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Tap Express, Inc. and International Brotherhood of Teamsters, Local 822.¹ Cases 5–CA–32130 and 5–CA–32181

December 14, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

The General Counsel seeks summary judgment in this case pursuant to the terms of a settlement agreement. Upon charges filed by the International Brotherhood of Teamsters, Local 822 (the Union), on September 13, October 14, and November 30, 2004, the General Counsel issued a complaint against the Respondent, TAP Express, Inc., on December 22, 2004 alleging that it had violated Section 8(a)(3) and (1) of the Act by various actions including terminating six employees. The Respondent filed an answer to the complaint.

Thereafter, the Union and the Respondent entered into an informal settlement agreement that was approved by the Regional Director for Region 5 on February 24, 2005. The settlement agreement required the Respondent to: (1) pay backpay owed to the discriminatees according to a set schedule;² (2) offer reinstatement to five of the discriminatees;³ (3) expunge all references to unlawful discipline and terminations; and (4) post a notice to employees regarding its unlawful conduct. The agreement also contained the following further provisions:

In consideration of the Regional Director approving this Settlement Agreement, Respondent agrees that, in the event of any non-compliance to make required payment on the date specified in Attachment (A) of this document, or to cure any such failure within fourteen (14) days of the specified payment date, the total amount of backpay (\$30,000.00) plus interest to date of payment

¹ We have amended the caption to reflect the disaffiliation of the International Brotherhood of Teamsters from the AFL-CIO effective July 25, 2005.

² According to the schedule, on March 19, 2005, the Respondent was to issue backpay checks to James Crain (\$700), Marquis Hankins (\$1500), Cory Ricks (\$1500), Alfred Flora (\$300), Nathaniel Motley (\$1500), and Darrick Smith (\$1500). Subsequently, on the 19th day of April through August, the Respondent was to issue \$700 checks each month to Marquis Hankins, Cory Ricks, Nathaniel Motley, and Darrick Smith (\$2800 in total each month).

³ James Crain, Alfred Flora, Nathaniel Motley, Cory Ricks and Darrick Smith. The sixth discriminatee, Marquis Hankins, waived reinstatement.

shall become immediately due and payable. Respondent agrees after fourteen (14) days' notice from the Regional Director of the National Labor Relations Board, on motion for summary judgment by the General Counsel, Respondent's Answer to the instant Complaint shall be considered withdrawn. Thereupon, the Board may issue an order requiring Respondent to show cause why said Motion of the General Counsel should not be granted. The Board may, without necessity of trial, find all allegations of the complaint to be true, and make findings of fact and conclusions of law consistent with those allegations adverse to Respondent on all issues raised by the pleadings. The Board may then issue an Order providing full remedy as specified in the Complaint. The parties further agree that a Board Order and U.S. Court of Appeals Judgment may be entered thereon ex parte.

By letter dated March 3, 2005, counsel for the General Counsel advised the Respondent that it could proceed with compliance with the settlement agreement and listed the specific actions required of the Respondent by that agreement. On March 17, the Respondent offered reinstatement to Alfred Flora and Darrick Smith.⁴

By letter sent on April 8, 2005 (but erroneously dated February 8), the compliance officer for Region 5 advised the Respondent that it had failed to comply with the terms of the settlement agreement. The compliance officer asked the Respondent to comply by April 22 and warned that failure to do so could result in the initiation of summary judgment proceedings. On April 14, in response to this letter, the Respondent partially complied with the settlement agreement by submitting a check for \$7000 and an offer of reinstatement for one discriminatee, Cory Ricks. It also requested new copies of the Board's notices stating that it had lost the copies previously sent to it.

By letter dated April 27, 2005, the compliance officer sent to the Respondent additional copies of the Board notice and advised the Respondent that it needed to post the notices and submit a certificate of posting to the Region by May 6, 2005. She also notified the Respondent that it owed an installment of \$2800 on the backpay which had been due on April 19. She advised the Respondent that full compliance also required it to expunge its records of its past discrimination and to notify the discriminatees and the Region that this had been done. The compliance officer reiterated the prior warning that

⁴ Contrary to the Respondent's initial position, the General Counsel contends that James Crain and Nathaniel Motley never received reinstatement letters and were never offered reinstatement. In its response to the Board's Notice to Show Cause, discussed below, the Respondent did not renew its assertion that Crain and Motley had been offered reinstatement.

failure to perform these actions could result in the initiation of summary judgment proceedings.

