JD-46-09
Boston, MA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

ARAMARK EDUCATIONAL SERVICES, INC.

and Case 1-CA-43486

UNITE HERE LOCAL 26

ARAMARK d/b/a HARRY M. STEVENS, INC.

and Case 1-CA-43657

UNITE HERE LOCAL 26

ARAMARK SPORTS, INC.

and Case 1-CA-43658

UNITE HERE LOCAL 26

Robert DeBonis, Esq.,
Of Boston Massachusetts
For the General Counsel

Michael T. Anderson, Esq.,
Of Boston, Massachusetts
For the Charging Party Union

Michael D. Keffer, Esq.,
Of Philadelphia, Pennsylvania
For the Respondent Employer

SUPPLEMENTAL DECISION ON REMAND

Statement of the Case

WALLACE H. NATIONS, Administrative Law Judge. This case was tried in Boston, Massachusetts on October 23 and 24, 2007. The charge in Case 1-CA-43486 was filed September 27, 2006[1] and an amended charge was filed on January 19, 2007 by UNITE HERE Local 26 (herein Union) and a Complaint based thereon was issued on December 21, 2006 against ARAMARK Campus, Inc., herein called by its correct name, ARAMARK Educational

[1] All dates are 2006 unless otherwise indicated.

Services, Inc. (herein ARAMARK Educational or MIT). On December 8, 2006, the Union filed a charge and then on January 19, 2007 filed an amended charge in Case 1-CA-43657 against ARAMARK d/b/a Harry M. Stevens, Inc. (herein ARAMARK Stevens or Hynes). The Union filed a charge in Case 1-CA-43658 on January 19, 2007 against ARAMARK Sports, Inc. (herein ARAMARK Sports or Fenway). Region 1 issued an Order Consolidating Cases, Amended Consolidated Complaint and Notice of Hearing (herein Complaint) on March 7, 2007. The Complaint alleges that ARAMARK Educational, ARAMARK Stevens and ARAMARK Sports or collectively Respondents or ARAMARK, have engaged in conduct in violation of Section 8(a)(1) and (5) of the National Labor Relations Act (herein Act). Respondents filed a timely Answer to the Complaint wherein, inter alia, they admit the jurisdictional allegations of the Complaint.

My decision in this matter issued on May 13, 2008. Following the receipt of exceptions and cross exceptions, the Board, on June 3, 2009, issued its Decision and Order Remanding. The Order remanding the case states the following conclusion: "In sum, the issues raised with respect to the Respondents no-match policy require further analysis. Therefore, we shall remand the case to the judge in the first instance to make the necessary additional findings of fact and conclusions of law about the legality of the implementation of the no-match policy and suspensions, the impact of any unremedied unlawful conduct on subsequent negotiations, the scope of the parties freeze agreement, and the appropriate remedy for any violations of the Act."

I adopt herein my original decision, including all findings of fact and conclusions of law not affected by the Board's Order remanding the case to me. Below, I will make such additional findings necessary to carry out the Board's Order. I will repeat portions of my original decision when I feel it necessary to further the reader's understanding of changes I have made.

A. The Implementation of the Respondent's Change in its No-Match Letter Policy.

Based on my detailed finding of fact on this issue, the Board's Remand states:

> "The Respondent's are ARAMARK subsidiaries that provide food and beverage services at three locations in the Boston, Massachusetts area. Based on unfair labor practice charges filed by UNITE HERE Local 26 (Local 26), which represents employees at these locations, the complaint alleges that the Respondents violated Section 8 (a)(5) of the Act by failing to bargain with Local 26 before changing their policy for processing Social Security Administration (SSA) "no-match" letters. The SSA issues such letters to employers when employee names and Social Security numbers submitted on W-2 forms do not match information in the SSA's database.
>
> The Respondents' no-match policy was in effect companywide but had not been enforced with respect to the employees in the three bargaining units prior to September 2006.[2] The policy required employees identified in SSA no-match letters to begin corrective action within 14 days, or face suspension, and to fully correct the problem within 90 days or face termination. In September, the Respondent's began implementing this policy for the three Boston units, but failed and refused to bargain with Local 26 about the change.
>
> The judge found that the enforcement of the no-match correction policy at the

