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IN BOUND VOLUMES

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Boston, MA

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

ARAMARK EDUCATIONAL SERVICES, INC.	Case 1-CA-43486
ARAMARK d/b/a HARRY M. STEVENS, INC.	Case 1-CA-43657
ARAMARK SPORTS, INC.	Case 1-CA-43658

and

UNITE HERE LOCAL 26

DECISION AND ORDER REMANDING

On May 13, 2008, Administrative Law Judge Wallace H. Nations issued the attached decision. The General Counsel filed exceptions and a supporting brief, in which the Charging Party joined, and the Respondent filed cross-exceptions and a supporting brief. The General Counsel and the Respondent each filed an answering brief and a reply brief.

The National Labor Relations Board[1] has considered the decision and the record in light of the exceptions and briefs,

[1] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act. See *New Process Steel v. NLRB*, ___ F.3d ___, 2009 WL 1162556 (7th Cir. May 1, 2009), *petition for cert. filed*, __ U.S.L.W.

and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order Remanding.

A.

The Respondents 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 Boston 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

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__ (U.S. May 27, 2009) (No. 08-1457); *Northeastern Land Services, Ltd. v. NLRB*, 560 F.3d 36 (1st Cir. 2009), *reh'g denied*, No. 08-1878 (May 20, 2009). But see *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, ___ F.3d ___, 2009 WL 1162574 D.C. Cir. May 1, 2009), *petition for reh'g filed*, Nos. 08-1162, 08-1214 (May 27, 2009).

[2] Unless otherwise stated, all subsequent dates are in 2006.

termination. In September, the Respondents began implementing this policy for the three Boston units, but failed or refused to bargain with Local 26 about the change.

The judge found that the enforcement of the no-match correction policy at the 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 the UNITE HERE International Union (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 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.[3]

[3] There are no exceptions to the judge's finding that the UNITE HERE constitution authorizes the International Union to bargain for its affiliated locals.

In October and November, while Ellis was negotiating with the International Union, the Respondents suspended employees who had 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 negotiations 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.

The judge concluded, "Though I believe that the Respondents may have violated the Act by their September conduct [initiating implementation without bargaining of the no-match policy], 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."

The General Counsel excepts to the judge's finding that any bargaining violations by the Respondents were "cured," inasmuch as the allegedly unlawful suspensions of employees were not rescinded. The General Counsel contends that the Respondents' unremedied unfair labor practices precluded a good-faith

bargaining impasse in January 2007, and thus that the Respondent was not privileged to implement its no-match policy. The General Counsel further contends that, even if the parties reached impasse in January, that impasse would not cure the Respondent's unilateral pre-impasse implementation, which included employee suspensions, or obviate the need to remedy that violation.

B.

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 Respondents 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.

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 the 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.

We acknowledge that Ellis offered uncontroverted testimony that the International Union agreed to the Respondents' proposal to freeze the process by suspending enforcement of the no-match policy pending further negotiations, without rescinding any previous action taken. However, Ellis also testified, on cross-examination, that the International Union representative did not say that, by agreeing to the freeze, the International Union was waiving any grievances or NLRB claims already filed by Local 26. Although the judge summarily stated that the Respondent "cured" any arguably unlawful conduct that occurred in September by agreeing to bargain with the International and then freezing implementation of the no-match policy during negotiations, he did not explain the legal basis for this finding. Nor did he

address the significance of the freeze agreement as it related to the legality of the suspensions in October and November.

In sum, the issues raised with respect to the Respondent's 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.[4]

ORDER

IT IS ORDERED that this proceeding is remanded to Administrative Law Judge Wallace H. Nations for further action consistent with this decision.

IT IS FURTHER ORDERED that the judge shall prepare and serve on the parties a supplemental decision setting forth findings of fact, and, if appropriate, revised conclusions of law and a new recommended Order. Following service of the

[4] We are not authorizing the judge to reopen the record to take additional evidence. With respect to the Sec. 8(a)(5) allegation involving Local 26's information requests, we affirm the judge's dismissal but rely only on the judge's finding that the Respondents, based on discussions with the International Union, furnished the same information to Local 26 that was furnished to the International Union, without objection. We hold all other issues in abeyance, including the Respondents' exceptions to the judge's findings that Local 26 had not waived its bargaining rights and that it timely requested bargaining, pending issuance of the judge's supplemental decision.

supplemental decision on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations shall apply.

Dated, Washington, D.C., June 3, 2009.

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Wilma B. Liebman, Chairman

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Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD