, the judge and the Board in *Schick* placed great significance on the fact that the employer and Local 705 found a resolution through

² The units in *Schick* were represented by Teamsters Local 710 and Local 705. The Local 710 unit had traditionally done meat hauling whereas the Local 705 unit had done dry-freight work. Both units worked for Transport Motors Express which had two separate contracts. *Schick*, supra at 397. Since the middle 1950s, Transport Motors Express had more dry-freight and less meat hauling. To remedy this, the company assigned Local 710 drivers to do dry-freight resulting in continual protests from Local 705 over work that was in their jurisdiction. This decision led to recurring disputes concerning the allocation of work between the units.

collective bargaining. As discussed infra in this answering brief, Local 727 and GES did not have any meaningful bargaining concerning the recognition agreement or seniority.

3. The ALJ Correctly Addressed the Respondent's Arguments Concerning Respondent's Constitution, Bylaws and Voting Procedures.

Respondent's Exception 6 argues that the ALJ should have addressed its argument that Teamsters Local 705's agreement with GES violated the union's constitution and bylaws. Related to this is Respondent's Exception 11 which concerns Respondent's voting procedures. Respondent claims that these facts are relevant, not because Local 705's agreement actually violated internal guidelines of the Teamsters, but rather because it disclosed the motivation of Respondent's representatives at the time it negotiated the consolidation agreement. However, even assuming Local 705's agreement with GES violated the Act, this evidence does not shed light on whether Respondent harbored a discriminatory motive when it negotiated the consolidation agreement after Respondent was recognized by GES.³

In Exception 11, Respondent further argues that the ALJ erred in finding that members of Local 727 would want their seniority to remain the same and would vote in their interest to keep it. Respondent points to the fact that the agreement only passed 12 to 10 and because of this, some former Cicero employees must have voted against the agreement. The ALJ finding that the March 1, 2012, vote did not validate Local 727's otherwise unlawful conduct is supported by Board law. ALJD 11. A union cannot validate what would otherwise be unlawful by having employees, who could be adversely affected by the resolution of the issue, vote to decide it. *Teamsters Local 435 (Super Value, Inc.)*, 317 NLRB 617 (1995). Although the ALJ found no

³ Respondent repeatedly claims that its recognition agreement with GES was somehow sanctioned by the NLRB. As the evidence clearly shows, the NLRB made no ruling concerning Respondent's unit clarification petition and did not participate in any way with, condone or supervise Respondent's conversations with GES concerning its recognition agreement or any other agreements for that matter. Respondent's representations concerning the NLRB are false.

validation, she did not find a separate violation for the vote. Hence, the ALJ's finding that the previous members of Local 727 would surely vote for the agreement is of no consequence to the Respondent. ALJD 11.

4. Respondent and GES and Respondent did not Resolve the Jurisdictional Dispute through Bargaining.

Respondent's Exception 10 concerns the ALJ's finding that there was no meaningful bargaining concerning the employees' seniority. Respondent claims in its supporting brief the finding is unsupported by the evidence. It argues that John Coli's testimony regarding his meeting with Gary Behling shows that the parties had meaningful bargaining. However, the ALJ correctly found that the record was devoid of any evidence of bargaining about seniority. ALJD 10.

As the Respondent points out, John Coli testified that he was concerned about the new employees coming into what he believed was an established bargaining unit, the effect on pension credits, the separate 401(k), and the prior posting of the sandwiched seniority list. Tr. 190. According to Coli, the parties discussed everything from wages to benefits, but he never mentioned anything about seniority. Tr. 193-96. Respondent appears to be arguing that the ALJ found no bargaining at all. However, as her decision states several times, the ALJ found no bargaining concerning seniority and the testimony supports her finding. ALJD 10-11.

B. The Respondent's Legal Exceptions.

Respondent's Exceptions numbered 1 and 2 contend that the ALJ misapplied Board law to the instant case. However, Respondent's exceptions are clearly wrong on the holdings. The Acting General Counsel contends that these erroneous legal arguments should be rejected by the Board for the reasons set forth below.

1. *The ALJ Properly applied Existing Case Law.*

The facts of *Schick* have already been discussed so they will not be repeated. Respondent has repeated all of the same legal arguments it made in its post-trial brief word for word. These arguments were addressed in the ALJ's decision. ALJD 8-10. The Board held in *Schick* that a union can affect a unit's seniority based on non-discriminatory factors. The units in *Schick* had a distinct identity based on a long standing dispute about work as evidenced by conflicts with and grievances against the employer. *Schick*, supra at 397. *Schick* does not support the Respondent's actions as it clearly took employees' union membership into account when it implemented a new seniority list. The same is true for the Respondent's arguments concerning *Interstate Bakeries Corp.*, 357 NLRB No. 4 (2011); *Whiting Milk Corp.*, 145 NLRB 1035 (1964); and *Reading Anthracite Company*, 326 NLRB 1370 (1998). ALJD 11-13. All three of these cases mentioned by the ALJD hold that a union cannot change employees' seniority based on impermissible factors, namely union membership.

II. CONCLUSION

Based on the foregoing, Respondent's Exceptions to the Decision of the Administrative Law Judge are all without merit and should be rejected by the Board. Therefore, Counsel for General Counsel respectfully requests that Respondent's Exceptions be overruled in their entirety.

DATED at Chicago, Illinois, this 23rd day of January, 2013.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of General Counsel's Answering Brief to Respondent's Exceptions to the Decision of the Administrative Law Judge have been served this 28th day of January, 2013, in the manner indicated, upon the following parties of record.

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