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February 13, 2020

Carolyn McConnell
Board Agent
National Labor Relations Board, Region 19
2948 Jackson Federal Building
915 Second Avenue
Seattle, Washington 98174

RE: Teamsters Local 117 and Local 313 and United Natural Food, Inc.
Case No. 19-CB-250856
Our File No. 1082-3833

Dear Ms. McConnell:

As you know, we represent the International Brotherhood of Teamsters Locals 117 and 313 (Locals 313 and 117) (together, the Unions) in the above-referenced matter. For the reasons explained in our position statement dated December 17, 2019, United Natural Foods, Inc.'s (UNFI) unfair labor practice charges are meritless and must be dismissed. Since transmitting that position statement, we have learned of additional authorities which further confirm the principles and holdings cited therein. In an effort to assist the Region in its investigation of this case and the law that governs it, the Unions submit this supplemental position statement, which discusses those additional authorities.

DISCUSSION

I. Relevant case law

In the December 17, 2019 position statement, we explained that bargaining unit members' contractual rights to transfer between facilities and maintain their wages, benefits, and other uniquely personal terms of employment are "contractual vestiges" that survive the dissolution of the bargaining unit. We explained that the arbitration award in this case enforces only uniquely personal rights by applying previously negotiated contractual terms to a new location. We further explained that the enforcement of those personal rights through an arbitration award does not raise any representational issues that would give rise to an unfair labor practice. Nor do they involve discrimination in favor of union membership. A number of federal court decisions and Board memos, not previously cited, further support these propositions.

Indeed, the first of these cases, *UFCW v. Alpha Beta Co.*, 736 F.2d 1371 (9th Cir. 1984), directly refutes UNFI's theory and explains at length why its assumptions are ill-founded. As here, *Alpha Beta* involved post-transfer maintenance of benefits rights negotiated between a supermarket chain, Alpha Beta, and the unions representing the chain's employees. *Id*. at 1373. The relevant CBA provision stated that "[t]he Employer shall staff such new or reopened food market with a combination of both current employees and new hires . . . *Employees, who are thus transferred, upon whom contributions are made to the various trust funds shall continue to have contributions to the several trust funds made on their behalf in the same manner and in the same amount per hour as such contributions were made prior to their transfer.*" *Id*. (emphasis in original). While this language was in effect, Alpha Beta opened a new store in a location within one of the signatory union's geographical jurisdiction. *Id*. When Alpha Beta transferred approximately 30 employees from various preexisting stores covered by the CBAs,[1] the unions insisted that the company continue to make trust fund contributions for those employees pursuant to the maintenance of benefits provision. *Id*. Alpha Beta disagreed that it was obligated to do so, leading the unions to invoke the CBAs' grievance mechanism. *Id*. When Alpha Beta refused to arbitrate, the unions moved to compel arbitration in federal district court. *Id*. The district court granted summary judgment for the unions. *Id*.

On appeal to the Ninth Circuit, Alpha Beta argued for the first time that the maintenance of benefits provision could not be enforced because doing so "would infringe upon the [new store] employees' right to self-organization under section 7…." *Id*. at 1376. Thus, just as UNFI argues here, Alpha Beta contended that "by seeking to enforce the disputed provision the Local Unions are attempting to unlawfully represent the employees at the [new] store…'under the guise of contract interpretation….'" *Id*. at 1376, 1378 (quoting *Local No. 3-193 International Woodworkers v. Ketchikan Pulp Co.*, 611 F.2d 1295, 1299-1300 (9th Cir. 1980)). The Ninth Circuit rejected this theory.

Fundamentally, the court held, continuing to make contributions on behalf of transferees arriving from other bargaining units "does not accord the Local Unions representational rights over the employees at the [new] store, directly or indirectly." *Id*. at 1377. That was because the unions were seeking only to enforce rights that they had previously negotiated on their unit members' behalf and which "arose under an agreement in force at their initial place of work." *Id*. at 1378; *accord id*. ("As to the transferred employees, they have already been the beneficiaries of their unions' successful obtaining of benefits at their former work site."). Since, in this scenario, unions only sought to realize unit members' preexisting rights, it did not follow that unions were surreptitiously acquiring representational rights over a new group of employees without a showing of majority support. *Id*. Analytically, the Court found, requiring an employer to honor trust fund contribution commitments to unit members—who both bargaining parties anticipated in advance might transfer to other locations—is no different than requiring it to pay benefits "to employees who retire, quit or are discharged" through "retirement, pension, severance, unemployment, and other benefits to employees after they have left the bargaining unit." *Id*. at 1378-79. A contractual commitment to maintain contributions previous levels of trust fund contributions for transferees "should be treated in a similar manner." *Id*. at 1379. Therefore, requiring