[2] Nor had the policy been enforced in any other part of the United States.

three facilities represented a change to a mandatory subject of bargaining. He also found that Local 26 had not contractually waived its right to bargain over the changes to the no-match policy and had timely requested bargaining at each of the three facilities, but that its bargaining requests `went unheeded at the local level.' The judge further found, however, that Aramark's Vice President of Labor Relations, Richard Ellis, notified representatives of UNITE HERE's International Union about the changes, that UNITE HERE's constitution authorized the International Union Representatives to bargain for the local unions, that Ellis had multiple conversations about the changes with International Union representatives to bargain about the changes with International Union representatives during the period September 2006 to January 2007, and that Ellis met in person with the International Union representatives to negotiate a resolution to the dispute on January 8, 2007, after which they reached an impasse.

In October and November, while Ellis was negotiating with the International Union, the Respondents suspended employees who failed to take timely initial steps to correct their Social Security number discrepancies, as required by the policy. In uncontradicted testimony, Ellis stated that he and the International Union representative reached a `verbal agreement' in November to freeze the implementation of the policy while negotiation continued, without rescinding any suspension already imposed. When those negotiations reached a stalemate in January 2007, the Respondents resumed implementation and enforcement of the no-match policy."

My findings with respect to this issue were as follows:

"Absent the clearly expressed consent of the union, an employer violates Section 8(a)(5) by changing a term or condition of employment without first bargaining to impasse with the Union. *NLRB v. Katz,* 396 U.S. 736 (1962). The rules governing the imposition of employee discipline are mandatory subjects of bargaining. *United Cerebral Palsy of New York City,* 347 NLRB No. 60, slip op. at 5 (2005). In addition, the establishment of a new condition of continued employment and new grounds for discipline are mandatory bargaining subjects. Where employees are disciplined for failing to comply with a unilaterally changed policy, such a change is material, substantial and significant. *Toledo Blade Co.,* 343 NLRB 385 (2004). An employer can make unilateral changes to such mandatory bargaining subjects only if the union clearly and unmistakably waives its right to negotiate over the changes. See *Metropolitan Edison Co. v. NLRB,* 460 U.S. 693 (1983); *Provena St. Joseph Medical Center,* 350 NLRB No. 64 (2007); *California Offset Printers, Inc.* 349 NLRB No.71 (2007).

First it is clear to me for the reasons set forth in the factual discussion at an earlier point in this decision that Respondents have made a significant change in their policy regarding no match letters, and further, their total about face in their enforcement of the policy by itself requires notice and bargaining upon request of the affected Union. A change from lax enforcement to more stringent enforcement must be bargained over. *United Rentals,* 350 NLRB No. 76, slip op. at 2 (2007).

Respondents take the position that the Union has waived its right to bargain over the changes in the no match policy and/or its decision to enforce the policy more stringently because, 1) the Union did not request to bargain over these changes, 2) any request made was not timely, 3) the contracts at Hynes and MIT already address the no match policy changes, and 4) the Respondents did in fact agree to meet and bargain over the changes, albeit at the International Union level.

The first two reasons given are not supported by the facts. Upon being notified of the changes at MIT in letter from King to Lang, the Union requested a meeting over the changes in a letter sent to King the next week. Lang sent a similar letter requesting a meeting over the changes to Issac Jackson, Director of Operations at Hynes on September 13. The information request sent by Lang to Julie Jordan, ARAMARK's General Manager at Fenway on October 7 impliedly requests bargaining stating: "There is another reason that you may not implement the proposed regulation before it is adopted. In the past, ARAMARK has received Social Security Administration no-match letters and has not taken the steps that it is now taking. ARAMARK may not change its employment policies without bargaining with Local 26." This letter was sent about a week after Lang was informed of the changes that would take place at Fenway. I find that the Union made timely request for bargaining over the changes to the no-match policy at each of the involved facilities and they went unheeded at the local level.

