

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

R AND C TRANSIT, INC.

and

Case 29-CA-107967

LOCAL 1181-1061, AMALGAMATED TRANSIT
UNION, AFL-CIO

Rachel Zweighaf, Esq., Brooklyn, NY
for the General Counsel.
Rene Sanvil, president, for Respondent.
Robert Marinovic, Esq. (Meyer, Suozzi, English
& Klein) for the Charging Party.

DECISION

Statement of the Case

Steven Fish, Administrative Law Judge: Pursuant to charges filed by Local 1181-1061, Amalgamated Transit Union, AFL-CIO (Charging Party or the Union) on July 24, 2013.¹ The Director for Region 29 issued a complaint and notice of hearing on September 24, alleging that R and C Transit Inc. (Respondent) violated 8(a)(1) and (5) of the Act by decreasing employees' wages and failing to pay annual wage accruals to unit employees without notice to the Union and without affording the Union an opportunity to bargain.

The trial, with respect to the allegations raised by said complaint, was held before me in Brooklyn, New York on November 7. A letter brief has been filed by General Counsel.

Based upon the entire record, including my observation of the demeanor of the witnesses, I make the following findings of fact and conclusions of law.

Findings of Fact

I. Jurisdiction and Labor Organization

Respondent is a corporation with an office and place of business in Queens Village, Queens, New York, where it is engaged in the business of providing school bus transportation services.

During the past 12 months, Respondent provided services in excess of \$50,000 to the New York City Department of Education, an entity directly engaged in interstate commerce.

Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

¹ All dates, herein, referred will be in 2013 unless otherwise indicated.

The Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. Facts

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Since 1980, the Union has been the collective bargaining representative for Respondent's full-time and regular part-time escorts. The recognition has been embodied in successive collective agreements, the most recent of which was effective from July 1, 2009 to December 31, 2012.

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Section 18 of the collective bargaining agreement is entitled, Wage Accruals, providing for payments on June 15th of each year of varying amounts to matrons depending upon their length of service.

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Respondent is not part of a multi-employer unit nor has it negotiated the prior contracts with the Union. Rather, the Union negotiates a contract jointly with an industry group of employers, and when that contract is agreed to, Respondent signs it and adheres to the terms and conditions of employment for its unit employees.

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The above contract expired on December 31, 2012. Negotiations for a renewal of this agreement began on October 31, 2012. The negotiations were not conducted through an association, but the bargaining was conducted jointly with representatives from a number of school bus companies that provide school bus services for the Department of Education of the City of New York (DOE). As noted above, the past practice has been that once the contract has been negotiated with this group, Respondent has traditionally agreed to it, signed it and adhered to it as it did with respect to the contract in effect until December 31, 2012. The current negotiations with the employer group continued through various dates in 2012 and 2013. At a bargaining session on March 19, the attorney for the employers submitted a "Last Best Offer" (LBO), stating that it believed the parties were at impasse and that the LBO would be implemented.

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The employers implemented the LBO shortly thereafter, which included a wage reduction, elimination of the Easter adjustment and elimination of the payment of summer accruals.

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The wage reduction in the LBO was 3.75% of the employee's salary. The employers in the group implemented that amount. Respondent, however, mistakenly believed that the LBO has provided for a decrease of 7.5% of wages and that had been implemented by the employers.

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Therefore sometime in April, Respondent implemented a decrease of 7.5% for all of its matrons.² When the Union found out about this action, Renee Jean-Louis (Renee), the union delegate, telephoned Carlos Jean-Louis (Carlos), one of Respondent's owners, who is no relation to Renee Jean-Louis, but they have the same last name.

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Renee asked Carlos if Respondent has reduced wages by 7.5%, and Carlos informed her that Respondent has done so because it had received the LBO from the other employers, and he "has to do it." Renee told Carlos that Respondent was not following the LBO and that the LBO was only 3.75%. Carlos replied that he would check it out and if he found out that Renee

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² Respondent employed five unit employees.

was right, Respondent would make the correction.