[1] The facts of *Alpha Beta* echo the instant case in another respect. In staffing its new store, Alpha Beta refused to transfer employees from a location that was closing in an effort to "exert leverage against [one local union] in order to obtain the contract concessions it sought," a decision that the NLRB separately found violated Sections 8(a)(1) and (3). *See Alpha Beta*, 294 NLRB 228, 228, 243-44 (1989); *see also Alpha Beta*, 736 F.2d at 1380, n.16.

Alpha Beta to comply with this commitment "would [not] interfere with the self-organizational right of those, or any other, employees." *Id*. at 1377.[2]

The Ninth Circuit then specifically refuted the notion that the transfer of collectively-bargained contract terms is an all-or-nothing proposition (i.e., that the parties must import all of the CBAs terms to a new worksite or none at all):

> There is no reason in federal labor law or policy why employees may not be guaranteed that they will continue to receive *most* of the economic benefits they received prior to their transfer in the event that for any reason their work locale is changed. We recognize that there are some instances in which the affording of particular benefits might be unlawful, not because doing so constitutes a "sub rosa" effort to obtain representational rights, but for a wholly different reason. Benefits could not be continued or provided if doing so would create an irreconcilable conflict with, or adversely affect, the rights of the other employees in the unit to which the transfer is made. For instance, requiring super-seniority for transferred employees in the face of a collective bargaining agreement at their new unit that prohibited the granting of such seniority would be contrary to federal labor law. So, too, would a provision for continued representation by the transferred employees' former bargaining representative without a showing of majority status. However, these examples represent the exception to the rule.

Id. at 1379 (emphasis in original; citations omitted). Thus, unions and employers are free to negotiate for transferees to enjoy all those terms and conditions that do not implicate representational issues or impair separate contracts which govern the new location. *Id*. The Court recognized that the outcome of the case would be different if the unions sought to enforce "an arbitration award that applied an *entire* collective bargaining agreement to employees it *never* represented in a new facility of the employer when those employees had not shown majority support for the union." *Id*. at 1378, n.12 (distinguishing *Sperry Sys. Mgmt. Div. v. N.L.R.B.* (2d Cir. 1974), *cert. denied*, 419 U.S. 831, 95 S. Ct. 55 (1974)) (emphasis in original). But unlike in *Sperry*, the union plaintiffs in *Alpha Beta* "do not seek to extend their collective bargaining agreements to the [new] store. They seek only to ensure the continuation of trust fund contributions on behalf of transferred employees." *Id*.

The many contractual terms which parties can negotiate to be imported to new locations include "the most important economic benefits—wages," since "[t]he payment of wages to transferred employees at a higher, protected rate does not interfere with any rights of the other employees in the new unit." *Id*. Trust fund contributions are also usually unproblematic, especially where, as in *Alpha Beta*, "[n]o other bargaining representative has been certified at the [new] store." *Id*. at 1380 & n.15. The Ninth Circuit concluded that the arbitrator could interpret the contractual requirement to continue trust fund contributions in a lawful manner that could avoid stepping on the Section 7 rights of other employees at the new store. *Id*. at 1380-81. It therefore upheld the district court's award of summary judgment compelling arbitration. *Id*.

[2] In fact, the Ninth Circuit noted, "[t]he abrupt termination" of the maintenance of benefits provision "might well have a far greater impact on the exercise of their self-organizational rights than would the continuation of those benefits." *Alpha Beta*, 736 F.2d at 1378.