The collective bargaining agreements at Hynes and MIT do cover the subject of no match letters without much specificity. In the first paragraph, they call for the Company to inform the Union in writing when a no match letter is received and upon request of the Union, to meet to see if the problem presented can be mutually resolved. The second paragraph calls for the Company to furnish any employee terminated because the employee is not authorized to work in the U.S. his or her rights and obligations under this portion of the collective bargaining agreement. ARAMARK's new policy is more restrictive and specific than the existing contract language and perhaps, more importantly, will be enforced whereas there was no enforcement of the no-match policy before September 2006. The complete change in the enforcement feature of the policy requires bargaining, upon request, as noted above.

On the other hand, I believe Respondents' fourth defense to be a valid one. While Bennett and Gould notified Lang of the impending no-match policy enforcement, Ellis concurrently notified his counterparts at UNITE HERE's International Union of those changes. UNITE HERE's Constitution authorizes representatives of the International Union to bargain and reach agreements on behalf of the local affiliates. Any agreement Ellis and the International might have reached would have been binding on Local 26. Upon receiving the notification from Lang, the International Union requested bargaining over the changes. Over the next several months, Ellis and officials of the International Union discussed and negotiated the issue over the phone and then in January met face to face to bargain. During these discussions, ARAMARK froze the implementation of the changes. The discussions throughout the fall of 2006 and the face to face meeting included exchanges of proposals. However the parties could not reach agreement on whether the Company would change its no-match policy or the extent of the change. As evidenced by letters sent by Local 26 to the Company, the Union's position is fixed, it wants no enforcement of the Employer's no-match policy. The Respondent's position is equally fixed, it wants to comply with existing immigration law and implement its no-match policy. The International Union walked away from negotiations saying no resolution of the parties' differences could be reached.

Bargaining with the International rather than the individual locals makes perfect sense as the changes were taking place nationwide and would affect all of the International Union's locals at ARAMARK facilities. The parties, in my opinion, did bargain over the changes at the International Union level and could not reach agreement. Though I believe that the Respondents may have violated the Act by their September conduct, I find they cured this violation by agreeing to bargain with the International Union and then freezing implementation while bargaining took place. I find that the parties did bargain as the law demands and reached impasse. This impasse is effective with respect to Local 26. Therefore I find no violation of the Act and will recommend this portion of the Complaint be dismissed."

With respect to my findings set forth above, Board in its Order Remanding stated:

> "With certain exceptions, such as a waiver by a union, a unilateral change in conditions of employment before good-faith bargaining reaches impasse violates Section 8(a)(5). *NLRB v. Katz,* 369 U.S. 736, 743 (1962). The judge made no finding that the Respondent's were privileged to implement the no-match policy and to suspend the employees pursuant to that policy before reaching impasse in bargaining with the International Union. Logic suggests, therefore, that the October and November 2006 suspensions of the employees were unlawful."

I have reconsidered my original findings and conclude that they were in error insofar as I concluded that Respondent's September unfair labor practices and the resulting suspensions were "cured". Relying on my earlier findings set out above and the cases I cited, absent my findings with respect to the "cure', I find that Respondents violated Section 8(a)(1) and (5) by unilaterally implementing the changes in their policy with respect to SSA no-match letters and by enforcing those changes without first affording the Union the opportunity to bargain over those changes. It follows then that the suspensions that took place following this unlawful implementation were likewise unlawful. I will recommend an appropriate remedy in the Remedy section of the Supplemental Decision.

