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VIA ELECTRONIC FILING

Thursday, 14 May 2009

Ronald Meisburg, General Counsel
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Washington, D.C. 20570-0001

Yvonne T. Dixon, Division of Appeals
Office of the General Counsel
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570-0001

RE: *NABET-CWA and its Local 16 (ABC, Inc.) <and> Brian Johnson*
Case Nos. 2-CA-39114, 2-CB-28174, and 2-CB-28175

Dear General Counsel Meisburg and Ms. Dixon:

Enclosed herein you will find Charging Party's Notice of Appeal in the above-referenced case.

Charging Party Brian Johnson, through his undersigned counsel, appeal from the Regional Director's dismissal of his above-referenced unfair labor practice charge.

I. FACTS OF THE CASE

Charging Party Brian Johnson is an independent contractor, performing work for ESPN, Inc. Johnson is occasionally hired on a daily basis to perform work for ABC, Inc., a wholly owned subsidiary of Disney Enterprises, Inc., a wholly owned subsidiary of the Walt Disney Company, Inc. ("ABC"), an employer, subject to the National Labor Relations Act. ABC has entered into a collective bargaining agreement ("CBA") with Respondents National Association of Broadcast Employees and Technicians, the Broadcasting and Cable Television Workers Sector of the Communication Workers of America, AFL-CIO, CLC ("NABET") and its Local 16.

The ABC/NABET CBA contains a forced-unionism clause providing that individuals who are "daily hires" of ABC shall "join the Union or pay the applicable dues and initiation fees after twenty (20) days of employment in one year or thirty (30) days employment in two consecutive years."

Johnson has **never** been in the employ of ABC for longer than a thirty-day period. Nevertheless, Local 16 — by letter dated 3 December 2008 — demanded that Johnson "complete the enclosed application forms in their entirety, including employment history, and return them to the union office," and that Johnson become a formal member of Local 16 as a condition of future daily employment with ABC. Local 16 also, by letter dated 5 January 2009, threatened, if Johnson did "not pay the applicable dues and initiation fees, the Union will exercise its rights under Article III of the NABET-CWA/ABC Master Agreement to notify the Company to terminate [his] employment."

Notwithstanding the CBA's forced-unionism clause and Local 16's demand and threat, Johnson is and has remained a nonmember of NABET and its Local 16.

II. THE CHARGE

Johnson filed his unfair labor practice Charge on or about 20 January 2009, alleging that Respondents violated the Act by entering into a forced-unionism clause unlawful on its face, § 8(a)(1) and (3) of the Act, 29 U.S.C. §§ 158(a)(1) and (3), and that the union Respondents illegally attempted to require that Johnson formally join the union as a condition of continued employment, all in violation of §§ 8(b)(1)(A), (2), and (3) of the Act, 29 U.S.C. §§ 158(a)(1), (2), and (3).

Specifically, ABC and NABET and its Local 16 entered into a CBA requiring that individuals who are "daily hires" of ABC shall "join the Union or pay the applicable dues and initiation fees after twenty (20) days of employment in one year or thirty (30) days employment in two consecutive years."

The second element of the Charges addresses the union Respondents' failure to satisfy their obligations under *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963), and *Communications Workers of America v. Beck*, 487 U.S. 735 (1988). **See** *California Saw and Knife Works*, 320 NLRB 224, 235 and n. 57 (1995).

III. THE REGIONAL DIRECTOR'S DISMISSAL

By letter dated 30 April 2009, the Regional Director dismissed the charges filed against ABC (Case No. 2-CA-39114) and against NABET and its Local 16 (Case Nos. 2-CB-21874 and 2-CB-21875) relating to the allegations that Respondents violated the Act by entering into an agreement that aggregates separate employments for ABC to satisfy the statutory grace period under the Act.

Even a cursory review of the Regional Director's dismissal reveals that the Regional Director either: (a) did not understand the allegation of the Charges; or (b) engages in artful evasions designed to avoid addressing the allegations of the Charges.

The Regional Director declares that the forced-unionism clause "is facially valid and this allegation is without merit" because, in 2007, "the parties' [forced-unionism] clause was amended to make clear that 'in each such instance all parties will continue to adhere to the statutory requirement that no person will be required to become a member in good standing earlier than thirty (30) days from the first date of hire.'"

The Regional Director therefore concludes that, since "Johnson first began working for [ABC] in approximately January of 2007 as a freelance graphic converter," and because Local 16's demand was not made until December 2008, "Johnson was not contacted about joining the Union [*sic*] until almost 2 years after he was first hired by the Employer," and "Thus the parties did not seek to apply the union security clause prior to thirty days from the date of hire." The Regional Director therefore concluded that "this allegation is without merit."

