Labor & Employment Issues
In Focus

Pitta LLP
For Clients and Friends
July 27, 2023 Edition

TEAMSTERS, UPS, AND THE NATION'S ECONOMY DODGE A BULLET AS CONTRACT IS SETTLED

On July 25, 2023, the International Brotherhood of Teamsters and United Parcel Service ("UPS") reached a tentative agreement on a new collective bargaining agreement covering 340,000 workers, the single largest bargaining unit in the United States' private sector. The successful conclusion of what had been difficult negotiations avoids the first UPS strike in forty years and prevents possibly dire economic consequences for the nation, all while two of the entertainment industry's major unions, the Screen Actors Guild and the Writers Guild, remain out for what appears to be the long term.

The five-year agreement calls for no givebacks by workers and numerous economic and non-economic improvements, including:

- Wage increases: Existing full- and part-time UPS Teamsters ("Teamster") will receive $2.75 more per hour in 2023, and $7.50 more per hour over the length of the contract;
- Existing part-timers will be raised up to no less than $21 per hour immediately;
- General wage increases for part-time workers will be double the amount obtained in the previous UPS Teamsters contract — and existing part-time workers will receive a 48 percent average total wage increase over the next five years;
- Safety and health protections, including vehicle air conditioning and cargo ventilation;
- All UPS Teamsters would receive Martin Luther King Day as a full holiday for the first time;
- No more forced overtime on Teamster drivers' days off. Drivers would keep one of two workweek schedules and could not be forced into overtime on scheduled off-days; and
- The creation of 7,500 new full-time Teamster jobs at UPS and the fulfillment of 22,500 open positions, establishing more opportunities through the life of the agreement for part-timers to transition to full-time work.

Significantly, for the first time, rank and file members served on the UPS bargaining committee, lending a ground level voice representing the concerns of the workers to the leadership. On July 31, representatives of all UPS Teamster locals in the United States and Puerto Rico will meet to review the agreement and the ratification vote will be held electronically beginning August 3 and concluding August 22.

DOLLAR GENERAL DEPLOYED A "RAPID RESPONSE TEAM" TO COMMIT A SERIES OF UNFAIR LABOR PRACTICES IN FACE OF UNION ORGANIZING CAMPAIGN, ALJ FINDS

On July 17, 2023, an Administrative Law Judge ("ALJ") for the National Labor Relations Board ("NLRB" or "Board"), Region 1, determined that Dollar General violated the National Labor Relations Act ("NLRA" or "Act") by committing a series of unfair labor practices in the context of an organizing campaign at one of its Connecticut stores. Among the violations were firing a pro-union worker, illegally surveilling and interrogating employees, and threatening to close the store where a representation petition had recently been filed by United Food and Commercial Workers Local 371 ("Union").

The petition was filed in September 2021. The following day, employees found themselves joined by representatives from corporate headquarters, who began maintaining a daily presence alongside the workers, even helping employees restock items. This "rapid response team," which stayed in Connecticut and visited the store daily for the entire month leading up to the representation election, surveilled union activity, solicited grievances and granted benefits, and kept a log of who they believed was likely to support the union, color coding employees day-to-day as green (likely to reject the union), yellow (on the fence), and red (supportive of the union). The corporate representatives also at least implied that if the Union was successful in representing the workers at the store, headquarters would close the store. Finally, Dollar General fired the worker they believed was the ringleader of support for the Union.

In his decision, the ALJ called these practices "blatant hallmark unfair labor practices." The evidence reflected not only that these practices "involve[d] individuals at the highest levels of [Dollar General] management," but also that they were "committed pursuant to a corporate policy" of fighting organization efforts in stores.

As a remedy, the ALJ issued a broad cease and desist order requiring Dollar General to stop firing and discriminating against employees who engage in protected activity. It also ordered Dollar General to reinstate the fired employee with backpay and to remedy all direct or foreseeable pecuniary harms as a result of its unlawful actions. Dollar General also must physically and electronically post a notice of employees' rights to organize at all stores and facilities which were canvassed in relation to the representation campaign at the Connecticut store.

STARBUCKS' PITTSBURGH UNFAIR LABOR PRACTICES PARTIALLY RESOLVED

On July 13, 2023, Starbucks and Nancy Wilson, Regional Director of National Labor Relations Board ("NLRB" or "Board") Region 6-Pittsburgh, came to an agreement on an interim settlement after an NLRB Administrative Law Judge ("ALJ") found in June that Starbucks had violated multiple sections of the National Labor Relations Act ("NLRA" or "Act") in response to union organizing drives at four Pittsburgh cafes. Starbucks agreed in the settlement to both cease and desist from committing unfair labor practices ("ULPs") and to take certain affirmative actions to remedy the harm caused by ULPs already committed. This voluntary interim settlement is the result of an initiative that NLRB General Counsel Jennifer Abruzzo announced in October 2022 which aims to provide faster remedies for certain violations which require injunctive relief.

