UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SMI/DIVISION OF DCX-CHOL ENTERPRISES, INC.,	)	
	)	
	)	Case No. 25-CA-117090,
and	)	et al.
	)	
INDIANA JOINT BOARD, RETAIL, WHOLESALE, DEPARTMENT STORE UNION, UNITED FOOD & COMMERCIAL WORKERS UNION, LOCAL 835, A/W DETAILS, WHOLESALE, DEPARTMENT STORE UNION, UNITED FOOD & COMMERCIAL WORKERS UNION,	)'	

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

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I. INTRODUCTION

The Indiana Joint Board, Retail, Wholesale, Department Store Union, United Food & Commercial Workers, Local 835 (the "Union") filed seven separate charges against the Respondent, SMI/Division of DCX Chol Enterprises, Inc. ("DCX"). In 2013, DCX purchased the assets of Stuart Manufacturing, Inc. and took over its operations and inherited the Collective Bargaining Agreement (the "CBA") between Stuart Manufacturing and the Union. On April 30, 2014, the General Counsel issued a complaint addressing six charges against DCX and on June 9, 2014, the General Counsel issued a consolidated complaint covering all seven cases.

On September 23, 2014, the ALJ found that (1) DCX violated Section 8(a)(5) and 8(a)(1) of the Act by denying the Union access to DCX's facility on August 22, 2013; (2) that DCX violated Section 8(a)(1) of the Act by threatening employees that DCX would divide into two

separate companies, one union and one non-union; (3) that DCX violated Section 8(a)(5) and 8(a)(1) by having the temerity to give all employees a $100 bonus in appreciation of obtaining a production goal in October 2013; (4) that DCX violated Section 8(a)(5) and 8(a)(1) by withdrawing recognition from the Union and declining to bargain when DCX had a decertification petition in hand; and (5) in April 2014, DCX unilaterally changed the pay dates without bargaining with the Union in violation of Section 8(a)(5) and 8(a)(1) of the Act.

On October 21, 2014, DCX filed exceptions to the decision of the Administrative Law Judge. On November 4, 2014, the General Counsel filed its Answering Brief to the Respondent's Exceptions to the Administrative Law Judge's Decision. DCX now files its Reply to the Answering Brief of General Counsel.

II. ARGUMENT

A. Finding that DCX Unlawfully Denied Union Official Access to Employees Was Error

DCX asserted that the Administrative Law Judge erred by finding that DCX unlawfully denied Altman access to employees because the General Counsel failed to meet its burden that the Union met with employees on a regular and frequent basis and because the parties acted consistently with the Collective Bargaining Agreement. Therefore, the ALJ's conclusion that DCX's actions, consistent with the Collective Bargaining Agreement, was error, particularly given the lack of a showing of frequency.

The General Counsel states that DCX's argument that the Union did not meet its burden of demonstrating that the Union met with employees on a regular and frequent basis is "simply wrong." (General Counsel Answering Brief at 3). The General Counsel asserts that the testimony "left little doubt that Altman always requested to meet with employees right after the monthly meeting with Respondent ended and that the only time he was denied access was on

August 22, 2013…" (General Counsel Answering Brief at 3-4). In support of this bold statement that DCX is "simply wrong", the General Counsel cites to pages 86, 110, and 125 of the Transcript and its Exhibit 2.

Page 86 of the Transcript is simply testimony from Gerry Petit as to the reasons why Altman was not given permission to meet on August 22, 2013. Page 86 says nothing of the frequency of Altman's visits. Page 110 of the Transcript is a recounting by Altman of DCX's decline of his request for permission to visit with employees on August 23, 2013. Again, Page 110 is silent as to the frequency of Altman's visits with employees. Finally, page 225 is testimony from another witness regarding the August 23, 2013 incident. General Counsel Exhibit 2 is similarly unhelpful.

Where is the evidence showing that the General Counsel met its burden of showing that Altman met with employees on a regular and frequent basis? Where is the evidence that demonstrates that DCX's argument is "simply wrong?" Where is the evidence that "left little doubt" that Altman "always requested" to meet with the employees right after the monthly grievance meetings? That evidence simply does not exist and the General Counsel could not produce one shred of evidence supporting it.

In its Exceptions, DCX noted that its actions were entirely consistent with the CBA and cited extensively to cases discussing when a contractual term may be implied from a past practice (which is permissible) as opposed to using a past practice to modify the Collective Bargaining Agreement (not permissible). *See, e.g., Anheuser-Busch, Inc. v. Local Union No. 744,* 280 F.3d 1133 (7th Cir. 2002); *Judsen Rubber Works, Inc. v. Manufacturing, Production & Service Workers Union Local No. 24,* 889 F.Supp. 1057, 1063 (N.D.Ill. 1995). The General Counsel completely fails to respond to this argument. However, it is clear that DCX acted

consistently with the Collective Bargaining Agreement and that the Administrative Law Judge was without authority to modify the Collective Bargaining Agreement under the guise of a "past practice."

Finally, DCX asserted that declining access to Altman on one particular day (consistent with the Collective Bargaining Agreement) was not a material, substantial or significant act. The General Counsel claims that access to Altman was important on August 22, 2013 because the employees had questions and did not know what would change under the new ownership. Exactly zero employees testified regarding this supposed apprehension. The General Counsel also stated that the "impact of the denial of access is clearly demonstrated by the fact that more than half of the employees who signed the decertification petition signed it on or after August 22, 2013." (General Counsel's Answering Brief at 4). The impact of the denial of access is not self-evident. Clearly, the employees who signed the decertification petition on August 22, 2013 did not do so because Altman was denied access on that very same day. Again, not one witness testified to the impact of Altman not meeting with the employees on this single, solitary occasion. The General Counsel failed to meet its burden of showing that the violation (if there was one) was material, substantial and significant and the Administrative Law Judge erred in concluding that it was, in the face of no supporting evidence.

B. Finding that DCX Threatened Employees with Dividing the Company into Two Companies was Error.

The Administrative Law Judge concluded that DCX threatened the employees with dividing DCX into two companies, one union and one non-union. Importantly, no witness ever testified to this fact. Rather, at best, Goods-North told the Union that Respondent would operate under the Collective Bargaining Agreement but that Stuart Manufacturing would be non-union. However, no one testified that Tobin's company would be an off-shoot of DCX or that DCX

would split into two companies. This evidence simply did not exist. Whether DCX and Tobin enjoyed a "cozy relationship," as the Administrative Law Judge found, not one person testified that DCX and Stuart Manufacturing were the same company or would be the same company in the future. Not one witness called by the General Counsel testified that he or she believed that DCX would be divided into two companies, one union and one non-union. Not one witness testified that Tobin told him or her that Stuart Manufacturing would be non-union. Not one witness testified that he or she was in any way apprehensive about their job or the status of the Union given that Stuart Manufacturing might open. It is a complete and utter failure of proof.

The General Counsel argues that Tobin planned to open a separate operation in the back of DCX's facility. (General Counsel Answering Brief at 5). The General Counsel also argues that Tobin shared his plans with Good-North and Gerry Pettit. (General Counsel Answering Brief at 5). But how do either of these facts translate into a threat by DCX to divide into two companies, one of which was unionized and one of which was not? It simply is a leap too far, unsupported by any facts or, respectfully, by any logic. There is no evidence to support this conclusion by the Administrative Law Judge.

C. The Finding that the $100 Bonus was an Unlawful Unilateral Change was Error

DCX gave all of its employees a $100 bonus for reaching a productivity goal. Inexplicably, the General Counsel argues that this gratuity was an unfair labor practice and the Administrative Law Judge agreed.[1] This conclusion was error.

[1] The General Counsel has argued that certain actions taken by DCX have resulted in the status of the Union being diminished in the eyes of the bargaining unit employees. However, the General Counsel has pushed for – and received if the decision of the Administrative Law Judge is permitted to stand – an order requiring bargaining unit employees (and only bargaining unit employees) to return their $100 bonus. It is doubtful whether the Union's position or its resulting effect (rescission of the bonus and forced repayment by bargaining unit employees) will bolster the Union's status.

With respect to the $100 bonus, the ALJ recognized that employers do not have to bargain for gifts. (ALJ Order at 19). However, the ALJ found that the $100 award was a form of compensation because its employees collectively reached a performance goal.[2] (*Id.*). The conclusion that the $100 was compensation was not supported by the factual findings. In *Unite Here v. NLRB,* 546 F.3d 239 (2nd Cir. 2008), the Court affirmed a finding that a one-time award of stock to employees as a result of a successful IPO was a gift. As the Court stated, the "stock award here was a one-time event, given to each employee, regardless of rank, in an equal amount." *Id.* at 244. The Second Circuit held that bonuses are the subject of mandatory bargaining when they were paid "over a sufficient length of time to have become a reasonable expectation of the employees and, therefore, part of their anticipated remuneration." *Id.* at 243 quoting *NLRB v. Electro Vector, Inc.*, 539 F.2d 35, 37 (9th Cir. 1976). Here, the bonus was given to bargaining unit and management employees alike in an equal amount. It was not given over a sufficient period of time to become a reasonable expectation of the employees. *See Century Elec. Motor Co. v. NLRB,* 447 F.2d 10, 14 (8th Cir. 1971) (A "regularly paid bonus" may be relied upon as part of total compensation). The General Counsel fails to distinguish any of these cases.

The General Counsel claims that DCX "disingenuously argues that the $100 cash award was not unprecedented because it was a practice at Respondent's other facilities." [3] (General Counsel's Answer Brief at 6). However, DCX did make such distributions at its other facilities. (Tr. at 69). The General Counsel also claims that DCX's argument is "baseless" because a bonus had never been given at this facility. (General Counsel's Answering Brief at 6). That

[2] Neither Union representative that testified saw anything wrong with the $100 bonus.