Subsequently, Respondent did check out the Union's assertion and discovered that the Union was correct and that the LBO called for only a 3.75% reduction. Accordingly, sometime in May, Respondent rescinded the 7.5% cut and reduced the reduction to the 3.75% cut, implemented by the other employers. Respondent also paid the employees retroactive pay for the difference in their pay reduction between April and May.

On June 15, the wage accrual due to employees in the contract became due. Respondent did not pay the amounts due to any of its employees. Renee telephoned Carlos and asked why Respondent did not pay the wage accrual. Carlos replied that Respondent was not paying this money until things "get back to normal." Carlos added that when the DOE pays the money to Respondent, Respondent would pay it to the employees. In that connection, Renee testified that she had been in a previous conversation with Respondent's other owner, Rene Sanvil, and was told by Sanvil that the DOE pays the escorts. Renee responded to Sanvil that Respondent signed a contract with the Union that the escorts should be paid on June 15 of each year and "that's all we know about."

The Union filed unfair labor practice charges against each individual employer in the employer group that implemented the LBO in March. On June 10, the Region issued a complaint in the case, entitled, All-American School Bus Corp. (et al),³ with the lead case number as 29-CA-100827. The case was tried before Judge Raymond P. Green between July 22 and July 31.

On September 20, 2013, Judge Green issued a recommended decision (JD(NY)-46-13), finding that the employers violated Section 8(a)(1) and (5) of the Act by implementing the LBO on March 19, without having reached an impasse in bargaining. Judge Green, in that decision, found that the employers had unlawfully implemented the LBO, which included the wage reductions and the failure to pay summer accruals. Exceptions have been filed to Judge Green's decision by the Respondents.

Meanwhile, the Region filed a petition in District Court, Eastern District for 10(j) relief based on the conduct litigated in the above trial. The federal judge, utilizing the record established in the trial before Judge Green, found in a decision issued on August 28, 2013 that General Counsel had established reasonable cause to believe that the employers had violated the Act, in that no impasse had been reached before implementation of the LBO and that an injunction was just and proper.⁴

Upon issuance of that order, the employers rescinded the wage reduction of 3.75% as ordered by the Court. The wage accrual reduction was not part of the 10(j) order and such relief was apparently not sought. Thus, the employers have not paid the wage accruals due either, although Judge Green's recommended decision orders the restoration of all unilateral changes in wages, hours and conditions of employment made since March, which would include the failure to pay wage accruals.⁵

Respondent still has not paid the wage accruals to employees, as detailed above.

³ The complaint named All-American Bus and 26 other employers as Respondents.

⁴ *Paulsen v. All-American Bus Co.*, ECF No. 63, Order Granting Preliminary Injunctions, August 28, 2013.

⁵ As noted above, the employers have filed exceptions to Judge Green's decision.

Respondent's president, Sanvil, testified that Respondent has not paid the amounts due because, according to Sanvil, his partner (Carlos) Jean-Louis spoke to a Ms. Wu of the DOE, who told him that the DOE was not paying the wage accruals. According to Sanvil, Ms. Wu did not tell Carlos why the DOE was not paying the wage accrual this year and then when asked, she told Carlos that she (Ms. Wu) did not know but some supervisor of the DOE told her not to pay it in 2013. In past years, according to Sanvil, Respondent sent a list to the DOE of the employees and the amounts, and the DOE pays the money due to Respondent, who in turn pays it to the employees. Sanvil asserts that Respondent sent the list to the DOE in 2013 as in past years, requesting payment, but in 2013, for the first time, the DOE has refused to pay the amounts to Respondent. Sanvil further testified that there is a contract in existence between the DOE and Respondent, obligating the DOE to pay these wage accruals to Respondent.