In so holding, the Ninth Circuit relied on another federal circuit court case of relevance here, *Courier-Citizen Co. v. Boston Electrotypers Union No. 11*, 702 F.2d 273 (1st Cir. 1983). *See Alpha Beta*, 736 F.2d at 1378. *Courier-Citizen* concerned the lawfulness of a contract provision that gave job preferences to laid-off unit employees for non-unit work. There, a typists union was certified as the representative for a unit of the company's journeymen but not its laborers. *Courier-Citizen*, 702 F.2d at 277. The governing CBA required the company to rehire laid-off journeymen in order of seniority and to give laid-off journeymen the opportunity to work as laborers at laborer rates if no journeyman positions were available. *Id*. at 275, n.2. After the company laid off several journeymen, it offered a laborer position to a more junior journeyman out of seniority order. *Id*. at 275. The union grieved the company's failure to follow the CBA's recall provisions, and through a series of arbitrations, obtained an award requiring the company to re-assign the laborer work to the most senior laid-off journeymen and to pay those workers back pay. *Id*. at 275-76. Meanwhile, the company filed unfair labor practice charges with the Board, alleging that the recall provision was illegal and the union's attempt to enforce it violated Sections 8(b)(1)(A) and 8(b)(2). *Id*. at 276 & n.4. The Regional Director declined to issue a complaint on these allegations. *Id*. at 276, n.4. The company then sued the union in district court to vacate the award, but the district court enforced it. *Id*. at 275.

On appeal to the First Circuit, the company reasserted its theory that enforcing the clause in the recall provision—which, as construed by the award, entitled journeymen to laborer jobs—would allow the union to "illegally extended its representational rights beyond the bargaining unit it has been certified to represent." *Id*. at 277. The First Circuit disagreed, finding that the "[t]he disputed clause merely gives priority to laid-off unit employees in obtaining other employment at the [c]ompany…and is thus addressed to the economic interests of unit employees." *Id*. Similarly, the Court rejected the company's alternative theory that granting job preferences to laid-off journeymen in hiring laborers "illegally discriminates on the basis of Union affiliation." *Id*. That was not the case because "[e]very member of the journeyman printers' bargaining unit is entitled to the preference without regard to Union status." *Id*. at 278. The CBA granted preferential recall treatment based on seniority, not affiliation with the union. *Id*. And while it was true that requiring the employer to draw it laborer workforce initially from a pool of journeymen "disadvantaged other prospective laborer applicants by reducing the available positions," that result was not in and of itself unlawful. *Id*. The contractual grant of benefits "to a unionized group will often diminish the pool of jobs and benefits available for others" but that result is an acceptable and unavoidable feature of labor relations. *Id*. Further, granting "former employees...priority to jobs in *the same company*" is not "unreasonable or inconsistent with sound labor policy." *Id*. (emphasis added).

The Board's Division of Advice (DoA) has also favorably cited *Courier-Citizen* to dismiss unfair labor practice charges based on attempts to enforce contractual preferential hiring clauses. *See Teledyne Indus., Inc.*, Case 30-CB-2389, 1986 WL 65493, at *4, n.12 (N.L.R.B.G.C. 1986); *General Motors Corp. & Saturn Corp.*, Case 7-CA-24872, 1986 WL 620213, at *5, n.7 (N.L.R.B.G.C. 1986). In *Teledyne*, an employer subdivided its operations into different divisions, which each (or in combination with another) had a collective bargaining relationship with a UAW local. *Teledyne, supra* at *1. Each division or grouping of divisions formed its own appropriate bargaining unit. *Id*. Although the company's divisions and the local unions bargained at the local level for some terms of employment, a national agreement covered issues such as transfer of work and preferential hiring. *Id*. at *2. The national agreement required the company to give preferential hiring treatment to any bargaining unit employee laid off for thirty days or longer when applying to jobs at another bargaining unit. *Id*. When a

laid off member of one unit was not hired at another location, he sued the company for wrongfully denying him employment under the preferential hiring provision. *Id*. at *3. After the UAW intervened on the employee's behalf to enforce the provision, the company filed ULP charges against it, alleging that the union's attempt to enforce the provision violated Sections 8(b)(1)(A) and 8(b)(2). *Id*.