[3] The General Counsel's use of the word "disingenuous" is peculiar here. DCX takes an accusation of deception seriously and assumes that the General Counsel did not attempt to make that accusation gratuitously. However, it is unclear what exactly was "disingenuous" since it is undisputed that DCX did, in fact, make cash distributions at its other facilities. (Tr. at 69).

argument might carry some weight if DCX had been operating at the facility for years, but DCX had been at the Fort Wayne facility for only a few months. The Administrative Law Judge's conclusion that payment of the $100 was an unfair labor practice because it had never been done at the facility, when DCX had only recently acquired that facility, is error.

D. The Conclusion that DCX Unlawfully Withdrew Recognition from the Union is Error

The Administrative Law Judge concluded, and the General Counsel argues, that DCX wrongfully withdrew recognition from the Union. As an initial matter, DCX did not withdraw recognition from the Union and merely by repeating that mantra over and over does not make it so. DCX agreed that it would continue the same terms and conditions in place under the Collective Bargaining Unit. That hardly is the equivalent to withdrawing recognition from the Union.

Moreover, as the General Counsel recognizes, *UGL-UNICCO*, 357 NLRB No. 76 (2011) represented a frank reversal in NLRB policy. It was not without its detractors, as the opinion produced a well-reasoned and insightful dissent. The NLRB should re-examine that holding in light of the dissent. Further, in *UGL-UNICCO*, the employer was not in possession of an unsolicited petition for decertification. In *UGL-UNICCO*, the issue was which Union would represent the employees, not whether the employees wanted union representation. Here, the issue is whether a majority of the bargaining unit employees want to be represented by a union. That was not an issue in *UGL-UNICCO*.

The General Counsel claims that DCX gave the Union the "runaround." (General Counsel's Answer Brief at 10). However, in a letter January 3, 2014, when counsel for DCX declined to bargain in light of the decertification petition, he indicated his willingness to reconsider if the Union could provide him with any contrary legal authority. Did the Union raise

the case of *UGL-UNICCO*, a case that it now claims is dispositive? It did not, instead filing grievances for actions that had occurred months prior. Under these circumstances, one might wonder who gave the runaround to whom.

E. Finding that Change in Pay Date was Unfair Labor Practice is Error

Finally, the General Counsel argues, and the Administrative Law Judge agreed, that it was an unfair labor practice to change the pay dates to the 5th and 20th of each month because the pay date of every other Wednesday was mandated by the Collective Bargaining Agreement. (General Counsel Answer Brief at 10). It is interesting to note that the General Counsel's entire argument hinges upon the argument that DCX is unable to change the terms and conditions of the Collective Bargaining Agreement. However, when DCX attempted to rely on the Collective Bargaining Agreement in declining to permit Altman access to the facility on August 22, 2013, then the Collective Bargaining Agreement folded like a cheap tent, giving way to a "long standing practice." Neither the General Counsel nor the Administrative Law Judge can have it both ways – either the Collective Bargaining Agreement governs (in which case DCX was free to exclude Altman consistent with its terms) or it doesn't (in which case DCX was free to make a *de minimas* change to the pay dates). The Collective Bargaining Agreement, however, appears to be dispositive only when it is expedient for the Union and merely suggestive at all other times.

Further, the Administrative Law Judge's conclusion was error because the change in pay date was a *de minimas* change. The General Counsel argues that "it is not a simple procedure that is being changed to make it more accurate or simple for employees." (General Counsel Answering Brief at 11). However, it is undisputed that the change was made to save money – a move that one would think the bargaining unit employees would applaud.

The General Counsel argues that this was "not a de minimas change" and that a change in pay dates "can seriously affect employees' personal financial situation." (General Counsel Answer Brief at 11). At the risk of being redundant, the General Counsel makes this claim in the face of absolutely no supporting evidence. As DCX explained in its Exceptions, the Record here does not indicate when the last payment was made on a Wednesday although the ALJ found that the pay date change was implemented on March 27, 2014 a Thursday. If March 26, 2014 was a payday, and the next scheduled payday would have been Wednesday, April 9, 2014, then as a result of the change in pay date to the 5th and 20th of the month, the employees received their pay *early* after the change in pay date. However, if the pay date was Wednesday, March 19, 2014, and the next scheduled Wednesday was April 2, 2014, then the employees received their pay two days later (if paid on Friday, April 4, 2014) or five days later (if paid on Monday, April 7, 2014). Even under this scenario, though, the employees would have received a slightly *larger* check on the 4th or the 7th, offsetting any small delay. The math gets complicated but suffice it to say the theoretical interest on the pay received early or the pay received late is pennies. There was no "serious effect" on any employee's personal financial situation as a result of the change and any suggestion to the contrary is clearly erroneous. Any violation simply is not material, substantial, or significant. Since this is evidence, however, that does not support the General Counsel's position, it is ignored by the General Counsel.

III. CONCLUSION

Based on the foregoing, DCX respectfully requests that its exceptions be granted and that the Board accordingly reverse the decision of the Administrative Law Judge as more particularly set forth in DCX's exceptions and herein.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing has been filed electronically through the E-filing Program this 18th day of November, 2014. On the same date a copy of said filing was served by electronic mail upon the following persons:

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