UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SUBREGION THIRTY-THREE

AMERICAN RED CROSS, HEART OF AMERICA BLOOD SERVICES REGION	)	
Respondent	)	
and	)	**Case No. 33-CA-15821, 15896, 16144, 16204, 16207, 16229, 16246, 16247, and 16248**
AMERICAN FEDERATION OF STATE, COUNTY, and MUNICIPAL EMPLOYEES COUNCIL 31, AFL-CIO,	)	
Charging Party	)	

BRIEF OF CHARGING PARTY IN ANSWER TO EXCEPTIONS

I. Statement of the Case

This cause came to trial before Administrative Law Judge Arthur J. Amchan (hereinafter referred to as "ALJ") on a Seconded Amended Complaint alleging that the Respondent, American Red Cross, Heart of American Blood Services Region, (hereinafter "Employer" or "Red Cross") had made several unilateral changes to terms and conditions of employment of bargaining unit employees beginning in 2009 and by these changes and other actions throughout the process of certification and bargaining had failed to bargain in good faith with the Charging Party, American Federation of State, County, and Municipal Employees Council 31, (hereinafter "Union" or "AFSCME") through May 9, 2011.

On November 4, 2011 the ALJ issued a decision on the

Complaint (hereinafter referenced as "ALJD") finding that Respondent had violated Section 8(a)(5) and derivatively 8(a)(1) of the Act by unilaterally changing several terms and conditions of employment of bargaining unit members, failing to bargain with the Union over discipline of certain bargaining unit members, and failing to provide information regarding discipline and discharge of bargaining unit members. Based on said findings the ALJ ordered an appropriate remedy including an extension of the certification year. (ALJD pp. 16-17).

Respondent filed 52 exceptions to the ALJD and a brief in support of those exceptions. Generally, the Respondent's exceptions center on a few legal arguments. The first is that Respondent should be free to act as if no petition had been filed or election held during the period in which its appeal from the decision of the Regional Director was pending contrary to the principles definitively set forth in Mike O'Connor Chevrolet, 209 NLRB 701 (1974) enfd. denied on other grounds, NLRB v. Mike O'Connor, 512 F.2d 684 (8th Cir. 1975). Secondly, Respondent takes the position that any changes which were discussed prior to the certification of the Union, based on its first argument, cannot be found to be unilateral changes even if implemented subsequent to certification. Respondent also takes issue that the changes made were impermissible due to said changes either being allowed as part of the dynamic status quo or not being

substantial changes. Finally, Respondent argues that an extension of the certification year under Mar-Jac Poultry, 136 NLRB 785 (1962) is erroneous. The arguments of Respondent are unsupported and should be rejected by the Board.

II. Argument

A. The ALJ Correctly Determined that Unilateral Changes Made By Respondent During the Pendency of its Request for Review Were at its "Own Peril".

The first argument the Employer makes in its exceptions if that the ALJ incorrectly applied the principles of Mike O'Connor, infra., to the unilateral actions taken by Respondent prior to September 2010. Simply put, the Employer states that since it was not aware that the Union had majority status when changes were made to the 401(k), health benefits, pension fund, and job duties of Team Leaders since the ballots were impounded pending review of the decision of the Regional Director the rule should not apply. It has long been established that if an employer makes any unilateral change during the pendency of a representation proceeding it makes such change at its own peril. Mike O'Connor Chevrolet, 209 NLRB 701 (1974), enf. denied on other grounds, 512 F.2d 684 (8th Cir. 1975). The principle behind the Board's policy applies regardless of whether there are objections pending or the count is delayed due to the pendency of review by the Board; unilateral changes after an election "have

the effect of bypassing, undercutting, and undermining the status of the union as the statutory representative of employees in the event certification is issued". Id. at 703. See also NLRB v. Sandpiper, 824 F.2d 318 (4th Cir. 1987).

