

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of)
)
WINGATE OF DUTCHESS, INC.)
)
Employer,)
)
and)
)
1199 SEIU UNITED HEALTHCARE)
WORKERS EAST,)
)
Charging Party.)
_____)

Case 03-CA-140576
03-CA-145659

**CHARGING PARTY'S REPLY BRIEF IN
SUPPORT OF CROSS-EXCEPTIONS**

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Pursuant to Section 102.46(h) of the Board's Rules and Regulations, Counsel for the Charging party submits this Reply to Respondent Wingate of Dutchess, Inc.'s Answer to General Counsel's and Union's Cross-Exceptions to the Administrative Law Judge's Decision ("Respondent's Answer").

ARGUMENT

A. An Inference of Knowledge on July 14 Is Supported by the Record and the Law.

In its Answer, Respondent complains that the Charging Party has relied on supposition and innuendo to establish knowledge and that the Charging Party has repeatedly conflated Union activity at Ulster with organizing activity at Dutchess. In fact, there is ample circumstantial evidence to support an inference of knowledge, including Respondent's anti-union campaign at Dutchess.

Ulster is only 16 miles from Dutchess, Tr. 2016, not 25 as Respondent asserts. See Respondent's Answer at 2. When the Union filed a representation petition at Ulster, on June 12, 2014, Respondent's owner attested that he assumed employees at Dutchess had similar "concerns." Tr. 1458-59. To learn what their concerns were, he and other corporate agents increased their presence at all NY facilities. *Id.*; Tr. 1191-92. In fact, the Ulster employees had concertedly demanded a wage increase before they filed the petition for representation. R34A. From this evidence, it is not a leap to conclude that as of June 12, Respondent suspected Union activity at Dutchess.

Nor is it a stretch to conclude that Respondent's Administrator, Clayton Harbby, was determined not to overlook or fail to report signs of concerted activity or organizing at Dutchess. Harbby attested that after the June 12 filing at Ulster, he received an instruction from corporate

to determine which Dutchess employees would agree to campaign against the Union at Ulster. Tr. 2056-57.¹ Corporate also instructed Respondent's agents to be on the lookout for Union organizers on Dutchess property. Tr. 1939-40. Harbby volunteered that a records-search was made to identify employees who previously worked in union facilities, Tr. 632, 2056-57, and that he noticed CNA Sandra Stewart died her hair purple (one of the Union colors) earlier in July. Tr. 1984. The ALJ also credited employee testimony that Harbby made it known that the Ulster Administrator did not know about the union drive until 70 authorization cards had been signed. Tr. 792. The implication being that he was not going to let that happen at Dutchess. Harbby himself testified that he held round-the-clock anti-union meetings on July 23 to respond to "scuttlebutt" and "rumors" among the Dutchess employees about the union organizing at Ulster. Tr. 2061. In fact, well before then, Georgann Allen had informed Harbby that she would not campaign against the Union *and* that she and others felt they were in the same boat as the Ulster employees. Charging Party's Brief in Support of Exceptions at 7. Sandra Stewart had also called the Union, solicited employees' support for a campaign by asking them to sign "the party list", faxed the list of signatures to the Union and scheduled a meeting with the Union for July 25, one day after the Ulster election. *Id.* at 6-9. According to Director of Nursing, Ann Nelson, multiple employees complained about Stewart's solicitation activities.²

On this record, it is not a leap to conclude that Respondent's knowledge was contemporaneous with Stewart's activities and that Respondent's witnesses who denied knowledge of "organizing" or "union organizing" before July 25 were parsing words.

¹ The Administrative Law Judge found that in complying with this instruction, Harbby unlawfully interrogated Georgann Allen. ALJD at 11.

² While it is undisputed that Respondent's handbook contained a no-solicitation policy, its own agents raised the topic of unionization during working time and in working areas. Accordingly, Respondent deserves no credit for withholding discipline against Stewart.

The suspect timing of Respondent's decisions to improve the Dutchess employees' terms of employment further supports an inference of knowledge. Respondent's failure to produce evidence in support of its explanations for such decisions also warrants adverse inferences. A detailed summary of Respondent's evidence or lack thereof is set forth in the Charging Party's Brief in Support of Exceptions at 3-4, 10-16.

Contrary to Respondent's suggestion, the holding in *Meijer, Inc. v. NLRB*, 463 F.3d 534 (6th Cir. 2006) does not require direct evidence of knowledge. In that case, the Board and the Court assumed or accepted that the employer did not know an employee was engaged in protected conduct when it instructed the employee to leave the parking lot. The disputed issue was whether the employer could have interfered with the employee's protected conduct if everyone agreed the employer's agent did not know he was engaged in protected conduct. The Board held that the employer could because the test for interference is objective: whether the employer's conduct or rule reasonably tends to interfere with Section 7 rights. Although the Court disagreed, it did not hold that the Board is prohibited from inferring knowledge.

Indeed, the Board has long held, with court approval, that knowledge may be inferred from circumstantial evidence. *See Remington Lodging & Hospitality, LLC*, 363 NLRB No. 112 (February 12, 2016) ("The Respondent's interrogations demonstrate, at the very least, a suspicion that employees were engaging in union activity, and 'knowledge or suspicion' is sufficient to satisfy the knowledge element under *Wright Line*."); *Montgomery Ward & Co.*, 316 NLRB 1248, 1253 (1995), *enfd. mem.* 97 F.3d 1448 (4th Cir. 1996) (inferring knowledge even though employees stated that they did not want the employer to know about their activities). *See also BMD Sportswear Corp.*, 283 NLRB 142, 142-143 (1987), *enfd. mem.* 847 F.2d 835 (2d Cir. 1988); *Davis Supermarkets, Inc. v. NLRB*, 2 F.3d 1162, 1168 (D.C. Cir. 1993), *cert. denied* 511

U.S. 1003 (1994); *Abbey's Transportation Services, Inc. v. NLRB*, 837 F.2d 575, 579 (2d Cir. 1988); *NLRB v. Health Care Logistics, Inc.*, 784 F.2d 232, 236 (6th Cir. 1986); *NLRB v. Wal-Mart Stores, Inc.*, 488 F.2d 114, 116-117 (8th Cir. 1973).