In his June 30, 2023 decision and order, ALJ Robert A. Ringler found that Starbucks had violated Section 8(a)(1), (3), and (5) of the NLRA in what he characterized as its "vivid response" to union organizing in its cafes. *Starbucks Corp. and Workers United A/W SEIU*, JD-40-23 (June 30, 2023) at *2. ALJ Ringler determined that Starbucks' illegal actions included, among others:

1. firing employees in response to union organizing;
2. making threats regarding loss of benefits and inability to transfer from union to non-union stores;
3. claiming that managers will no longer be able to handle scheduling issues or assist with bargaining unit work as needed;
4. unilaterally changing scheduling requirements without bargaining;
5. giving the impression that the company was surveilling employees' protected activity;
6. soliciting grievances about working conditions from employees;
7. removing employees' access to a GroupMe chat in response to union activity;
8. improperly interrogating employees about their views on the union; and
9. enforcing dress codes and attendance policies more strictly than it did prior to the unionizing effort.

The ALJ also dismissed three claims, including allegations that an anti-union bargaining unit employee was acting as an agent of the company; allegations that captive audience meetings violated the NLRA; and allegations that Starbucks had an obligation to bargain before taking disciplinary action before a contract was signed.

ALJ Ringler's order, which Starbucks agreed to follow in the interim settlement, requires Starbucks to cease and desist from engaging in the violative activities. Additionally, ALJ Ringler found that Starbucks' misconduct was so egregious that "a broad order requiring it to cease and desist 'in any other manner' from interfering with, restraining, or coercing its employees in the exercise of their Section 7 rights [was] warranted." *Starbucks Corp. and Workers United A/W SEIU* at *41. The order also

requires Starbucks to reinstate the four terminated employees, make the affected employees whole, revoke the unilateral schedule changes, post the order in all four cafes, and hold meetings during work hours to read the order to workers. Additionally, the order requires Starbucks to bargain with the union at one of the cafes.

General Counsel Abruzzo's new interim settlement initiative allows NLRB Regions to settle only the Section 10(j) aspects of a case (those that warrant injunctive relief) when settling the case overall is unlikely. These interim settlements allow for faster relief for injured parties and do not require Regions to pursue the cases in federal district court. This initiative is in line with several other policies from General Counsel Abruzzo that prioritize injunctive relief, particularly in cases involving threats and coercion.

THE HAVES AND THE HAVE NOTS: NLRB RULES TRUCKING COMPANY CAN INCREASE WAGES TO NONUNION WORKERS WHILE PUTTING A CONDITION ON THE INCREASE TO UNIONIZED WORKERS

On July 14, 2023, the National Labor Relations Board ("NLRB" or "Board") found that 10 Roads Express ("Employer"), a trucking company, did not violate the National Labor Relations Act ("NRLA" or "Act") when it offered a wage increase in 2021 due to "present market and labor shortages" but told the International Brotherhood of Teamsters, Local 727 ("Union") that it would have the unilateral right to repeal the increase. *10 Roads Express, LLC*, 372 NLRB No. 105 (July 14, 2023).

The Employer contracts with the U.S. Postal Service to haul mail and is subject to the Service Contract Act where the Department of Labor determines the wage floor for its employees. The Union represents employees in two of the Employer's five facilities around Chicago. During bargaining in August 2021, the Employer offered an "emergency" raise to the hourly wage to its unrepresented employees. The Employer asked the Union for consent to implement the increase for represented employees with the condition it can unilaterally implement "downward adjustment as market conditions change." The Union sought the wage increase without that condition and the Union argued that the Employer sought to condition acceptance of the emergency wage increase on accepting the Employer's then-initial contract proposal for wages. After back and forth, the sides did not agree, and the wage increase went into effect for nonunion employees. In September 2021, the Employer emailed unionized workers that the Union continued to reject the offer and urged them to vote to approve its latest contract proposal. The Union brought a charge to the Board on September 31, 2021. Eventually, a collective-bargaining agreement was agreed to between the Employer and Union in November 2021, and unionized workers received a lump-sum payment for the "emergency" wage increase they would have gotten.

The NLRB General Counsel and the Union argued that the Employer discriminated against the represented employees for their union activities under the Board's *Wright Line* analysis. To prove unlawful discrimination under *Wright Line*, the General Counsel must show that animus against the Union was a motivating factor in the Employer's conduct.

Here, the Board found that the Employer treated unionized and nonunionized employees the same, as it could unilaterally repeal the wage increase for nonunion employees as well. As for the Employer's email, the Board read it "as accurately updating employees on the then-existing status of the parties' negotiations regarding the wage increase[.]" The Board recognized that the withholding of an *existing* benefit from unionized employees, while continuing it for represented employees, is "inherently destructive" under the Act. Here, the Board noted that that is distinguishable where there is a new benefit and the Board found it was not withheld at all, as the Employer offered it with the same terms to nonunion employees.

The Board also rejected General Counsel's argument that the Employer refused to bargain in good faith. The Board takes a "totality of the circumstances" approach to determine lack of good faith. Here, the Employer made an offer regarding one subject, the wage increase, and it was an interim measure while bargaining for an initial contract was ongoing. Both sides admitted that at the time of the offer there was a labor shortage and a volatile economy, therefore the Employer had legitimate and *bona fide* reasons for its condition.

Finally, the Board found the offer was not a take-it-or-leave-it Hobson's choice but rather the Employer offered the Union the same increase with the same condition as it did nonunion employees and was willing to bargain over it.

To Our Clients: If you have any questions regarding any of the matters addressed in this newsletter, or any other labor or employment related issues in general, please contact the Pitta LLP attorney with whom you usually work.

To Our Clients and Friends: To request that copies of this publication be sent to a new address or fax number, to unsubscribe, or to comment on its contents, please contact Aseneth Wheeler-Russell at arussell@pittalaw.com or (212) 652-3797.