B. The Question Whether the Unremedied ULPs Precluded an Impasse

The Board goes on to raise another issue for determination on Remand:

> "Assuming that the suspensions were unlawful, it would be necessary, as the General Counsel contends, to consider whether the existence of those unremedied unfair labor practices precluded a subsequent lawful impasse in January. The Board has stated that "[n]ot all unremedied unfair labor practices committed before or during negotiations . . . will lead to the conclusion that impasse was declared improperly . . . . Only `serious unremedied unfair labor practices that *affect* the *negotiations* will taint the asserted impasse." *Dynatron/Bondo Corp.,* 333 NLRB 750, 752 (2001) (citations omitted) (emphasis in original).
>
> The judge did not analyze whether the suspension of employees, if unlawful, precluded the possibility of reaching good-faith impasse over the no match policy. Nor did he explain why, even if the subsequent impasse was not tainted by the unfair labor practices, there should not be a remedy for the pre-impasse suspensions."

Having found that the implantation and enforcement of the changes in the Respondents' no-match letter policy and the resulting suspensions were unlawful and must be remedied, I continue to believe that they did not sufficiently taint the negotiations so as to void the impasse reached in January 2007. In *Dynatron/Bondo Corp,* supra, the Board also stated: "Thus, the central question is whether the Respondent's unlawful conduct detrimentally affected the negotiations over a new collective bargaining agreement and contributed to the deadlock. In *Alwin,* 192 F.3d at 139,[3] the court identified

> `at least two ways in which an unremedied ULP can contribute to the parties' inability to reach an agreement. First, a ULP can increase the friction at the bargaining table. Second, by changing the status quo, a unilateral change may move the baseline

[3] *Alwin Mfg. Co.,* 326 NLRB 646, 688 (1998) enfd. 192 F.3d 133 (D.C. Cir. 1999).

for negotiations and alter the parties' expectations about what they can achieve, making it harder for the parties to come to an agreement.'"

Though I concede that the unfair labor practices found to have been committed need to be remedied, I think it would be incorrect to say that they affected the negotiations over the proposed change in the Respondent's no-match letter policy. The Respondents' reasons for the change are valid and discussed in detail in my original decision. For the reasons offered by Respondent and discussed in my original decision, the Respondent's position is fixed. The Union's position has been fixed since it learned of the change in policy. The Union at all times opposed enforcement of Respondents' no-match letter policy. This position did not change by Respondents' suspension of its implementation between November 2006 and January 2007. Nor was it affected materially by Respondents' unilateral implementation and enforcement of the no-match letter policy.

I can find no evidence that the violations created any friction above and beyond the friction that the proposed changes caused. I can find no move in the baseline and alteration of what the parties could expect to achieve in the negotiations over the proposed change because of the unlawful implementation. I can find no evidence to convince me that the Union's walking away from the January 2007 negotiations, saying that no resolution of the parties' differences could be reached, was any way affected by the Respondents' unfair labor practices. The unfair labor practices were certainly not cited as the reason for leaving or even part of the reason. Accordingly, I find that the impasse reached was not tainted by unremedied unfair labor practices and that the subsequent implementation and enforcement of the Respondents' no-match letter policy was lawful. I believe that the best solution to the issues presented by the Board's Remand Order is to remedy the violations and to allow the impasse to stand. The November freeze in the implementation and enforcement of the policy did not remedy the unlawfulness of the implementation in September and the unlawful suspensions in October and November. I will recommend that a remedy be provided.

Conclusions of Law

1. Respondents ARAMARK Educational Services, Inc., ARAMARK d/b/a Harry M. Stevens, Inc., and ARAMARK Sports, Inc. are employers engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.
2. UNITE HERE Local 26 is a labor organization with the meaning of Section 2 (5) of the Act.
3. By unilaterally implementing and enforcing their changes in the no-match letter policy, including suspending employees as a result, Respondents violated Section 8 (a) (1) and (5) of the Act.
4. Respondents' unfair labor practices affect commerce within the meaning of Section 2 (6) and (7) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondents having discriminatorily suspended their employees,[4] they must rescind the suspensions and offer the affected employees reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Respondents should additionally remove any reference to the unlawful suspensions from the personnel records of the affected employees and notify them in writing that this has been done, and that the unlawful suspensions will not be used against them in any way in the future.[5]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

