

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

-----X
:
ALL AMERICAN SCHOOL BUS CORP., :
et. al., : Case Nos. 29-CA-100827 *et al.*
:
and :
:
LOCAL 1181-1061, AMALGAMATED :
TRANSIT UNION, AFL-CIO :
:
-----X

**BRIEF OF CHARGING PARTY LOCAL 1181-1061, AMALGAMATED TRANSIT
UNION, AFL-CIO IN SUPPORT OF ITS LIMITED CROSS-EXCEPTIONS TO THE
DECISION OF THE ADMINISTRATIVE LAW JUDGE**

1. The ALJ erred by inadvertently omitting from the Recommended Order that all Respondents must make employees whole, with interest, for the loss of any earnings or benefits as a result of any changes in the terms and conditions of employment made after March 19, 2013. ALJ Decision (“ALJD”) 23. (Cross-Exception 1).

The ALJ correctly concluded that “by prematurely declaring an impasse on March 19, 2013 and by implementing their final offer, the Respondents violated Section 8(a)(1) & (5) of the Act.” ALJD 22:8-9. However, the ALJ inadvertently ordered only Respondent Pioneer to make employees whole for loss of earnings. See ALJD 24:28-29 (Order Section B(2)(c)). The ALJ inadvertently omitted the remedial language from the Order that applies to all Respondents other than Pioneer. See ALJD 23.

We request that the Board make the following addition to the affirmative obligations of Section A of the ALJ’s recommended Order (ALJD 23):

Make employees whole, with interest, for the loss of any earnings or benefits as a result of any changes in the terms and conditions of employment made after March 19, 2013.

Local 1181 also requests that the Board correct the typographical errors which appear in Section B(2)(c) on page 24 of the Order: “Make employees whole, with interest, for the loss of any earnings or benefits **as a result** of any changes in the terms and conditions of employment made after March **19**, 2013;” as well as the same error that appears in Appendices A and B:

“**WE WILL** make our employees whole, with interest, for the loss of any earnings or benefits **as a result** of any changes in the terms and conditions of employment made after March **19**, 2013.”

2. The ALJ erred by failing to conclude that even if the parties had lawfully reached impasse, Respondents unlawfully imposed certain terms and conditions of employment. (Cross-Exception 2)

The ALJ correctly found that there was no impasse in bargaining and that Respondents violated Section 8(a)(1) and (5) by unilaterally implementing their best and final offer made on

March 19, 2013 (“BFO”) (GC Ex. 20). See ALJD 21:39-41. However, the ALJ failed to consider whether imposition of certain terms of the BFO would have been unlawful even assuming the impasse was lawful. See ALJD 21 and 23. The Board need not rule on this exception or reach this issue if it rejects Respondents’ Exceptions.

Board law prohibits employers from unilaterally implementing certain changes in terms and conditions of employment even if the negotiating parties are at a valid impasse. Board law includes specific prohibitions against unilateral implementation of proposals that are “contract bound” or involve a “statutorily guaranteed right,” and more general prohibitions against unilateral implementation of proposals that are “inherently destructive” of employee rights under the Act and of the bargaining process. See McClatchy Newspapers, Inc., 321 NLRB 1386, 1390-91 (1996), enf’d in part, 131 F.3d 1026 (D.C. Cir. 1997), cert. denied, 524 U.S. 937 (1998). Thus, as explained in Local 1181’s opening statement, see Tr. 21, even if the Employers and Local 1181 were at impasse, the Employers violated the Act by unlawfully implementing several proposals included in their BFO (GC Ex. 20). These include:

Item 1 (Term of Contract) – Employers may not unilaterally set the term of an agreement (as this proposal does) because parties have a continuing obligation to bargain even after impasse. See Roosevelt Mem’l Med. Ctr., 348 NLRB 1016, 1017 (2006).

Item 4(E) (Welfare) – By this proposal, the Employers reserved to themselves “the right to issue like-in-kind benefits instead of the Local 1181 plan,” i.e., sole discretionary authority to change the method and/or means for providing medical benefits, leaving no room for bargaining with Local 1181. Such a proposal is inimical to the collective bargaining process. See KSM Indus., 336 NLRB 133, 135 (2001). Indeed, Local 1181’s position on the Employers’ proposal was that Local 1181 should have the right to approve any change in coverage. See GC Ex. 19.

Item 19 (No-Strike) – Employers may not unilaterally impose no-strike provisions (as this proposal does) because such provisions involve the surrender of statutory rights. See Roosevelt Mem’l, 348 NLRB at 1016.

Item 20 (Master List/EPP) – This proposal would eliminate certain employees’ right to be placed on the “Master List.” This right derives from contracts between the Employers and DOE, not from the CBA. See Tr. 134, 163 (Cordiello); Jt. Ex. 1. Local 1181 has no ability to require changes to contracts to which it is not a party. Thus, the Employers improperly included this proposal in their BFO.

