UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

ACTION CARTING ENVIRONMENTAL SERVICES, INC.,

Case: 22-CA-28197
and Case: 22-CA-28211

Case: 22-CA-28337

LOCAL 813, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

LOCAL 621, UNITED WORKERS OF AMERICA

and Case: 22-CB-10530

SHAFI ADSON, an Individual

RESPONDENNT LOCAL 621, UNITED WORKERS OF AMERICA'S
STATEMENT OF EXCEPTIONS
TO PARTS OF THE
ADMINISTRATIVE LAW JUDGE'S DECISION

Pursuant to Section 102.46 of the Board's Rules and Regulations, Respondent Local 621, United Workers of America (hereinafter variously referred to as "Local 621", "621" or "Respondent Union") excepts, in part, to the Decision of Administrative Law Judge Stephen Davis, (hereinafter referred to as "ALJ") which issued on May 8, 2009. In general Local 621 excepts to those portions of the ALJ's decision upon which the ALJ relies to recommend that certain objections be sustained and a new election ordered. It is axiomatic in an R case that a new election will only be ordered based upon a finding that objections filed by a party have merit. While the instant case involves a number of unfair labor practices, only a limited number of

those unfair labor practices have been raised by Local 813 as objections and found by the ALJ to have merit, to wit, the unlawful discharge of Shafi Gadson (hereinafter "Gadson") and the unlawful transfer of Frank Madden ("Madden"). It is respectfully submitted that all of the other allegations and findings of unfair labor practices are extraneous to the determination of whether a new election should be run. Having said that, the specifics of the exceptions to the Decision are as follows.

EXCEPTIONS

1. The ALJ erred in finding that Shafi Gadson (hereinafter "Gadson") was taken off his regular route and demoted to shape worker in December, 2007. D. 25 Lines 48 – 50.[1] This finding contradicts the ALJ's own recitation of Gadson's testimony. D. 9, Lines 11 – 17. The ALJ finds that Gadson identifies himself as a "swing man" as early as July, 2007 (see also Tr. 396, line 25, Tr. 397, lines 7 -9) although no one told him he was a "swing man" (Tr. 451, lines 22 – 240. At D. 9, line 12, the ALJ concedes that Shafi himself testified that a "swing man" does not have a regular route (see also Tr. 452, lines 14 – 15). While Gadson described a "swing man" as a "permanent worker" and one who works every day, the ALJ concedes that Gadson testified that he did not go out on a truck every day beginning in July 2007 (D. 9 lines 11 – 14). In his decision, the ALJ neglects to point out that Shafi admitted that beginning in July, 2007, through his cessation of work at Action, there were days he showed up for work, was not sent out on a truck and he admitted that he was not paid for those days. Tr. 452, lines 21 – 23. See also GC. Exh. 12, which shows that beginning in July, 2007, Gadson was rarely, if ever, paid five days a week. It is respectfully submitted that the job Gadson described as a "swing man" was, in reality, a "shape up" job. This is also corroborated by R 621 Exh. 1, which identifies Gadson as a "shape

[1] References to the Decision, Transcript, General Counsel's Exhibits, Respondent Action's Exhibits, Respondent 621 Exhibits and Charging Party 813's Exhibits, if any, are designated herein as "D", "Tr", "GC Exh.", "R Act. Exh.", "R 621 Exh." And "CP 813's Exh." Respectively.

employee" as of July or August, 2007, not a "swing man". It is clear that Gadson was demoted to a "shape up" job in the summer of 2007, not December 2007 as the ALJ found.

2. The ALJ erred in finding that Gadson was unlawfully discharged and that the Employer had not met its *Wright Line* burden of proof. D. 26, Lines 32 – 33. It is respectfully submitted that Counsel for the General Counsel failed to introduce any evidence to substantiate key criteria established in *Wright Line*, 251 NLRB 1083 (1980). In that case the Board held that General Counsel is required to prove by a preponderance of the evidence that the employee concerned was engaged in union activity, that the Employer was aware of that union activity and that it was a motivating factor in the discharge (in this case). It is respectfully submitted that the record herein is devoid of any credible evidence that Gadson engaged in any union activity prior to his discharge and is devoid of even a scintilla of evidence that the Employer was aware of any union activity on Gadson's part prior to his showing up as an observer for Local 813.