By letter dated May 13, 2005, the compliance officer advised the Respondent that it had failed to pay the installment due on April 19 and that another \$2800 installment would be due on May 19. Further, the Respondent had failed to comply with the settlement agreement provisions requiring it to post Board notices, provide the Region with copies of letters informing the discriminatees that the unlawful discipline had been expunged from its records, and offer reinstatement to two of the discriminatees, Crain and Motley. The compliance officer once again warned the Respondent that its continued failure to comply with the settlement agreement would cause the Regional Director to file a Motion for Summary Judgment.

By letter dated May 23, 2005, the Regional Director for Region 5 informed the Respondent that due to its failure to comply with the settlement agreement, the General Counsel was now demanding full payment of the balance of the backpay owed, \$23,000, by June 6. The Regional Director also advised that if the Respondent failed to do so by that date, the General Counsel would then file a Motion for Summary Judgment and could seek additional backpay beyond that specified in the settlement agreement. In response, on or about June 7, the Respondent sent the Region a check for \$3000, reducing the total backpay owed to \$20,000 (with interest).

Having failed to obtain full compliance with the settlement agreement from the Respondent, on August 4, 2005, the General Counsel filed a Motion for Summary Judgment with the Board. The General Counsel submits that the Respondent defaulted on the settlement agreement by failing to: (1) pay \$20,000 of the backpay owed to the discriminatees; (2) offer reinstatement to two discriminatees, James Crain and Nathaniel Motley; (3) expunge from its records all mention of its unlawful discrimination and other unlawful acts; and (4) post notices provided by the Board advising its employees of its unlawful conduct. On August 10, 2005, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted.

The Respondent responded on August 23, 2005, by offering to renegotiate the settlement to provide for a slower rate of re-payment. It did not dispute any of the factual or legal contentions made by the General Counsel.

The General Counsel replied that the Respondent had failed to comply with the settlement agreement and thus the appropriate remedy is the granting of its Motion for Summary Judgment. The General Counsel further ad-

vised that he had been willing to discuss the terms of the settlement agreement with the Respondent and to accommodate it regarding the agreement's conditions, but the Respondent had simply failed to meet its obligations, and that this failure required the filing of the Motion for Summary Judgment. The General Counsel also expressed willingness to discuss the backpay issue after the issuance of the summary judgment order and the Respondent's compliance with the affirmative aspects of the Board's Order.

Ruling on Motion for Summary Judgment

According to the uncontroverted allegations in the Motion for Summary Judgment, the Respondent initially submitted an answer to the complaint, but subsequently entered into a settlement agreement which provided for the withdrawal of the answer in the event of noncompliance with the settlement agreement. The Respondent does not dispute that it has not complied with the settlement agreement in that it: failed to pay the agreed-to backpay, did not offer reinstatement to all the discriminatees, did not expunge its unlawful actions from its records, and did not post the Board notices at its facility. We therefore find that the Respondent's answer has been withdrawn by the terms of the February 24, 2005 settlement agreement, and that, as further provided in that settlement agreement, all the allegations of the complaint are now deemed to be true.⁵

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a Virginia corporation with an office and place of business at the DHL Express, Inc. facility in Virginia Beach, Virginia (the DHL facility), has been engaged in the business of delivering parcels for DHL Express, Inc.

During the 12-month period preceding issuance of the complaint, the Respondent, in conducting its business operations from the DHL facility provided services valued in excess of \$50,000 for DHL Express, Inc. In turn, DHL Express performed services valued in excess of \$50,000 in states other than the State of Virginia and has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Accordingly, we find that the Respondent itself is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

⁵ See *U-Bee, Ltd.*, 315 NLRB 667 (1994).

II. ALLEGED UNFAIR LABOR PRACTICES

Background

At all material times, the following individuals held the position set forth opposite their respective names and have been supervisors of the Respondent within the meaning of Section 2(13) of the Act:

Monica Broadnax	Owner
Bernetta Upshaw	Manager

1. In or around June 2004,⁶ the Respondent, by Monica Broadnax, in the DHL facility's parking lot, created an impression among its employees that their union activities were under surveillance by the Respondent. At this time, Broadnax also told employees they could not have a union and threatened them with discharge.

2. In or around June, the Respondent, by Monica Broadnax, met with employees in the parking lot at the DHL facility. Broadnax threatened employees with discharge if they supported the Union. She also told them that the Union could not tell her what to do, could not make her give them anything or make her give them a raise, and that it would be futile for them to select the Union as their bargaining representative. She created an impression among the employees that their union activities were under surveillance by the Respondent. Broadnax again told employees they could not have a union and threatened them with stricter enforcement of existing rules including those regarding the employment of felons, attendance and drug testing if they selected the Union as their bargaining representative.

3. On or about June 29, the Respondent, by Monica Broadnax, threatened employees that there would soon be a lot of new faces and a lot of change. Broadnax made this threat in response to employee union activity.