The DoA found these charges unmeritorious and directed the region to dismiss them. The DoA held that it was not unlawful for the union to enforce preferential hiring rights between units of a single employer. *Id*. at *3-5. First, "eligibility for the benefit does not depend on union membership as such but rather on employment in the unit for which the benefit has been negotiated." *Id*. at *3. Second, to the extent the benefit encouraged unit members to join the union, that outcome was not unlawful because it was accomplished by obtaining a benefit that was universal to unit members. *Id*. Third, in the context of a single employer, enforcing preferential hiring rights did not discriminate against "off-the-street applicants" because "they do not share the same status as the employer's own employees" and so allowing an employee from one location preference over a non-employee in hiring at another location was merely "the equivalent of seniority and transfer rights…." *Id*. at *4 & n.12 (citing *Courier-Citizen*, 702 F.2d at 278).[3] Fourth, the job preference did not discriminate against employees in unrepresented units or in units represented by other unions because nothing precluded the employer from "extending a similar benefit" to those employees. *Id*. In the absence of such employer generosity, a union is entitled to negotiate a benefit that applied solely to its unit members, even when that means treating employees differently who are merging from different units into a single one. *Id*. (citing cases on seniority dovetailing in merged units). Thus, the DoA found nothing coercive or discriminatory about the intra-company hiring preference.

A similar result obtained in *General Motors Corp. & Saturn Corp.*, *supra*. There, after establishing Saturn Corp. as a wholly owned subsidiary, GM entered into a memorandum of agreement with the UAW establishing a procedure for staffing a future Saturn facility. *Id*. at *1. The MOA provided that "a majority of the full initial complement of operating and skilled technicians in Saturn will come from GM-UAW units throughout the United States." *Id*. A charging party (who was not connected to either GM or UAW) then filed a ULP charge alleging that the MOA unlawfully discriminated against employees outside of GM units represented by the UAW. *Id*. at *4.[4]

The DoA concluded that the job preferences for UAW-represented employees was not unlawful because it was "the product of legally required 'effects' bargaining over an employer decision which has potential adverse consequences for unit employees" and because its preference for unit employees was not the kind of "discrimination" prohibited by the Act. *Id*. at *4. First, the MOA resulted from effects bargaining because GM's decisions to create a new subsidiary and build a new plant were "management decision[s] that could affect the jobs of unit employees." *Id*. Such restructuring creates a "potential for significant job loss for UAW-represented employees." *Id*. And when the subject of effects bargaining is

[3] The fact that this preference was applied to a single employer's multiple operations distinguished the facts in *Teledyne* from cases where contracts gave job referral preferences in finding new employment to unit members who had experience working for signatory employers. *Teledyne*, *supra* at *4. In those other cases, the contract provisions "were illegal not because they had an extra unit effect, but because they required the hiring employer to distinguish among off-the-street applicants for initial hire based on their prior union representation." *Id*. Conversely, in the context of intra-employer transfers, unit employees are not "off-the-street applicants." *Id*.

[4] Because the same MOU also recognized the UAW as the bargaining representative for certain employee classifications at a future Saturn plant, the ULP charge separately alleged that GM prematurely extended recognition to the UAW. *Id*. at *6-8. The DoA's separate discussion of this portion of the charge is not relevant here.

the staffing of a new facility, it is normal and entirely "legitimate" for employers and unions to negotiate for "preferential hiring right at that new facility." *Id*. Moreover, the DoA found, the preference granted to UAW-represented employees was not discriminatory merely because it could "have some negative impact on the employment prospects of others." *Id*. If that result encouraged union membership, it did so lawfully by "obtain[ing] a benefit for employees it represents." *Id*. Turning to intra-unit effects, the preference did not unlawfully discriminate in favor of union members because the hiring preference was available to unit members "irrespective of whether he/she is actually a member of the Union," while on the other hand, "if an employee is a UAW member, and yet not in a represented unit, he/she would not receive the benefit." *Id*. In addition, the DoA found, the MOA's job preferences flowed from a "legitimate and substantial business justification"—GM's "need for a ready supply of skilled employees to assure the success of this costly new undertaking." *Id*. at *5. Finally, as in *Teledyne*, the DoA distinguished the intra-employer preference at issue from preferences granted to unit members in referring applicants for jobs at new employers. *Id*. "Simply stated, the Board cases do not prohibit an employer from preferring its own employees over 'the rest of the world.'" *Id*. & n.7 (citing *Courier-Citizen*, 702 F.2d at 276, n.4, 277-78). Accordingly, the DoA recommended that the Region dismiss the ULP charge. *Id*. at *6, 8.

