

THE AMERICAN NATIONAL RED CROSS, GREAT LAKES BLOOD SERVICES REGION and MID-MICHIGAN CHAPTER,

Respondent ANRC – Region
Respondent ANRC – Chapter,

and

LOCAL 459, OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, AFL-CIO,

Charging Union OPEIU,

and

LOCAL 580, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Charging Union Teamsters.

Cases 7-CA-52033
7-CA-52288
7-CA-52544
7-CA-52811
7-CA-53018

Cases 7-CA-52282
7-CA-52308
7-CA-52487

**AFFIDAVIT OF LESLIE A. SAMMON
IN SUPPORT OF RESPONDENTS’ MOTION FOR RECONSIDERATION
AND ACCEPTANCE OF RESPONDENTS’ REPLY BRIEF**

STATE OF WISCONSIN)
) ss.
COUNTY OF DANE)

Leslie A. Sammon, being first duly sworn, on oath deposes and says:

1. That she is an attorney duly licensed to practice law in the State of Wisconsin and is engaged in the practice of law at 2 East Mifflin Street, Post Office Box 1767, Madison, Dane County, Wisconsin in the firm of Axley Brynerson, LLP, co-counsel for Respondents, American National Red Cross, Great Lakes Blood Services Region, and American National Red Cross, Mid-Michigan Chapter (hereinafter “Respondents”), in the above-captioned matter.

2. That I make this affidavit in support of Respondents’ Motion for Reconsideration and Acceptance of Respondents’ Reply Brief.

3. That on May 5, 2011, Administrative Law Judge Jeffrey D. Wedekind issued a Decision and Order in the above-captioned matter.

4. That on May 27, 2011, Counsel for the Acting General Counsel (hereinafter "General Counsel") requested and was granted an extension until June 30, 2011 to file exceptions to the ALJ's Decision; said motion was not opposed by Charging Union, Local 459, Office and Professional Employees International Union, AFL-CIO ("Charging Union OPEIU") or Charging Union Local 580, International Brotherhood of Teamsters ("Charging Union Teamsters").

5. That on June 30, 2011, General Counsel, Charging Party OPEIU and Respondents filed and served upon the respective parties exceptions to the Decision and Order issued on May 5, 2011, along with supporting briefs.

6. That on July 1, 2011, General Counsel, by Dynn Nick, contacted the law offices of Axley Brynelson, LLP requesting an extension until on or about August 5, 2011, to file answering briefs in order to accommodate the vacation schedule of one of the General Counsel.

7. That the due date for filing answering briefs to the respective parties' exceptions and supporting briefs was extended to August 4, 2011.

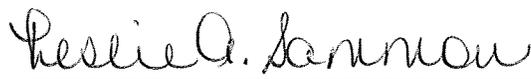
8. That on August 4, 2011, Respondents were served with answering briefs filed and served by Charging Union OPEIU and General Counsel in response to Respondents' exceptions and supporting brief.

9. That I was assigned responsibility to file and serve Respondents' reply brief in response to the answering briefs filed by Charging Union OPEIU and General Counsel.

10. That pursuant to Section 102.46(h) of the Board's Rules and Regulations, reply briefs were due on August 18, 2011.

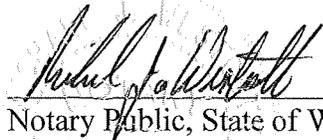
11. That I intended to file Respondents' reply brief using the Board's e-filing system on or before 11:59 p.m. on August 18, 2011, but that I mistakenly failed to account for the fact that the receiving office in Washington, D.C. is on Eastern Standard Time rather than Central Standard Time, the time zone from which I was filing the reply brief.

12. That Respondents' reply brief was e-filed at 12:33:15 AM, Eastern Standard Time on August 19, 2011 (attached as Exhibit A is a copy of the E-filing receipt with confirmation number) and was served by electronic mail on the parties of record at 12:42 AM Eastern Standard Time on August 19, 2011 (attached as Exhibit B is a copy of the e-mail serving the brief).



Leslie A. Sammon

Subscribed and sworn to before me
this 22nd day of August, 2011.



Notary Public, State of Wisconsin

My Commission expires: permanently

Leslie A. Sammon

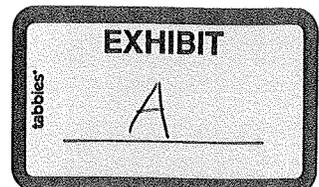
From: ExecSec@nlrb.gov [e-Service@nlrb.gov]
Sent: Thursday, August 18, 2011 11:35 PM
To: Leslie A. Sammon
Subject: RE:07-CA-052033-Reply Brief to Answer to Exceptions, 07-CA-052033-Service Documents
Confirmation Number: 307577

You have successfully accomplished the steps for E-Filing document(s) with the NLRB Office of the Executive Secretary. This E-mail notes the official date and time of the receipt of your submission. Please save this E-mail for future reference.

As a courtesy, a notification of this electronic filing will be sent to all parties in this case who have registered for the Board's E-Issuance/E-Service Pilot Program. ****PLEASE NOTE - This courtesy notification does not constitute service on those parties pursuant to Board Rules & Regulations Sections 102.114(a) or 102.114(i). You must take action to meet the requirements of these Rules to properly effectuate service.**

Date Submitted: 8/19/2011 12:33:15 AM (GMT-05:00) Eastern Time (US & Canada)
Case Name: American Red Cross
Case Number: 07-CA-052033
Filing Party: Charged Party / Respondent
Name: Sammon, Leslie
Email: lsammon@axley.com
Address: 2 East Mifflin Street, Suite 200
Madison, WI 53703
Telephone: (608)283-6798 Ext:
Fax:
Attachments: Reply Brief to Answer to Exceptions: Respondents' Reply Brief (00919794).PDF, Service Documents: Certificate of Service Documents (Reply Brief) (00919793).PDF

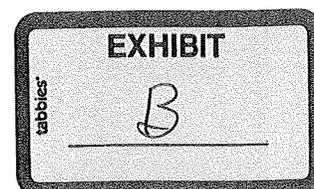
DO NOT REPLY TO THIS MESSAGE. THIS IS A POST-ONLY NOTIFICATION.
MESSAGES SENT DIRECTLY TO THE EMAIL ADDRESS LISTED ABOVE WILL NOT BE READ.



Leslie A. Sammon

From: Leslie A. Sammon
Sent: Thursday, August 18, 2011 11:42 PM
To: 'Dynn.Nick@nlrb.gov'; 'Robert.Drzyzga@nlrb.gov'; 'pappaslawoffice@comcast.net'; 'waynearudellplc@yahoo.com'; 'Batten, Fred W.'
Cc: Michael J. Westcott; Jean C. Karls
Subject: Case No. 7-CA-52033, et al.
Attachments: Certificate of Service Documents (Reply Brief) (00919793).PDF; Respondents' Reply Brief (00919794).PDF
Attached is Respondents' Reply Brief and Certification of Service filed with the NLRB.

Leslie A. Sammon
AXLEY BRYNELSON, LLP
Direct Dial: 608-283-6798
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8/22/2011



AXLEY BRYNELSON, LLP

• • • • •
LESLIE A. SAMMON
lsammon@axley.com
608.283.6798

August 18, 2011

VIA E-FILING & FIRST-CLASS MAIL

Mr. Lester A. Heltzer
Executive Secretary
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570-0001

RE: Respondent: American National Red Cross, Great Lakes Blood Services Region
and Mid-Michigan Chapter
Charging Unions: OPEIU, Local 459 and Teamsters, Local 580
Case Nos. 7-CA-52033, et al. (Consolidated Cases)
Our File: 7862.64193

Dear Mr. Heltzer:

Enclosed for filing are Respondents' Reply to Answering Briefs of Office and Professional Employees Local 459 and Counsel for the Acting General Counsel and a Certificate of Service.

By copy of this letter, service is being made on all parties of record.