4. In or around early July, the Respondent, by Monica Broadnax, in the parking lot at the DHL Facility, interrogated employees about their union membership, activities, and sympathies and created an impression that the Respondent was surveilling their union activities.

5. In or around July, the Respondent, by Monica Broadnax, in the parking lot at the DHL facility, coerced employees by naming employees who she believed were principally responsible for trying to bring in the Union.

6. On or about July 29, the Respondent, by Monica Broadnax, informed employees in a telephone conversation, that she could not consider them for rehire because of the union situation.

7. On or around June, the Respondent reissued rules of conduct to its employees. It also began enforcing these

rules more strictly, including rules of attendance, checking out procedures, handling OFDs,⁷ trash removal, use of company vehicles, and drug testing. It engaged in these actions in response to employee union activity.

8. On the following dates in 2004, the Respondent issued written warnings to the following employees as part of its stricter enforcement of its rules: Aaron Baker (June 2, 14 & July 20); Tyrone Banks (September 14); Atif Canty (June 28); Cory Carter (June 14 & 28); James Crain (June 28 & July 14); Tommy Cutler (July 14); Albert Flora (June 8 & 28); Russell Flowers (June 14); Marquis Hankins (June 25); Nathaniel Motley (July 2); Cory Ricks (June 28); Keith Sumblin (June 17 & 24); Gregory Williams (June 14). In the course of its stricter enforcement of its rules, the Respondent also suspended Nathaniel Motley from July 5-7 and discharged Albert Flora on September 22. The Respondent also warned Crain and Hanks and suspended Motley because these employees formed, joined, or assisted the Union and engaged in concerted activities and in order to discourage employees from engaging in these activities.

9. On or about June 29, the Respondent began enforcing rules regarding the use of company vehicles during the time periods between routes, and prohibited Darrick Smith from using company vehicles during these time periods.

10. On or about July 28, the Respondent subjected John Bland, James Crain, Brandon Hart, Mills Hart Jr., Cory Ricks, and Thomara Shoulders to drug testing. At that time, the Respondent terminated James Crain for refusing to take the drug test. On or about August 8, the Respondent terminated Cory Ricks because of the results of his drug test. The Respondent engaged in this conduct because of its stricter enforcement of its rules. It targeted Crain because he had formed, joined, or assisted the Union and had engaged in concerted activities, in order to discourage him from engaging in these activities.

11. During the period on or about July 7 to 20, the Respondent suspended employee Darrick Smith and refused to allow him to work. The Respondent discharged the following employees on or about the following dates: Marquis Hankins on July 25, Nathaniel Motley on July 20, and Darrick Smith on July 20. On or about July 29, Respondent revoked Marquis Hankins' right to drive Monica Broadnax's personal vehicle for his personal use and on or about August 2, and subsequently, Respondent has refused to reinstate Marquis Hankins. The Respondent took all of these actions because these employees formed, joined, or assisted the Union and engaged in

⁶ All dates in this section are in 2004 unless stated otherwise.

⁷ The complaint does not provide any further description of what an "OFD" is.

concerted activities, and in order to discourage its employees from engaging in these activities.

CONCLUSIONS OF LAW

1. The Respondent, by its acts and conduct described in section II, paragraphs 1–5, above, restrained and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

2. The Respondent, by its acts and conduct described in section II, paragraphs 7–11, above, discriminated in regard to the hire or tenure, or terms and conditions of employment of its employees, thereby discouraging membership in the labor organization in violation of Section 8(a)(3) and (1) of the Act.⁸

3. The Respondent, by its acts and conduct described in section II, paragraph 6, above, both interfered, restrained, and coerced employees in the exercise of their rights under Section 7, and discriminated in regard to the hire, tenure, or terms and conditions of employment of its employees, thereby discouraging membership in the labor organization. These acts and conduct therefore violated Section 8(a)(1) and (3), respectively.

4. The Respondent's unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to take certain affirmative actions designed to effectuate the policies of the Act, as requested by counsel for the General Counsel. Specifically, the Respondent shall comply with all remaining unmet terms of the settlement agreement approved by the Regional Director for Region 5 on February 24, 2005, including taking the following actions:

- (1) pay \$20,000 of the backpay owed to the discriminatees;
- (2) offer reinstatement to two discriminatees, James Crain and Nathaniel Motley;
- (3) expunge from its records all mention of its unlawful discrimination and other unlawful acts, and notify employees in writing that this has been done; and
- (4) post notices provided by the Board advising its employees of its unlawful conduct.

In limiting our backpay remedy to the remaining money owed under the settlement agreement, we note that the General Counsel is empowered under the agreement to seek

additional backpay owed to the discriminatees beyond that specified in the agreement. However, in his motion for summary judgment, the General Counsel has not sought such additional backpay and we will not, *sua sponte*, include it within this remedy.