Items 6 (Wage Accruals) and 8 (Adjustment Weeks) – These proposals retroactively deprive employees of entitlements to pay earned, at least in part, before the CBA expired but that were not due to be paid until later. The wage accrual “is an additional contractual payment for past services,” GC Ex. 2 at 24, and adjustment weeks pay is “additional compensation for work done,” id. at 21. Employees are entitled to the payments upon achieving specified years of consecutive employment in the industry. See id. at 24 (wage accrual), 21 (adjustments weeks). However, payment of the wage accrual is due on June 15 of each year, see id. at 25, and adjustment weeks pay is due on the last working day prior to the adjustment week, see id. The elimination of entitlements that were agreed to in the expired CBA and that accrued in part or in whole during the term of the expired CBA, effectuated by the Employers not by written agreement with Local 1181 but by unilateral action, conveys to members that the Employers hold all the power in negotiations and that Local 1181 is powerless. Such employer actions are inherently destructive of employee rights under the Act and of the bargaining process.

Item 18 (Pending Arbitration) – This proposal also retroactively and unilaterally deprives employees of entitlements to pay earned during the prior CBA. Contract proposals concerning

grievance/arbitration procedures may not be imposed without a union's consent because "arbitration typically requires parties to give up their statutorily-protected economic weapons" and must be the product of consent. See Roosevelt Mem¹, 348 NLRB at 1016-17. Here, the Employers' proposal forces Local 1181 to abandon a pending arbitration, thereby modifying the arbitration procedure to give the Employers final and exclusive say over whether an issue may be arbitrated. In addition to violating the principles described in Roosevelt Memorial, such a provision is inherently destructive of employee rights under the Act and the bargaining process.

Items 1, 2, 6, 8, 9, and 14 of the Employers' list of "Agreed-upon Items" at pages 6-7 of their BFO – Cordiello testified, without rebuttal, that the Employers misstated the items they listed in the BFO as agreed to by the negotiating parties. See Tr. 177-179, 225. The Employers violated the Act by unilaterally implementing terms that were different from pre-impasse agreements with Local 1181 or by misrepresenting terms as agreed. See Sierra Publishing, 291 NLRB at 552, 557 n.30, 560.¹

¹Any assertion by the Employers that certain provisions of the BFO were not implemented can not be considered because the Employers admitted that they implemented the BFO in their Answer and at the hearing and there is no record evidence to the contrary. See GC Ex. 1(g) (Cplt. ¶12(a)); GC Ex. 1(T) (Ans. ¶12(a)); Tr. 21.

CONCLUSION

For the foregoing reasons, the Board should grant Local 1181's cross-exceptions.

Dated: December 6, 2013

Respectfully submitted,

By: /s/Richard N. Gilberg

Richard N. Gilberg

Richard A. Brook

Robert Marinovic

Jessica Drangel Ochs

MEYER, SUOZZI, ENGLISH

& KLEIN, P.C.

1350 Broadway, Suite 501

New York, New York 10018

(212) 239-4999

Attorneys for Charging Party Local 1181-1061,
Amalgamated Transit Union, AFL-CIO

CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing Limited Cross-Exceptions of Local 1181 to the Decision of the ALJ, and Brief in Support, to be filed electronically via the NLRB's e-filing system. I further certify that I caused copies of the Exceptions to be served by e-mail upon:

Peter N. Kirsanow
Benesch, Friedlander, Copian
& Aronoff LLP
200 Public Square, Suite 2300
Cleveland, OH 44114
pkirsanow@beneschlaw.com

Counsel for Respondents

Jeffrey D. Pollack
Mintz & Gold LLP
470 Park Avenue South, 10th Fl., North
New York, New York 10016
pollack@mintzandgold.com

Counsel for most Respondents

Jarrett Andrews
VP & Associate General Counsel
MV Transportation, Inc.
5910 N. Central Expressway, Suite 1145
Dallas, TX 75206
jarrett.andrews@mvtransit.com

Counsel for Respondent Reliant

Annie Hsu
Erin E. Schaefer
National Labor Relations Board - Region 29
Two MetroTech Center
Brooklyn, NY 11201
Annie.Hsu@nlrb.gov
Erin.Schaefer2@nlrb.gov

Counsel for the Petitioner

Richard Milman
Milman Labuda Law Group PLLC
3000 Marcus Avenue, Suite 3W8
Lake Success, NY 11042
rich@mmmlaborlaw.com

Counsel for certain Respondents

Eric B. Chaikin
Chaikin & Chaikin
375 Park Avenue, Suite 2607
New York, NY 10152
chaikinlaw@aol.com

Counsel for Respondents
Tufaro and School Days

this 6th day of December, 2013.

/s/ *Jessica D. Ochs*
Jessica Drangel Ochs