Analysis

It is well-settled that, even though a collective bargaining agreement has expired, an employer is obligated to adhere to the terms and conditions of employment of its employees established by the contract and many not make any changes in these terms, absent a new agreement or good faith bargaining to an impasse. *E.I. DuPont De Nemours*, 355 NLRB 1084 (2010); *Cibao Meat Products*, 349 NLRB 471, 475 (2007), enf. 547 F.3d 336 (2nd Cir. 2008); *Made 4 Film*, 337 NLRB 1152, 1152 (2002); *REC Corp.*, 296 NLRB 1293 (1989).

Thus, while the contract is no longer in effect, the employment terms and conditions are kept in place by virtue of Section 8(a)(5) of the Act rather than by force of the contract. *E.I. DuPont*, supra, at 1086, fn. 9.

Here, there is no dispute that, although the collective bargaining agreement between Respondent and the Union had expired on December 31, 2012, the terms and conditions of employment covered by the contract, included wages, payment of wages and the payment of wage accruals. These conditions cannot be changed, absent an impasse in bargaining.⁶

There is no dispute that Respondent unilaterally without having bargained to impasse, reduced employees' wages of unit employees in April by 7.5%, changed the reduction to 3.5% in May, and continued the reduction through September. By such conduct, Respondent has clearly violated Section 8(a)(1) and (5) of the Act.

Respondent's defense, essentially that it was merely following what was done by the other employers in connection with their negotiations with the Union, is without merit. The fact that Respondent traditionally signs the contract, agreed to by the other employers, is of no consequence. The employers implemented the LBO and reduced wages of their employees, but no impasse has been found to exist when they did so. Indeed, Judge Green found to the contrary in his decision, finding that no impasse existed at the time and that the implementation of the wage reduction was unlawful. Thus, Respondent has not established the existence of an impasse with the Union or any other lawful justification for its wage reduction. It has, therefore, violated Section 8(a)(1) and (5), I so find.

Respondent also failed to pay to its five unit employees the wage accruals due to them in June of 2013. This action also represents a departure from the established terms and

⁶ There are some limited exceptions to these principles, set forth in *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991) and exemplified by *RBE Electronics*, 320 NLRB 80, 82 (1995). None of these exceptions are applicable here.

conditions of employment of its employees without an impasse in bargaining. Such conduct is similarly unlawful.

5 Respondent defends against this “change” by asserting that the DOE, by virtue of Respondent's contract with the DOE, is responsible for the payment of these accruals to the employees. It further states that the DOE decided not to pay these monies to Respondent, even though Respondent requested that it do so in order to enable Respondent to pay it to the employees.

10 However, this is not an adequate defense to Respondent’s failure to meet its obligations to pay its employees the amounts due to them. The contract signed by the Respondent and the Union contains no exceptions for payments made by the DOE or any other indication that if the DOE fails to pay Respondent for these amounts that the employees are not entitled to the money from Respondent. It is Respondent, who is obligated under the contract to adhere to its terms, and these terms cannot be altered, absent impasse. Whatever agreement Respondent and the DOE may have concerning DOE’s responsibility for making these payments to Respondent is not material to Respondent's obligation to adhere to the terms of the contract it signed and not to change conditions of employment, absent impasse. Respondent is, of course, free to pursue any recourse it may have against the DOE for failure to pay this money under their contract with Respondent. However, as detailed above, the DOE’s failure to pay the amounts to Respondent does not constitute a valid legal defense to Respondent’s statutory violation of its obligation to maintain conditions of employment of its employees, absent impasse.

25 Accordingly, I conclude that Respondent had also violated Section 8(a)(1) and (5) by failing to pay the wage accruals to its employees in June of 2013.

Conclusions of Law

30 1. The Respondent, R & C Transit, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

35 2. Local 1181-1061, Amalgamated Transit Union, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. At all material times, the Union has been the exclusive representative of Respondent’s employees in the following unit:

40 All full-time and regular part-time escorts, excluding all other employees, guards and supervisors as defined in Section 2(11) of the Act.