As to the *Beck* allegations, the Regional Director issued a conditional dismissal in part, declaring that "further proceedings on that portion of the charges filed [against NABET and its Local 16] would not effectuate the purposes and policies of the Act," apparently because "Local 16 has agreed to rescind" its demand letter to Johnson, because it took no further action against him, and because it has "agreed that all such letters will now include" notice of *General Motors* and *Beck* rights. Based upon these representations and conclusion, the Regional Director conditionally dismissed this element of the Charges, contingent on Local 16 "not engaging in the same or substantially similar conduct which would have resulted in the issuance of complaint, absent settlement, within six months of the date of this letter."

IV. ARGUMENT

While infrequent, this case does not present a question of first impression justifying the Regional Director's desperate efforts to avoid Board/judicial scrutiny: whether a union and employer may enforce a forced-unionism clause against an individual who has never been a statutory "employee" for a period longer than the thirty-day grace period under § 8(a)(3) of the Act, 29 U.S.C. § 158(a)(3).

However, either the Regional Director and the investigating agent seek to evade that issue, or they fail to understand the

core allegations of the Charges, which are nevertheless quite plainly stated therein: Johnson is a "daily hire" of ABC (" hired on a daily basis to perform work for Respondent ABC, Inc.," ABC Charge, ¶ 1), after which ABC has no authority or responsibility over him as an employer; he has never satisfied the minimum period of thirty days of employment with ABC during any of his many employments with ABC. The only possible circumstance under which he might be understood to have satisfied the thirty-day grace period under § 8(a)(3) of the Act is if a union and employer are permitted to aggregate separate **employments** to calculate the thirty-day period.

However, the first proviso to § 8(a)(3) permits only compulsory unionism clauses in which "***an employer*** ... require[s] as a condition of employment membership ... on or after the thirtieth day following the beginning of ***such*** employment." 29 U.S.C. § 158(a)(3), 1st proviso (emphasis added). Consequently, employees have a statutory, thirty-day grace period with every employment relationship.

An employee "'who has become delinquent in dues under a contract covering one bargaining unit cannot be denied employment under a contract covering another bargaining unit without affording him the statutory grace period in which to become current in his or her dues.'" *NLRB v. Iron Workers Local 433*, 767 F.2d 1438, 1442 (9TH CIR. 1985), **quoting** *Iron Workers Local 118*, 257 NLRB 564, 566 (1981), **enforced *per curiam***, 720 F.2d 1031 (9TH CIR. 1983). Moreover, an employee has a right to a new grace period when an employer rehires him unless the employee was delinquent in dues when previously employed by that employer. *Carpenters Local 740*, 238 NLRB 159, 160-61 (1978).

The agreement between ABC and NABET and/or its Local 16 require that individuals who are "daily hires" of ABC shall "join the Union or pay the applicable dues and initiation fees after twenty (20) days of employment in one year or thirty (30) days employment in two consecutive years." Thus, the agreement misrepresented employees' obligations, denying them the separate thirty-day grace period with each employment that is their statutory right, unless they were delinquent in their dues obligations in a prior employment with the same employer.

The Board held a similar clause facially invalid in *Theatrical Stage Employees Local 644*, 259 NLRB 1415 (1982). Amazingly enough, that case was prosecuted **in the very region in which these Charges were filed!** In *Local 644*, that clause required all cameramen employed by a producer to join the union "'not later than the 31st day following the beginning of their first employment,'" defined as "'the first such employment for producers under contract with Local 644.'" *Id.* at 1418. The

Board held that the clause "clearly contravenes the statutory intent of Section 8(a)(3) of the Act," because it does "not provide for the statutory 30-day waiting period before requiring union membership." *Id.* at 1416, 1422. With "respect to any employee who ... has completed 31 days of employment with any employer subject to its provisions, the provision constitutes a[n unlawful] closed shop and a bar to employment unless that employee continues to remain a member of the Union in good standing." *Id.* at 1422.

Rather than apply this authority, and the plain statutory language, the Regional Director ignored the plain meaning of the clause and the issue raised in the Charge to evade a question upon which Johnson quite clearly should prevail. Indeed, Johnson's Affidavit makes only the vaguest reference to the nature of his employment as a "daily hire," and no reference at all to the fact that each employment with ABC is separate, and of no more than two or three days' duration.

In short, the Regional Director's conclusion does nothing so much as beg the question before her.

Even more amazing is the Regional Director's seeming indifference to the union Respondents' responsibilities under *Beck* and *General Motors*. At this point, nearly a half-century after *General Motors* was decided, and more than twenty years after the Supreme Court issued its decision in *Beck* **against this very union, the Communications Workers of America**, it is long past the point where the Board's agents should be excusing refusal to comply with its requirements.

V. CONCLUSION

Based upon the foregoing, the dismissal and conditional dismissal of Johnson's unfair labor practice charges should be reversed, and the case remanded for issuance of complaint, absent settlement.

Very truly yours,

/s/ W. James Young

W. James Young
Attorney for Charging Party

WJY/lks
encl.
cc: Brian Johnson
Service List (Notice of Appeal only)
Celeste Mattina