Sincerely,

AXLEY BRYNELSON, LLP

Leslie A. Sammon

Enclosures

cc: Parties of Record (see attached Certificate of Service)

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.**

THE AMERICAN NATIONAL RED CROSS,
GREAT LAKES BLOOD SERVICES REGION and
MID-MICHIGAN CHAPTER,

Respondent ANRC-Region
Respondent ANRC-Chapter,

and

LOCAL 459, OFFICE AND PROFESSIONAL
EMPLOYEES INTERNATIONAL UNION, AFL-CIO,

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CASES 7-CA-52282
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 7-CA-52487

CERTIFICATE OF SERVICE

I, Leslie A. Sammon, an attorney in the offices of Axley Brynson, LLP, hereby certify that on August 18, 2011, I electronically filed the Respondents' Reply to Answering Briefs of Office and Professional Employees Local 459 and Counsel for the Acting General Counsel in the above-referenced matter with Lester A. Heltzer, Executive Secretary of the National Labor Relations Board, using the NLRB E-Filing System and that I electronically (via e-mail) served copies of same on the parties of record as follows:

Mr. Lester A. Heltzer
Executive Secretary
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Leslie A. Sammon
Leslie A. Sammon

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.**

THE AMERICAN NATIONAL RED CROSS, GREAT
LAKES BLOOD SERVICES REGION and MID-
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**REPLY BRIEF OF RESPONDENTS, THE AMERICAN NATIONAL RED CROSS,
GREAT LAKES BLOOD SERVICES REGION, AND THE AMERICAN NATIONAL
RED CROSS, MID-MICHIGAN CHAPTER TO ANSWERING BRIEFS OF
OFFICE AND PROFESSIONAL EMPLOYEES LOCAL 459 AND COUNSEL FOR THE
ACTING GENERAL COUNSEL**

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ARGUMENT

I. CHANGES TO THE 401(k) SAVINGS PLAN AND RETIREMENT SYSTEM PLAN WERE MADE CONSISTENT WITH THE RESPONDENTS' DUTY TO MAINTAIN THE STATUS QUO, AND THEREFORE, CONTRARY TO THE CONCLUSION REACHED BY THE ALJ, RESPONDENTS DID NOT VIOLATE SECTION 8(a)(5) OF THE ACT.

The well established guiding principle relevant to the changes made to the 401(k) Savings Plan and the Retirement System by Respondents is that when an alleged "change" actually maintains the status quo there is no violation of Section 8(a)(5). *The Post-Tribune Co.*, 337 NLRB 1279, 1280-1281 (2002). The arguments raised by OPEIU and General Counsel in their Answering Briefs in an effort to overcome this principle are primarily aimed at attacking Respondents' past practice of changes to the 401(k) Savings Plan and the Retirement System.

First, OPEIU and General Counsel assert that Respondent may not rely on its past practice of change because prior changes did not occur during a hiatus period. As set forth in Respondents' Brief in Support of Exceptions, there is nothing in the *Courier Journal* cases that should be read to support the proposition that the determinative factor supporting the Board's rulings was the presence of out-of-contract changes within the past practice. Indeed, the *Courier-Journal* cases recognize that whether unilateral changes occur inside or outside a contract is irrelevant to the rationale underlying the dynamic status quo according to past practices. Rather, the holdings of the *Courier-Journal* cases, and the established precedent upon which they are based, is that parties by their actions can create a past practice authorizing an employer's unilateral action, and that practice becomes the status quo. All of these decisions recognize that it is the *creation* of the practice that controls, and none turn on whether the *timing* of an occurrence of the practice happened to arise either inside or outside of the term of a contract. To the extent that the *E.I. DuPont* cases suggest otherwise, those cases are

distinguishable in that, unlike here, the past practices in those cases were established pursuant to general waiver language included in the management rights provisions of the expired contracts.