II. Application to the instant charges

A. Summary

These decisions further illustrate why UNFI's charges against the Unions are untenable. It simply is not the case that permitting Tacoma-based employees to transfer to Centralia and allowing them to enjoy the contractual terms and conditions identified by Arbitrator Duffy in the October 7, 2019 Award will coerce employees in their selection of a bargaining representative, discriminate against some employees at the new facility, or impermissibly encourage union membership. Since there is no coercion, discrimination, or encouragement, it also follows that UNFI's derivative claim that the Unions have refused to bargain by attempting to enforce the Award also fails.

B. No coercion in selecting a bargaining representative

These cases further undermine UNFI's assumption that allowing employees to enjoy preexisting contractual benefits at a new location amounts to an attempt to extend the representational rights of the union that negotiated those benefits to the new location.

First, the foregoing cases confirm that a contract may lawfully provide for the survival of uniquely personal terms of employment in new bargaining unit settings. That is all that is at issue here. It bears repeating that the Award construed the contract terms referenced in Section 1.01.2 of the CBA to be limited to those which maintain Tacoma-based employees' "standard of living." Award, p. 18. These include "wages, hours, benefits and working conditions." *Id*. They do not include union recognition or union security rights. *See id*. The Arbitrator's distinction is critical because the former are exactly the kinds of contractual terms that *Alpha Beta* held can be applied in new locations without a union obtaining representational rights or discriminating against non-unit employees. *Alpha Beta*, 736 F.2d at 1379-81 (specifically approving portability of wages and fringe benefits).[5] In addition, as in *Alpha Beta*,

[5] And while UNFI has in its federal suit criticized Arbitrator Duffy for construing the contract to permit the transfer of economic but not representational terms, the permissibility of this approach was precisely why the Ninth Circuit allowed the

there is currently no separate collective bargaining agreement or certified representative at the new facility. That means there is no chance that by continuing to implement transferees' "standard of living" terms and conditions, UNFI would risk a conflict with incompatible contract requirements. *Id*. at 1380 & n.15. Similarly, Section 1.01.2's right to transfer to new UNFI facilities is personal to unit members. It does not grant the Unions recognition unless and until they can demonstrate majority support within appropriate units. So the mere act of transferring unit members to a new worksite would not result in either Union becoming an exclusive bargaining agent there.

The facts of this case also track *Alpha Beta*'s explanation of the relationship between the original contractual commitment and the new setting in which the terms are to be implemented. Just as in *Alpha Beta*, the Unions bargained for these protections in contemplation of a new facility opening "outside the unit." *Id*. at 1378. Local 117 did so as far back as 1999 and Local 313 did it in 2018 when it appeared that SuperValu might open a new location in Centralia. "[A]t the time the agreement containing the disputed provision was entered into," the Unions were certified to represent Tacoma units and the unit members who acquired these rights "were still employed within the bargaining unit." *Id*. at 1377-78 & n.11. Thus, there is no question that Section 1.01.2's contractual protections "arose under an agreement in force at their initial place of work." *Id*. at 1378. The fact that those rights are to be exercised outside of the original bargaining unit (i.e., at the Centralia facility) is of no moment—just as retirees and other former employees may enjoy contractual benefits after leaving the unit without threatening others' Section 7 rights. *Id*. at 1378-79. Since the benefits conferred by Section 1.01.2 are features of the original contractual relationship, it is not necessary for the Unions to be certified to represent new bargaining units at Centralia before their unit members can enjoy them.

Alpha Beta and *Citizen-Courier* also show why UNFI's claim that the Unions are trying to "impose" CBA terms on other employees is false. As in *Alpha Beta*, the Unions do not demand that UNFI apply the contractual wages, hours, benefits, and other working conditions to off-the-street employees that UNFI hires to work at its Centralia facility. They "seek only to enforce rights of transferred employees." *Id*. at 1378. The Ninth Circuit put an even sharper point on this distinction when, to rebut the same incorrect inference made by Alpha Beta, it distinguished that case's facts from those in *Sperry Systems*. As the Court noted, there is a material difference between an arbitration award that requires an employer to "appl[y] an *entire* collective bargaining agreement to employees it *never* represented in a new facility"—as in *Sperry* and under UNFI's distortion of the instant facts—and one which requires applying specific contractual terms to transferees from a certified bargaining unit—as in *Alpha Beta* and as is actually the case here. *Id*. at 1378, n.12. *Citizen-Courier* made a similar point when it found that a contract provision entitling unit employees to priority in obtaining non-unit work does not by implication give the union representational rights over employees working full-time in that non-unit classification. *Citizen-Courier*, 702 F.2d at 277. Where the relevant contract provision and the associated arbitration award do not apply terms and conditions to non-unit employees, the negotiating union is not assumed to seek representation of that group. *Id*. Rather, so long as the contract terms are "addressed to the economic interests of unit employees," the scope of representation is correspondingly limited. *Id*. Likewise, although UNFI would impute a representational

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Unions' grievance in *Alpha Beta* to proceed to arbitration. *Alpha Beta*, 736 F.2d at 1379, 1380-81 ("There is no reason in federal labor law or policy why employees may not be guaranteed that they will continue to receive *most* of the economic benefits they received prior to their transfer in the event that for any reason their work locale is changed…We hold that the arbitrator could interpret the provision in a way consistent with the [new] store employees' section 7 rights.") (emphasis in original).

objective to the Unions, the plain terms of Section 1.01.02 and Arbitrator Duffy's Award show that the economic rights at issue here are "addressed" solely to Tacoma transferees, not new hires at Centralia. It thus does not follow from the fact that Tacoma transferees would enjoy their Section 1.01.02 benefits while working alongside off-the-street hires at Centralia that the Unions have attempted to represent those new hires.

In sum, *Alpha Beta* and *Courier-Citizen* further illustrate the implausibility of UNFI's claims that the Unions are coercing employees in the selection of a bargaining representative or are imposing contract terms on employees.

C. No unlawful encouragement of union membership or discrimination against non-unit or non-union members

The above authorities also show why UNFI's discrimination and encouragement charges fail. First, there is clearly no discrimination among Tacoma unit members. Just as in *Citizen-Courier*, *Teledyne,* and *General Motors,* the rights to transfer and to continue enjoying "standard of living" benefits under Section 1.01.2 do not depend on a Tacoma unit member's union status. Every member of each unit represented by Local 117 and 313 respectively are "entitled to the [Section 1.01.2 benefits] without regard to Union status." *Courier-Citizen,* 702 F.2d at 278; *accord Teledyne, supra* at *3; *General Motors, supra* at *4. On the other hand, "if an employee is a [Teamster] member, and yet not in" one of the two Tacoma units, "he/she would not receive the benefit[s]" of the right to transfer to Centralia or the right to maintain his/her standard of living there. *General Motors, supra* at *4.

Second, enforcing Section 1.01.2 would not unlawfully discriminate against non-Tacoma transferees, i.e., off-the-street hires employed at Centralia. To begin with, it is inherently non-discriminatory for a union and employer to negotiate for the employer's own workers to receive preference in hiring at the employer's future facilities, since a company's own employees are differently situated from new applicants. *Courier-Citizen*, 702 F.2d at 278 (granting "former employees...priority to jobs in the same company" is not "unreasonable or inconsistent with sound labor policy"); *Teledyne, supra* at *4 (giving unit members preference over "off-the-street applicants" permissible because the latter "do not share the same status as the employer's own employees"); *General Motors, supra* at *5 ("…the Board cases do not prohibit an employer from preferring its own employees over 'the rest of the world'"). Section 1.01.2 is therefore not discriminatory merely because it gives Tacoma unit employees the opportunity to work at Centralia before UNFI can consider new applicants. And although implementing this provision will naturally reduce the number of available positions for new applicants (or, depending on UNFI's manpower needs, may result in displacing some current Centralia workers), that result is not discriminatory within the meaning of the Act. *See Courier-Citizen,* 702 F.2d at 278 (the mere fact that "granting [an] economic benefit to a union group will [] diminish the pool of jobs and benefits available for others" does not lead to discrimination under Section 8(b)(2) or unlawful encouragement of union membership under 8(b)(3)); *General Motors, supra* at *4 (the possibility that enforcing a contractual preference will "have some negative impact on the employment prospects of others" is not discriminatory). Moreover, the Unions cannot discriminate against off-the-street hires because it is UNFI that controls whether it will hire additional applicants and, if so, what kinds of wages, benefits, and other terms of employment it will offer them. Nothing in Section 1.01.2 precludes UNFI "if it so chooses, from extending [] similar benefit[s] to other [non-unit employees]...." *Teledyne,*

supra at *5. Should UNFI continue to provide new applicants inferior wages and benefits, that "discrimination" results from its own choices, not the Unions'.

Third, as in *General Motors*, Section 1.01.2 represents a species of lawful effects bargaining. A company's decision to construct a new facility creates a serious "potential for significant job loss" by unit employees. *General Motors, supra* at *4. A collectively bargained commitment governing what should happen to unit employees in the event of such a new construction is a "legitimate product of [] 'effects' bargaining." *Id*. Section 1.01.2 obviously deals with this very scenario. The only difference between the MOA in *General Motors* and Section 1.01.2 is that in the latter case, the parties had the foresight to determine, before an individual case arose, what should happen in instances of new construction and movement of operations. The Unions should not be punished for contemplating this scenario in advance and obtaining employer commitments at the time they bargained an entire contract, when the same commitments would have been lawful had they been subsequently bargained in a specific negotiation over the opening of the Centralia facility and the closure of the Tacoma one.

Fourth, even if Section 1.01.2 was otherwise discriminatory in some respect (it is not), the provision would still not violate Section 8(b)(2) because SuperValu had a legitimate and substantial business justification for granting job preferences to unit employees over new applicants in staffing new facilities.[6] Like GM, SuperValu likely decided it needed "a ready supply of skilled employees to assure the success of [a] costly new undertaking" and believed that current employees already possessed the skills and knowledge to "best fill that need." *Id*. at *5. That business need fully justifies any incidental discrimination that applying Section 1.01.2 could inadvertently create. *See id*.

Fifth, the only way the Unions can be understood to have "encouraged" union membership is by negotiating contractual benefits under Section 1.01.2 that accrued to their unit members and in turn caused employees to recognize the economic benefits that flow from union representation. But that result is merely an instance of the Unions fulfilling their exclusive bargaining agent status exactly as the Act envisions. If more bargaining unit employees support the Unions because they like the benefits the Unions obtained for them (or if non-unit members and off-the-street hires decide to organize because they want to obtain similar benefits), the Act does not punish the Unions for their successful efforts. *Teledyne, supra* at *3 ("…it is well settled that the encouragement of union membership resulting from a union obtaining contractual benefits for employees in the unit does not, in itself, make those benefits unlawful"); *General Motors, supra* at *4 (gain in union support resulting from lawfully negotiated benefits to unit members "is not the kind of encouragement which the Act prohibits").

Accordingly, these cases further prove that UNFI's discrimination and encouragement allegations lack merit.

D. No refusal to bargain

It is still unclear how exactly UNFI believes the Unions have refused to bargain. The attachment to its ULP charges only states conclusorily that the Unions violated their "duty to bargain collectively with UNFI as defined in Section 8(d) of the Act." Possibly, UNFI suggests that the Unions have refused to bargain insofar as they have sought to enforce Section 1.01.2 through a contract grievance and now seek to enforce the Award, rather than entertaining proposals that would require unit members to

[6] Because UNFI assumed the CBAs when it acquired SuperValu, the same business justification is imputed to it.

relinquish their preexisting rights. If that is UNFI's theory, the claim is derivative of UNFI's other allegations. Because, for the reasons explained above, Section 1.02.01 and Arbitrator Duffy's Award are both enforceable, the Unions have not refused to bargain by demanding that UNFI comply with a lawful contract provision. Thus, UNFI's derivative 8(b)(3) refusal to bargain charge must fall with the rest of its allegations.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Unions' December 17, 2019 position statement, UNFI's unfair labor practice charges against Locals 117 and 313 have no merit and should be dismissed. Please do not hesitate to contact me with any questions or concerns.

Sincerely,

Danielle Franco-Malone
Ben Berger

Attorneys for International Brotherhood of Teamsters Locals 117 and 313

cc: Tracey Thompson
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