3. The ALJ erred in crediting the testimony of Gadson in general. Even a cursory reading of Gadson's testimony can leave no doubt that his testimony is not credible. As evidenced in paragraph 1, the ALJ in his decision points out significant contradictions in Gadson's testimony. In addition, Action's records and Gadson's own testimony regarding those records establish beyond peradventure that Gadson was stealing time from his Employer. A comparison of R. Act. Exh. 11, which is a report of the days Gadson "hand scanned" himself into the employer's payroll system as having worked, to R. Act. Exh. 7, which are the crew sheets which show which employees actually worked on those same days, proves beyond any doubt that Gadson was scanning in and getting paid for days he did not work. He was unable to explain his actions in this regard. For these reasons, it is respectfully submitted that the entirety of Gadson's testimony is not entitled to credit.

4. The ALJ erred in finding that the transfer of Madden to Brooklyn was unlawful D. 28, lines 50 – 51. In order for the Employer's transfer of Madden to Brooklyn to have been unlawful, pursuant to the guidelines of *Wright Line*, supra, the employee involved must have been involved in union activity, the Employer must have been aware of that activity and the Employer's knowledge of that activity must have motivated the transfer. However, the record is once again devoid of any evidence that Madden engaged in any significant protected union activity and there is no evidence that the Employer was aware of such activity.

Furthermore, the Employer established by the weight of the evidence that regardless of his union activity, Madden would have been transferred anyway. While the ALJ's decision exhibits some confusion[2] regarding the "veggie routes", the routes involved in this exception, the record reflects that there were two such routes, the Manhattan route and the Brooklyn route, both of which were initially dispatched from the Newark facility. D. 15, 24 -25. The Manhattan route was known as 802; it was the longer of the routes and was initially driven by Madden. Tr. 565. The Brooklyn route was the shorter route and was driven by a Mack Johnson (hereinafter "Johnson"). Tr. 568. Subsequent to the purchase of the Waste Management accounts, the Employer made a decision to transfer the Brooklyn "veggie route" to the Brooklyn facility while the Manhattan "veggie route" would continue to be dispatched from Newark. Tr. 555. See also D. 15 lines 49 – 52, D. 16, lines 1 – 7.

There is no question that Johnson, hired to work at Action in 2004, had greater seniority than Madden who had been hired in June, 2006. D. 14, line 19, Tr. 117. Madden conceded this fact at the hearing. D.15, lines 42 – 43. It is undisputed that Johnson wanted to remain in Newark, in part because it was closer to his home and in part because he had heard the Employer

[2] For example, at D. 15, lines 25 – 26, the ALJ states that Madden's route was the larger of the two but on the very next page the ALJ finds that Johnson was assigned to Madden's route **"which had fewer stops and was completed earlier"** D. 16, lines 30 – 31 (emphasis added).

was purchasing a new truck to be used on the Manhattan "veggie route" which was run out of Newark. Citing his greater seniority, Johnson asked Rizzo to give him the "veggie route" run out of Newark. Tr. 688, 691, 692. The Employer agreed and, according to the decision, Madden agreed that Johnson should have gotten the Newark route. D. 16, lines 30 -34. As the only other "veggie route" was run out of Brooklyn and Madden was the only other driver of the "veggie routes" he had to be transferred to Brooklyn. It is respectfully submitted that the Employer met the burden imposed by *Wright Line*, supra, and proved that Madden would have been transferred to Brooklyn (and thereafter the Bronx) even in the absence of his protected activities.

5. The ALJ erred in recommending that Objection #2 concerning the payment of safety bonuses be sustained. D. 34, lines 44 – 46. It is beyond dispute that the Employer had a long standing policy of granting safety bonuses and that there was a valid legitimate reason for the policy. D. 33, lines 42 – 48, D. 34, lines 1 – 4. It is respectfully submitted that pursuant to the holding in *Mercy Hospital*, 338 NLRB 545, (2002), the granting of the safety bonus in this case was not objectionable.

6. The ALJ erred in recommending that Objection #6 concerning the discharges of Gadson and the transfer of Frank Madden ("Madden") be sustained. D. 36, Lines 35 – 40. These two subjects were treated previously in Paragraphs 2 and 4, respectively.

For the reasons stated herein, the ALJ's decision concerning the unlawful discharge of Shafi Gadson, the unlawful transfer of Frank Madden and the recommendations that Objections #2 and 6 herein be sustained should be reversed and the election results certified.

Dated: June 24, 2009

Respectfully submitted,

O'Connor & Mangan, P.C.

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CERTIFICATION

I hereby certify that I have e-filed and served by e-mail the foregoing exceptions on Counsel for the parties and by depositing a true copy thereof in the US mail addressed to Shafi Gadson an individual party at the address provided to me by the Board today.

Dated: June 25, 2009

Bryan C. McCarthy