Second, OPEIU and General Counsel assert that the changes made in May, 2009 and July, 2009 are not sufficiently similar to changes made in the past such that the previous changes do not constitute a past practice of change privileging Respondents' actions. The assertion lacks legal and evidentiary support. OPEIU cites two cases in support of its assertion. Both cases are distinguishable from the facts here. In *Palm Beach Metro Transportation, LLC*, 357 NLRB No. 26, slip op. at 1 (July 26, 2011), the employer's past practice defense failed because the unilateral reduction in hours and days of work was, as the Board stated, a "first-time event" with no established past company practice for dealing with it. Here, far from being a first-time event, and as the ALJ recognized, the record is replete with numerous changes to both the 401(k) Savings Plan and the Retirement System plan.¹ (ALJD, p. 24, l. 32-45). *Caterpillar, Inc.* is likewise distinguishable. In that case, unlike here, the record did not establish the specific circumstances surrounding the prior changes to the benefit program because the respondent did not present evidence of the dates on which prior changes occurred or the number or frequency of the changes. *Caterpillar, Inc.*, 355 NLRB No. 91, slip op. at 2 (August 17, 2010). Also, contrary to the record in this case, the past changes in *Caterpillar, Inc.* lacked any thread of similarity to the changes at issue in the case. *Id.* at 2-3. The change made to the 401(k) Savings Plan in May, 2009 was a change to the matching contribution. A similar change, i.e., a change to the matching contribution, was made in July, 2005 when the matching contribution was increased. Likewise, the change made to the Retirement System plan in July, 2009 was a change

¹ OPEIU and the General Counsel attempt to minimize the past practice of change by characterizing many of the changes to the plans as "administrative" in nature. However, just as there is no principle that exempts administrative or procedural changes from the duty to bargain (*See Caterpillar, Inc.*, 355 NLRB No. 91, slip op. at 3), such changes are not exempted from the concept of past practice and neither OPEIU nor the General Counsel cites any law supporting such an exclusion.

to the eligibility requirements for participation (i.e., a hire date prior to July 1, 2009). A similar change, i.e., to the eligibility requirements for participating in the plan, was made in July, 2005, when a 1,000 hour requirement was added for participation.

The Respondents' changes to the 401(k) Savings Plan and the Retirement System reflect a pattern and practice of unilateral change. That pattern of change became a term and condition of employment that the Respondents were obligated to maintain as part of the status quo after expiration of the OPEIU contracts. Contrary to the ALJ's decision, none of the changes to the retirement benefits constitute a violation of Section 8(a)(5).

II. THE ALJ ERRED IN FINDING THAT THE CHAPTER'S CHANGES TO THE RETIREE MEDICAL PROGRAM VIOLATED SECTION 8(a)(5) OF THE ACT BECAUSE OPEIU'S CHARGE IS UNTIMELY AND OPEIU WAIVED ITS RIGHT TO BARGAIN REGARDING CHANGES TO THE RETIREE MEDICAL PROGRAM BY FAILING TO EXERCISE DUE DILIGENCE.

In arguing that OPEIU's charge was timely and that there was no waiver by inaction, OPEIU and General Counsel ignore the undisputed facts establishing a lack of reasonable diligence on the part of Rhines as it relates to the Chapter's Clerical/Warehouse bargaining unit. It is undisputed that Rhines received McGovern's announcement of the upcoming changes to the retiree medical program on October 28, 2008. It is also undisputed that he made no inquiry to the Chapter regarding whether the changes would be applied to the Chapter's Clerical/Warehouse bargaining unit. OPEIU and General Counsel speculate that had Rhines made such an inquiry he would have been advised that the changes did not apply to Chapter bargaining unit employees. There is no support for such a conclusion in the record. Moreover, even if OPEIU and General Counsel were correct, such speculation cannot be relied upon to excuse Rhines' lack of diligence because the law imposes upon OPEIU the obligation to make the inquiry and charges OPEIU with constructive knowledge in the absence of exercising

reasonable diligence. Whether or not Richmond had knowledge of the changes' impact on Clerical/Warehouse unit employees is of no legal significance in light of Rhines' lack of diligence.