The ALJ correctly rejected the premise of Respondent that the principle behind the "at its own peril" doctrine is that majority status has been established in some way because a count has occurred. No such language is relied upon in any of the cases cited, the majority of which are prior to the Mike O'Connor decision. The point is that the status of representation has not been settled and therefore an Employer takes unilateral action at its own risk. Palm Beach Metro Transportation, LLC, 357 NLRB No. 26 (July 26, 2011). It is only logical that an employer cannot use the process of the Board to test an election and then claim that it could act as if a petition had not been filed and an election had not occurred until such time a certification issued particularly when it is the Employer who has invoked the process as noted by the Court in Sandpiper.

The argument advanced by Respondent that it would have been risking an 8(a)(2) violation if the Union did not have majority status and the Employer engaged in bargaining is in no way supported by the case law. First, the Employer is not obligated to bargain with the Union, it is obligated to refrain from changing conditions of employment without bargaining with the

Union. The case law focuses not on the Employer's failure to bargain but its change in conditions of employment without bargaining. Hence the "at its peril" rule. The peril is making the unilateral change when it is aware that its employees may have selected a representative for the purpose of bargaining which prevents such unilateral action.

Similarly Respondent's second part of this argument, that it made decision prior to the count and therefore cannot be held responsible for such changes, must also be rejected. It is just another way of saying that it was free to make unilateral changes until the ballots were counted. It should be noted that Respondent only discusses the changes made pursuant to the April 2009 memo; that is the 401K match suspension, the suspension of merit pay increases, and the upcoming major health care changes in connection with this argument.

Accordingly, the ALJ correctly applied the case law. Respondent had every right to pursue its appeal and did so. It should not now complain that somehow the failure to succeed should insulate its conduct in making major changes to the wages, hours, and working conditions of its employees who had chosen representation by the Union. The ALJ rejected this defense and the Board should as well.

B. The Benefit Changes Altered the Status Quo and Unilateral Implementation Violated the Act

Respondent also excepts to the decision of the ALJ that the that the unilateral changes made to the 401K, merit pay, and retirement plan were not unilateral changes prohibited by the Act in that the changes represented the status quo. The ALJ correctly applied the case law on this subject to determine that the changes made were not status quo. The Board has long recognized that there are changes which can be made unilaterally by an employer because such changes are regularly made as part of a long standing practice and thus making the change is the status quo. Katz v. NLRB, 396 U.S. 736 (1971). However whether a change is permissible requires the establishment of a long-standing practice as well as a the degree of discretion by the employer which takes the action beyond continuation of the status quo. Our Lady of Lourdes, 306 NLRB 340 (1992) and Katz, supra.

The evidence presented by the Employer does not support a long-standing practice to support any of the unilateral changes nor did the Employer establish that there was no discretion in its decision to implement the changes. As to the merit increases the Employer does not even argue that the status quo could apply to the suspension of merit increases or that increases had ever been suspended.

As the ALJ found the Red Cross had made changes in the past

to the pension, 401(k), and health plans although the evidence did not support any pattern or consistency to those changes. First as to the health benefits, the Employer determined that its plans should be national and eliminated several choices for the bargaining unit employees at issue. Some plans had been eliminated for the calendar year of 2008 but for 2010 all but the two national plans were eliminated. All choices included large increases to co-payments, co-insurance and out of pocked costs as well as a penalty for some married couples. The Employer admitted that the changes made to be effective in January of 2010 were more significant than changes made in prior years. (Tr. 939-941). In a case involving the Red Cross in Connecticut the ALJ found that the changes to heath care which occurred in January 2010 did not represent the status quo. American Red Cross, Blood Services, Connecticut Region JD(NY) 28-11 (August, 2011) pp. 36-38. The ALJ in that case specifically rejected the dynamic status quo argument and the application of the Post-Tribune case as the Respondent urges here.

Just like the changes made to the health care were substantial and not similar to changes made in prior years the elimination of a 401k match for current employees or exclusion of new employees from the pension plan were very different from the types of changes made in the past. The ALJ was justified in finding that these are discretionary changes on the part of the

Respondent. Indeed that was the testimony on the 401K plan from the Respondent's witness that there was discretion in determining a match. (Tr. 937). As the ALJ noted an employer cannot hide behind the rationale that there is some national plan it must follow as it did prior to the NLRB election. As the decision in Goya Foods of Florida, 347 NLRB 1118 (2006), notes the employer cannot just pretend that the Union does not exist. Further the ALJ correctly found that Respondent did not establish that there was an inability to negotiate regarding changes to the 401K or pension plan and Respondent does not cite to any testimony which would establish a different result. As the ALJ discussed given that the parties to this case were not operating under any contract language and that there was no evidence of any longstanding practice of changes; no dynamic status quo existed upon which the Employer can rely to defeat its obligation to refrain from making unilateral changes to its benefits.

C. The Reassignment of Duties from Team Leaders to Team Supervisors Violated the Act

Respondent characterizes the unilateral change of the duties assigned to Team Leaders to Team Supervisors, thus creating more Team Supervisors and fewer Team Leaders, as a complaint about promotions. It is not just an issue of promotion, it is an issue of reassignment of bargaining unit work and reduction of bargaining unit positions. Removal of work from the bargaining

unit and reassignment of work is clearly a mandatory subject of bargaining as discussed by the ALJ. ALJD pp 7-8. The arguments of Respondent that there was no showing of work reduction is without merit. The ALJ specifically discusses the reduction of duties for Team Leaders including monitoring blood drives and completion of reports at blood drives as well as the duties related to a team of employees. Thus, Respondent ignores the findings of the ALJ as to the reduction of duties and bargaining unit positions and the correct application of Board precedent.

In addition, the Board has held that it is not necessary to show a reduction in work or adverse effect on the unit to establish a violation of the Act. In Goya Foods, supra., the Board stated that establishment of a violation of 8(a)(5) does not require a showing of adverse impact on the unit. Although such a showing was made here, as in Goya, it is not necessary and the assignment of bargaining unit work to supervisory personnel violates the Act.

D. The Reassignment of Duties for Loading Trucks Violated the Act and Respondent Refused to Bargain

Respondent raises this issue but makes no real argument as to why the decision of the ALJ should not be affirmed by the Board. There is no question that the Employer changed the duties and schedules of both the Mobile Unit Supply Assistants and the Warehouse employees causing both a loss of hours to be worked and

a change in schedules. Respondent does not dispute this in their exceptions nor can they. ALJD p. 9.

Respondent claims in their exceptions that the Employer did not refuse to bargain about schedules while admitting that it did refuse to bargain about one employee. In fact, the Employer did refuse to rescind the work changes or bargain about the changes and refused to bargain about the change in schedule for the warehouse employee. (Tr. 335, 341-342). As the ALJ notes the fact that only one employee is impacted does not relieve the employer of its duty to bargain. ALJD p. 9. A three hour change in start time and the requirement of weekend work is material and the Employer was obligated to notify and bargain with the Union prior to implementation. There is no dispute that it did not do so. The ALJ findings should be affirmed.

E. The Charge in Connection with the Unilateral Change in Paid Time Off Accumulation Was Not Time-Barred and Constitutes a Unilateral Change

Respondent initially argues that the charge filed regarding the change in the policy of Respondent as to the number of paid time off hours which could be carried over was time-barred. Essentially, Respondent claims that the change in policy was announced in 2009 although the policy did not actually change until January 1, 2011. Respondent bases its argument not on the fact that the Union had notice but on the fact that employees

were provided notice and that should suffice. In making this argument Respondent cites several cases regarding notice to Union officers or stewards which does not apply here. There is no evidence that any employee was a designated Union representative that could be charged with receiving notice and the record does not support such a finding. The ALJ correctly determined that the Union was only provided notice of the change in the paid time off policy when it was actually implemented.

There is also no merit to the Respondent's argument that the change to the paid time off carry over was not a material change. The evidence presented was that several employees were directly impacted by losing time and that, as the ALJ found, all employees may be impacted by the reduction in the number of hours of paid time they can carry over from one year to the next. Losing a week of paid time is significant. Frankly, it is ludicrous to even argue that the loss of a week of pay or a week of vacation is not a significant reduction in wages and working conditions despite the attempt of Respondent to liken a week of vacation to a change in break time. The decision of the ALJ finding that the change in the paid time off policy was a violation of the Act should be affirmed.

F. The Assignment of Work Outside the Unit Violates the Act.

The record supports the findings of the ALJ that bargaining

unit work was performed by non-bargaining unit personnel. As argued in C above, the assignment of bargaining unit work outside the bargaining unit is a unilateral change in conditions of employment.

G. The ALJ Correctly Determined that Respondent Did Not Provide the Union With Information Regarding Discipline or Bargain About Discipline.

The ALJ found that the Employer failed to provide the Union with information regarding employee discipline despite repeated requests. The Respondent wants to place the burden of compliance on the Union without, as the ALJ appropriately determined, ever justifying its refusal to just comply with the request. Charging Party would note that the actual initial requests regarding discipline occurred prior to any bargaining sessions and continued through bargaining. Testimony at the hearing was that the Union continuously requested information regarding discipline and the Employer just as continuously refused to provide the information. (Tr. 353-354). As the ALJ determined it is the duty of the Employer to furnish the information or a valid reason for not providing the information. The Employer never established that providing the names of discharged employees was too burdensome.

The same is true of the discipline imposed on employees where the Employer refused to bargain. This decision of the ALJ

is clearly supported by the record testimony of Tim Lavelle. (Tr. 318-322). This testimony was not refuted. The decision of the ALJ on these violations should be affirmed.

H. The ALJ Properly Extended the Certification Year

Respondent argues that the ALJ improperly provided a remedy pursuant to Mar-Jac Poultry by extending the certification year for six months from the time Respondent rescinds its unilateral changes. Essentially, Respondent takes the position that an extension of the certification year is only appropriate in a case where there is a refusal to bargain or a finding of overall bad faith bargaining. The case law does not support such a finding.

In Covanta Energy, 356 NLRB No. 98 (2011) the Board adopted the finding of the ALJ to extend the certification year for a period of six months based on the conduct of the Employer in making unilateral changes in violation of the Act. The ALJ in that case discussed the impact of the unilateral changes on the Union's ability to bargain acknowledging that by making these changes the Employer has put the Union at a disadvantage in both the bargaining process and in the confidence of the bargaining unit. The same is true here. The unilateral changes made by the Employer effect every aspect of working conditions. Wages, benefits, job assignments, change in hours, reduction in vacation, along with failure to provide information on discipline and to allow representation at discipline meetings are all

hurdles which the Union must overcome. An extension of the certification year is necessary and appropriate to allow the Union time to bargain as provided for in the Act.

III. Conclusion

Based on the testimony and evidence of record as well as the cases relied upon by General Counsel, Charging Party, and the ALJ the Exceptions of Respondent should be rejected and the decision of the ALJ affirmed.

Respectfully submitted,
CORNFIELD AND FELDMAN

BY _____
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January 17, 2012

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CERTIFICATE OF SERVICE

GAIL E. MROZOWSKI, certifies that she served a copy of the foregoing POST HEARING BRIEF electronically on the following named parties of record on the 17th day of January, 2012:

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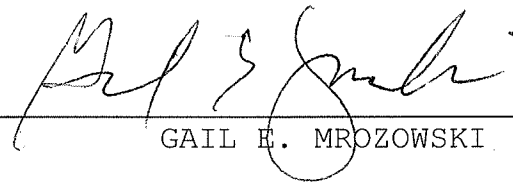

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