The Respondents, ARAMARK Educational Services, Inc., Cambridge, Massachusetts, and ARAMARK d/b/a Harry M. Stevens, Inc. and ARAMARK Sports, Inc., of Boston, Massachusetts, their officers, agents, successors, and assigns, shall

1. Cease and desist from:

a. Unilaterally and without affording the Union notice and the opportunity to bargain, implementing and enforcing, including suspending employees, its no-match letter policy.

b. In any like or related manner, interfering with, coercing or restraining employees in the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

a. Within 14 days from the date of the Board's Order, rescind the suspensions of Gorge Aquirre, Carmen Plasencia, Consuelo Buenrostro, Wilson Melgar, Alejandro Silva, Ana Vargas, Maria Salmoran, Ana Martinez, Silvia Vargas, Sandra Montoya, Agnaldo Arruda, James Coakley, Maria Martinez, Dario Roldan and Jose Luissy and offer these employees full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

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[4] Respondents' records indicate that in about October and November, several employees were indefinitely suspended for violating the new no match policy. At MIT Gorge Aquirre and Carmen Plasencia were suspended on about October 5. At Hynes, Consuelo Buenrostro, Wilson Melgar, Alejandro Silva, Ana Vargas, Maria Salmoran, Ana Martinez, Silvia Vargas, Sandra Montoya, Agnaldo Arruda, James Coakley and Maria Martinez were suspended. At Fenway, about October 1, Dario Roldan and Jose Luissy were suspended.

[5] The matter of the immigration status of these employees was not sufficiently litigated in the trial on the unfair labor practices. It can be litigated at the compliance stage.

[6] 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 Gorge Aquirre, Carmen Plasencia, Consuelo Buenrostro, Wilson Melgar, Alejandro Silva, Ana Vargas, Maria Salmoran, Ana Martinez, Silvia Vargas, Sandra Montoya, Agnaldo Arruda, James Coakley, Maria Martinez, Dario Roldan and Jose Luissy whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

c. Within 14 days from the date of the Board's Order, remove from their files any reference to the unlawful suspensions and within 3 days thereafter notify the employees in writing that this has been done and that the suspensions will not be used against them in any way.

d. 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, social security payment 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.

e. Within 14 days after service by the Region, post at their facilities in Cambridge and Boston, Massachusetts, copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region One, after being signed by the Respondents' authorized representative, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondents have gone out of business or closed the facilities involved in these proceedings, the Respondents shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 27, 2006.

f. 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.

Dated, Washington, D.C. September 30, 2009

_____
Wallace H. Nations
Administrative Law Judge

[7] 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, Unilaterally and without affording the Union notice and the opportunity to bargain, implement and enforce, including suspending employees, our no-match letter policy.

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

WE WILL rescind the suspensions of Gorge Aquirre, Carmen Plasencia, Consuelo Buenrostro, Wilson Melgar, Alejandro Silva, Ana Vargas, Maria Salmoran, Ana Martinez, Silvia Vargas, Sandra Montoya, Agnaldo Arruda, James Coakley, Maria Martinez, Dario Roldan and Jose Luissy and offer these employees full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE Will make Gorge Aquirre, Carmen Plasencia, Consuelo Buenrostro, Wilson Melgar, Alejandro Silva, Ana Vargas, Maria Salmoran, Ana Martinez, Silvia Vargas, Sandra Montoya, Agnaldo Arruda, James Coakley, Maria Martinez, Dario Roldan and Jose Luissy whole for any loss of earnings and other benefits suffered as a result of our discrimination against them, with interest.

WE WILL remove from their files any reference to the unlawful suspensions and notify them in writing that this has been done and that the suspensions will not be used against them in any way.

ARAMARK Educational Services, Inc.

ARAMARK d/b/a Harry M. Stevens, Inc.
ARAMARK Sports, 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.

10 Causeway Street, Boston Federal Building, 6th Floor, Room 601

Boston, Massachusetts 02222–1072
Hours of Operation: 8:30 a.m. to 5 p.m.
617-565-6700.

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, 617-565-6701.