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August 11, 2016

VIA E-FILING

Gary W. Shinnars
Executive Secretary
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570-0001

Re: Oberthur Technologies of America
Cases 04-CA-128098; 04-CA-132055; 04-
CA-134781; and 04-CA-158860

Dear Mr. Shinnars:

Attached please find Counsel for the General Counsel's Answering Brief in the above-captioned matter. A copy of this document has been served on the persons below by e-mail.

Very truly yours,

DAVID G. RODRIGUEZ
Counsel for the General Counsel

Enclosures:

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**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FOURTH REGION**

OBERTHUR TECHNOLOGIES OF
AMERICA CORPORATION

and

Cases 04-CA-128098
04-CA-132055
04-CA-134781 and
04-CA-158860

LOCAL 14M, DISTRICT COUNCIL 9,
GRAPHIC COMMUNICATIONS
CONFERENCE/INTERNATIONAL
BROTHERHOOD OF TEAMSTERS

ANSWERING BRIEF

Respectfully submitted,



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Dated: August 11, 2016

I. PROCEDURAL HISTORY

The charge in Case 04-CA-128098 was filed by Local 14M, District Council 9, Graphic Communications Conference/International Brotherhood of Teamsters, herein called the Union, on May 6, 2014 (GC-1(a)).¹ The charge in Case 04-CA-132055 was filed on July 2 (GC-1(c)). The charge in Case 04-CA-134781 was filed on August 15 (GC-1(e)). The charge in Case 04-CA-158860 was filed on August 26, 2015 (GC- 1(g)). The amended charge in Case 04-CA-158860 was filed on October 20, 2015.

On October 27, 2015, the Regional Director issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing in Cases 04- CA-128098; 04-CA-132055; 04-CA-134781; and 04-CA-158860, herein called the Complaint, alleging that Oberthur Technologies of America Corporation, herein called Respondent, has been engaging in conduct in violation of Section 8(a)(1) and (5) of the Act (GC-1(k)). Specifically, the Complaint alleges that Respondent violated Section 8(a)(1) and (5) of the Act by: (i) imposing discretionary discharges on Albert Anderson, Dan Clay, Harvey Werstler, and Lawrence Bennethum without notice to the Union or an opportunity to bargain; and (ii) delaying from March 13 to July 17 in furnishing relevant and necessary information requested by the Union.

In its Answer to the Complaint, Respondent denied the agency status of Vice President of Manufacturing Jean Francois Durand; denied the Union's status at the exclusive bargaining representative of the employees in the bargaining unit; and admitted that the discharges at issue were discretionary, but denied any obligation to give notice to, or bargain with, the Union over the discharges (GC-1(m)). The Answer also contended that the Union's certification was legally

¹ GC- (followed by a number) refers to General Counsel's exhibits and R- (followed by a number) refers to Respondent's exhibits. Numbers in parenthesis refer to pages in the official transcript. All dates are in 2014, unless otherwise indicated.

incorrect and therefore nonbinding; and that Section 10(c) of the Act prohibited a reinstatement remedy for Albert Anderson, Dan Clay, Harvey Werstler, and Lawrence Bennethum, as they were discharged for cause (GC-1(m)). On March 21, 2015, Respondent filed a First Amended Answer to rescind its admission that the discharges at issue were discretionary (GC-1(p)). On April 1, 2015, Respondent filed a Second Amended Answer that raised the affirmative defense that Regional Director Dennis Walsh did not have legal authority to issue the Complaint because he was nominated by an Acting General Counsel who served in violation of the Federal Vacancies Reform Act of 1998, 5 USC §§ 3345 et seq. (GC-1(r)).

A hearing on the allegations in the Complaint was held before Administrative Law Judge Arthur Amchan in Philadelphia, Pennsylvania on April 13, 2015. Administrative Law Judge Amchan issued his decision in this matter on June 16, 2016. On June 30, 2016, the General Counsel filed Exceptions arguing that the Administrative Law Judge erred by: (1) failing to find that Respondent violated Section 8(a)(1) and (5) of the Act by imposing discretionary discharges on Albert Anderson, Dan Clay, Harvey Werstler, and Lawrence Bennethum without notice to the Union or an opportunity; and (2) finding that Section 10(c) of the Act prohibits the award of backpay and reinstatement to employees discharged in violation of Section 8(a)(5) of the Act. On July 28, 2016, Respondent filed Cross Exceptions to the Administrative Law Judge's decision. This brief is filed in response to Respondent's Cross Exceptions to the Administrative Law Judge's Decision.

II. FACTS AND ARGUMENT

A. The Administrative Law Judge correctly found that the Union did not waive its right to bargain over the discharges of Anderson, Clay, Werstler, and Bennethum

Facts

Background

On September 7, 2012, a representation election in a production and maintenance unit of employees, herein called the Unit, was held pursuant to a Stipulated Election Agreement (GC-2). *Oberthur Technologies of America Corp.*, 362 NLRB No. 198, slip op. at 7 (2015). Out of the 229 eligible voters, 108 voted in favor of representation by the Union, 106 voted against representation, and three voters cast challenged ballots. *Id.* In, November 2012, a hearing was held before Administrative Law Judge Raymond P. Green, herein called ALJ Green, over the determinative challenged ballots, objections to the representation election, and unfair labor practice allegations pursuant to a Complaint in Case 04-CA-086325. *Id.* at 7 and 8.

On February 20, 2013, ALJ Green, in relevant part, issued a Decision sustaining two of the challenges and overruling the third. 362 NLRB No. 198. ALJ Green then severed the unfair labor practice charge from the representation case and remanded the representation case to Region 4 for further processing. *Id.* at 13. However, Respondent filed exceptions to ALJ Green's decision.

On March 11, 2013, following ALJ Green's decision, Union Vice President John Potts sent Respondent a letter requesting bargaining for a collective bargaining agreement (GC-2(a)). In the letter, Potts acknowledged the possibility that Respondent could file exceptions and stated:

Should the Company file exceptions to the AL[J]'s decision, it is the position of the Union that any unilateral changes by the Company pertaining to terms and conditions of employment or with respect to the issuance of discipline without first providing the

Union with notice and the opportunity to bargain over those changes is an attempt to unlawfully change, alter or eliminate those terms and conditions of employment and will be met by the Union pursuing legal remedies available it for the violation of law.

(GC-2(a)). On March 15, 2013, Respondent's General Counsel Timothy Feely responded to Potts by indicating that Respondent had no obligation to bargain until the Board resolved its appeal of ALJ Green's decision (GC-2(b)).

On August 27, 2015, the Board affirmed ALJ Green's decision and issued a Certification of Representative. However, Respondent continued to steadfastly refuse to bargain with the Union. On September 1, 2015, Potts sent Respondent another letter demanding bargaining (GC-3). On September 22, 2015, Respondent sent Potts a letter refusing to bargain and indicating its intent to challenge the Board's Certification (GC-4). In fact, Respondent has refused to acknowledge any duty to bargain with the Union since the September 7, 2012 representation election (23).

Albert Anderson

On February 4, Respondent discharged Unit employee Albert Anderson without notice to the Union or an opportunity to bargain (27). The Union learned of Anderson's discharge from the employee himself, and was never advised of the discharge by Respondent (27). On March 13, Potts sent a letter to Respondent's Counsel, Kevin McCormick, requesting information concerning Anderson and another Unit employee's discharges (GC-5). On March 18, McCormick sent a letter to Potts indicating Respondent's intent to furnish the requested information the following week (GC-6). Respondent furnished the requested information on July 17 (29; GC-7).

Dan Clay and Harvey Werstler

On July 14, Respondent discharged Unit employees Dan Clay and Harvey Werstler without notice to the Union or an opportunity to bargain (31). The Union learned of their

discharges from Werstler, and was never advised of the discharges by Respondent (31). On July 24, Potts sent a letter to McCormick requesting information concerning Clay and Werstler's discharges (GC-8). On August 11, McCormick sent a letter to Potts explaining the reasons for Respondent's decision to discharge Clay and Werstler (GC-9).

Lawrence Bennethum

On July 22 or 27, 2015, Respondent discharged Unit employee Lawrence Bennethum without notice to the Union or an opportunity to bargain (34; GC-10; GC-11). The Union learned of his discharge from Bennethum himself, and was never advised of the discharge by Respondent (31).

Analysis

In his decision, the Administrative Law Judge incorrectly found that Respondent did not violate the Act by failing to give notice to the Union and an opportunity to bargain prior to imposing the discretionary discharges at issue in this case. Instead, he applied the Board's decision in *Fresno Bee*, 337 NLRB 1161 (2002), and held that Respondent still violated its bargaining obligation under Section 8(a)(5) of the Act. An employer has an obligation to bargain with the Union about disciplinary matters upon request, even under the theory that there is no duty to bargain to impasse prior to the imposition of discipline. *Fresno Bee*, 337 NLRB 1161, 1186-87 (2002); *Ryder Distribution Resources*, 302 NLRB 76, 90 (1991). Notably, Respondent did not except to the Administrative Law Judge's finding that the discharges at issue were discretionary, or that Respondent failed to provide the Union with notice of the discharges. Instead, Respondent excepted only to the finding that the Union did not waive its right to bargain over the discharges.

On March 11, 2013, the Union explicitly requested bargaining over employee discipline (GC-2(a)). Respondent replied with a letter indicating that it had no duty to bargain with the Union prior to its certification (GC-2(b)). In fact, Respondent has steadfastly refused to bargain with the Union about *anything* in the four-plus years since it won the representation election (23).

In its Cross Exceptions, Respondent contends that the Union forfeited its right to bargain over the discharges because it did not request bargaining over each instance of discipline. The Board has repeatedly held that a union's failure to request bargaining does not constitute a waiver of the right to bargain if an employer fails to give timely notice to the union, presents a decision to the employees as a fait accompli, or otherwise indicates that requests for bargaining would be futile. See *Seaport Printing*, 351 NLRB 1269, 1270 (2007) (citing *Smith & Johnson Construction Co.*, 324 NLRB 970 (1991)); *Gannett Co.*, 333 NLRB 355, 359 (2001) (A union does not waive its right to bargain over effects when presented with a fait accompli). Here, the Union was not even presented with a fait accompli. Instead, Respondent discharged all of the employees without bothering to notify the Union. The Union had no duty to repeat its already soundly rejected request to bargain over discipline where Respondent had made clear that it did not recognize the Union's status as the employees' collective bargaining representative. Therefore, the Union did not waive its right to bargain over the discharges.

Respectfully Submitted,



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