45 4. Respondent, by unilaterally changing the established terms and conditions of employment of its employees, by reducing wages in April of 2013 and failing to pay them wage accruals due in June of 2013, without notice to and bargaining with the Union to impasse, Respondent has violated Section 8(a)(1) and (5) of the Act.

5. The unfair labor practices, set forth above, affect commerce within the meaning of Section 2(6) and (7) of the Act.

50 Remedy

Having found that Respondent has engaged in certain unfair labor practices, I

recommend that it cease and resist therefrom and take certain affirmative action designed to effectuate the Act. Respondent must rescind the unlawful unilateral changes and restore its past practices and pay the wage accruals that it unlawfully withheld from its employees.

5 Respondent shall also make whole the employees for any losses suffered by reason of Respondent's conduct in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), enf. 444 F.2d 502 (6th Cir. 1971) with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), enf. denied on other grounds sub. nom., *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (DC Cir. 2011).

10 Respondent shall also file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters for the affected employees. Respondent shall also compensate the employees adversely affected by Respondent's conduct for the adverse
15 consequences, if any, of receiving one or more lump sum backpay awards covering periods longer than one year. *Latino Express, Inc.*, 359 NLRB No. 44 (2012).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁷

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ORDER

The Respondent, R & C Transit, Inc., Queens Village, New York, its officers, agents, successors and assigns shall

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1. Cease and desist from

(a) Failing and refusing to bargain collectively and in good faith with the Union as the exclusive representative of employees in the following appropriate unit:

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All full-time and regular part-time escorts, excluding all other employees, guards and supervisors as defined in Section 2(11) of the Act.

35 (b) Unilaterally implementing the elimination of wage accruals due to its employees, reducing wages of its employees or any other changes in terms and conditions of employment of its employees in the above unit, without notifying and bargaining with the Union and without bargaining in good faith with the Union to a lawful impasse.

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

2. Take the following affirmative action which is necessary to effectuate the purposes of the Act.

45 (a) Pay the wage accruals that Respondent unlawfully failed to pay to its employees that were due in June of 2013.

50 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.

(b) Make whole all affected employees with interest in the manner set forth in the remedy section of this decision.

5 (c) Reimburse the affected employees an amount equal to the difference in taxes owed upon receipt of a lump sum backpay payment and taxes that would have been owed had there been no discrimination against them.

10 (d) Submit the appropriate documentation to the Social Security Administration so that when backpay is paid to the affected employees it will be allocated to the appropriate periods.

15 (e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

20 (f) Within 14 days after service by the Region, post at its Queens Village, New York facility copies of the attached notice marked "Appendix."⁸ Copies of the notice, on forms provided by the Regional Director for Region 29, 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, 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. If 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 April 1, 2013.

30 (g) 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.

35 Dated, Washington, D.C. December 30, 2013

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 Steven Fish,
Administrative Law Judge

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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."

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 Local 1181-1061, Amalgamated Transit Union, AFL-CIO as your exclusive representative in the appropriate unit by failing to give notice to and bargain with the Union before making changes in your wages or your working conditions.

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

WE WILL pay the wage accruals that we unlawfully failed to pay to you in June of 2013.

WE WILL make you whole with interest for any losses that you suffered as a result of our failure to pay the wage accruals and the reductions in your wages.

WE WILL reimburse all employees from whom we unlawfully reduced wages and failed to pay their wage accruals, amount equal to the difference in taxes owed on receipt of a lump sum backpay payment and taxes that would have been owed had there been no discrimination against them.

WE WILL submit the appropriate documentation to the Societal Security Administration so that when backpay is paid to these employees it will be allocated to the appropriate periods.

R & C Transit, 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.

Two MetroTech Center, Jay Street and Myrtle Avenue, Suite 5100
Brooklyn, New York 11201-4201
Hours: 9 a.m. to 5:30 p.m.
718-330-7713

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, 973-645-3784.