The 10(b) limitations period commences when the charging party has actual or constructive notice of the conduct that constitutes the alleged unfair labor practice. *Concourse Nursing Home*, 328 NLRB 692, 694 (1999); *Carrier Corp.*, 319 NLRB 184, 193 (1995). "The concept of constructive knowledge incorporates the notion of due diligence, i.e., a party is on notice not only of facts actually known to it but also facts that with 'reasonable diligence' it would necessarily have discovered." *Nursing Center at Vineland*, 318 NLRB 337, 339 (1995). "A party will be charged with constructive knowledge of an unfair labor practice where it could have discovered the alleged misconduct through the exercise of reasonable diligence." *St. Barnabas Medical Center*, 343 NLRB 1125, 1126-1127 (2004). "While a union is not required to police its contracts aggressively in order to meet the reasonable diligence standard, it cannot with impunity ignore an employer or a unit ... and then rely on its ignorance of events occurring at the shop to argue that it was not on notice of an employer's unilateral changes." *Moeller Bros. Body Shop*, 306 NLRB 191, 193 (1992)(emphasis added). If a party "'ha[s] the means of discovery [of a fact] in his power, he will be held to have known it[.]" and 'whatever is notice enough to excite the attention and put the party on his guard and call for inquiry, is notice of every thing to which such inquiry would have led.'" See *Miramar Hotel Corp.*, 336 NLRB 1203, 1252 (2001), quoting *Wood v. Carpenter*, 1010 U.S. 135, 139 (1879); see also *Mathews-Carlen Body Works*, 325 NLRB 661, 662 (1998)(finding that had the union had exercised reasonable diligence the union would have become aware that respondent had not made fringe benefit payments on behalf of a majority of employees).

Rhines had actual knowledge of the proposed changes to the retiree medical program on October 28, 2008 when he received a copy of McGovern's communication. Additionally, to the extent Rhines had any question regarding whether the changes would affect the Clerical/Warehouse bargaining unit, the law charges him with constructive knowledge of those facts that he would have discovered through the exercise of reasonable diligence. OPEIU cannot claim ignorance of the change for purposes of Section 10(b) when it made no effort to inquire further upon being placed on notice of the upcoming changes on October 28, 2008.

Reliance on Rhines' inquiries to the Region's HR Supervisor, Smelser, concerning retiree medical program changes is misplaced. The record clearly establishes that the Chapter's Clerical/Warehouse unit is a separate bargaining unit from either of the Region's OPEIU units with its own separately bargained collective bargaining agreement. The record further establishes that Smelser has never been an employee of the Chapter and has no authority to act on behalf of the Chapter. (Tr. 1249-50.) There is no reason to treat an inquiry made to the Region concerning benefits applicable to Region bargaining unit employees as an inquiry made to the Chapter regarding its employees. Contrary to the ALJ's conclusion and the arguments by OPEIU and General Counsel, OPEIU should be charged with constructive knowledge of the changes by virtue of its own failure to exercise reasonable diligence to learn of the alleged violation relating to the Chapter.

Even if the charge were timely, the same lack of diligence on the part of OPEIU as it relates to the retiree medical program changes in the Clerical/Warehouse unit dictates a finding that OPEIU waived any right it had to bargain regarding the changes. Again, the ALJ, OPEIU and General Counsel improperly rely on Rhines' inquiries to the Region to support the finding

that there was no waiver despite Rhines admission that he did not make any request to the Chapter to bargain over the changes.

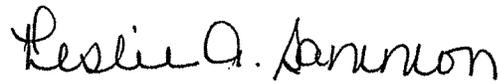
CONCLUSION

For all of the foregoing reasons and for the reasons set forth in Respondents' Answering Brief, Respondents request that the Board grant Respondents' Exceptions to the ALJ's Decision and Order and that the Board reverse the judge's rulings, finding and conclusions relating to said Exceptions.

Dated: August 18, 2011.

Respectfully submitted,

AXLEY BRYNELSON, LLP



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