B. Respondent's Survey of Employee Interest In In-House Child-Care Implied That Respondent Might Offer Such Benefit, When It Had No Such Intent.

Respondent also complains that the Charging Party failed to acknowledge that in 2013 it “pursued the possibility of in-house child care and inquired employees about their interest in such a benefit.” Respondent’s Answer, at 15. Based on this evidence of “past practice,” Respondent contends that its survey of employees’ interest in a Child Care Program in August 2014 carried no implied promise.

First, there is no evidence to support the claim that Respondent inquired about employees’ interest in child care in 2013. The transcript pages and exhibit cited by Respondent establish that in 2013 Respondent investigated the possibility of providing in-house child care, Tr. 2073-75, 2077-78, R-55, but employees were not aware of such investigation. Tr. 406-07.

Second, Respondent admitted that after investigating the feasibility of in-house child care in 2013, Harbby learned that the landlord wanted to tax Respondent for such use of its space, and the corporate office decided Respondent would not offer that benefit. Tr. 2074, 2076. When asked what if anything changed between that 2013 decision and August 2014, Harbby robotically replied, “It was a number of surveys that we sent out to find out what people were thinking and what they were interested in.” Tr. 2108. In other words, nothing had changed and Respondent had no reason—other than pending representation petition--to float the idea of child care in August 2014.

Subjectively-speaking, an employee who knew that Respondent had already investigated and decided not to provide in-house child care should probably not have been misled by

Respondent's well-timed suggestion that it was re-considering such decision. Objectively-speaking, however, employees who knew nothing of Respondent's 2013 decision could only have drawn one conclusion from the question, "If we have an 'In-House Child Care' program, would staff use it?,"—that is, Respondent was considering offering such a valuable benefit.

With respect to Respondent's failure to make good on its offer, Respondent asserts that the Union would have "jumped on the opportunity to file another unfair labor practice charge if it had implemented in-house child care." Respondent's Answer at 17. Such argument is not a substitute for evidence and there is no evidence that Respondent decided not to offer in-house child-care because it feared an unfair labor practice charge.

Moreover, as Respondent knows, "an employer's legal duty in deciding whether to grant benefits while a representation proceeding is pending is to decide that question precisely as it would if the union were not on the scene. In determining whether a grant of benefits is objectionable, the Board has drawn the inference that benefits granted during the critical period are coercive, but it has allowed the employer to rebut the inference by coming forward with an explanation, other than the pending election, for the timing of the grant or announcement of such benefits." *SBM Management Services*, 362 NLRB No. 144 (2015) (citations omitted). Even if the Union would have filed a charge, Respondent would have easily obtained dismissal by coming forward with evidence of a lawful reason for the timing of its implementation. In fact, there is only one reason Respondent failed to offer in-house child care after proposing it in August 2014—it never intended to.

C. Respondent's Eventual Implementation Of A Low-Budget 401(k) Match Is Not Sufficient To Rebut The Evidence Of Unlawful Motive.

Even if, as Respondent claims, it always intended to reinstate the 401(k) match, and even if it contemplated reinstating some form of the 401(k) match "as Company finances improved in

2014”--as Respondent has self-servingly asserted-- Respondent has yet to explain why the announcement on August 22, September 26, and October 4, 2014, that it was “investigating” the “possibility” of reinstating a 401(k) match in 2015. GC17, CP25, R 48, GC42. For what reason, other than the pending representation petition and election, did Respondent make these announcements before it had even decided what form the 401(k) match would take? Why did Respondent remind employees of its “commitment to evaluating” its retirement plans in the 25th-hour speech it gave before the election? CP21. And, why did Respondent not implement on January 1, but wait instead until March 20, 2015 to offer a \$100 maximum match per employee per year? R49. It was Respondent’s burden to prove that the timing of its announcement and implementation were unrelated to the organizing activity or the unfair labor practice charge, and Respondent has offered nothing. Literally nothing, except its post-ULP attempt to mitigate the damage with a low-budget, meaningless fix.

Respondent also misleads when it argues that the 401(k) match was eventually reinstated Company-wide. Its own proof makes clear that employees Company-wide were offered a \$100 maximum 401(k) match “except those subject to collective bargaining.” R49 (emphasis added).

CONCLUSION

For the reasons stated above and in the Charging Party’s Brief in Support of Exceptions, we respectfully request that the Board grant the Charging Party’s cross-exceptions to the decision of the Administrative Law Judge.

Dated: New York, New York
March 11, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have served a true and correct copy of the CHARGING PARTY'S REPLY BRIEF IN SUPPORT OF CROSS EXCEPTIONS in Case No. 03-CA-140576, 03-CA-145659 via electronic filing through the National Labor Relations Board's website, www.NLRB.gov, upon:

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The CHARGING PARTY'S REPLY BRIEF IN OPPOSITION IN SUPPORT OF CROSS EXCEPTIONS was also served, via electronic mail, upon counsel of record for the Charging Party as follows:

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