ORDER

The National Labor Relations Board orders that the Respondent, TAP Express, Inc., Virginia Beach, Virginia, its officers, agents, successors and assigns, shall

1. Cease and desist from

(a) Questioning employees about their union membership, activities, and sympathies.

(b) Creating the impression that it is surveilling employees' union activities.

(c) Threatening to discharge employees if they support the International Brotherhood of Teamsters, Local 822 (the Union), or any other union.

(d) Telling employees that it is futile for them to select the Union as their collective-bargaining representative.

(e) Telling employees that they cannot have a union.

(f) Threatening employees with stricter enforcement of existing rules because employees support the Union.

(g) Threatening employees by telling them there will soon be a lot of new faces and a lot of changes because employees support the Union.

(h) Coercing employees by naming those employees who it believes are responsible for trying to bring in the Union.

(i) Telling employees that it could not rehire them because of the situation involving the Union.

(j) Enforcing its rules more strictly because employees are interested in representation by the Union.

(k) Issuing written warnings, suspending, discharging, or otherwise discriminating against employees because they support or engage in activities on behalf of the Union.

(l) Enforcing its drug testing policies because employees are interested in representation by the Union.

(m) Choosing employees for drug testing because they support the Union.

(n) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights as guaranteed in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Immediately remit \$20,000 plus interest to Region 5 to be disbursed to James Crain, Albert Flora, Marquis Hankins, Nathaniel Motley, Cory Ricks, and Darrick Smith, in accordance with the terms of the informal settlement agreement approved by the Regional Director on February 24, 2005.

⁸ In finding that the Respondent's stricter enforcement of its rules violated Sec. 8(a)(3), we find it unnecessary to rely on Respondent's stricter enforcement of its rule regarding the handling of OFDs.

(b) Within 14 days from the date of this Order, if it has not already do so, offer employees James Crain, Albert Flora, Nathaniel Motley, Cory Ricks, and Derrick Smith full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges of James Crain, Albert Flora, Marquis Hankins, Nathaniel Motley, Cory Ricks, and Darrick Smith, and within 3 days thereafter notify in writing the employees who were unlawfully discharged that this has been done and that the discharges will not be used against them in any way.

(d) Within 14 days from the date of this Order, remove from its files any reference to rules that were unlawfully reissued and enforced against employees because of their Section 7 activities including drug testing and prohibitions against employees using the Respondent owner's vehicle for personal use; within 14 days from the date of this Order, withdraw all written warnings and other disciplinary actions issued pursuant to these rules against Aaron Baker, Tyrone Banks, Atif Canty, Cory Carter, James Crain, Tommy Cutler, Albert Flora, Russell Flowers, Marquis Hankins, Nathaniel Motley, Cory Ricks, Keith Sumblin, and Greg Williams; and within 3 days thereafter notify in writing employees disciplined under these rules that this has been done and that this discipline will not be used against them in any way.

(e) Within 14 days after service by the Region, post at the DHL facility in Virginia Beach, Virginia, copies of the attached notice marked "Appendix."⁹ Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 1, 2004.

⁹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. December 14, 2005

Robert J. Battista , Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD
APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE NATIONAL LABOR
RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT question our employees about their union membership, activities and sympathies.

WE WILL NOT create the impression that we are watching over our employees' union activities.

WE WILL NOT threaten to discharge our employees, if they support the International Brotherhood of Teamsters, Local 822, on any other union.

WE WILL NOT tell our employees that it is futile for them to select the Union as their collective-bargaining representative.

WE WILL NOT tell our employees that they cannot have a union.

WE WILL NOT threaten our employees with stricter enforcement of existing rules because employees support the Union.

WE WILL NOT threaten our employees by telling them there will soon be a lot of new faces and a lot of changes because employees support the Union.

WE WILL NOT coerce employees by naming those employees who we believe are responsible for trying to bring in the Union.

WE WILL NOT tell employees that we cannot rehire them because of the situation involving the Union.

WE WILL NOT enforce our rules more strictly because our employees are interested in representation by the Union.

WE WILL NOT issue written warnings, suspend, discharge or otherwise discriminate against employees because they support or engage in activities on behalf of the Union.

WE WILL NOT enforce our drug testing policies because our employees are interested in representation by the Union, or are engaging in activities on behalf of a labor organization; and WE WILL NOT choose employees for drug testing because they support the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights set forth above.

WE WILL pay to Region 5 \$20,000 to be dispersed to James Crain, Albert Flora, Marquis Hankins, Nathaniel Motley, Cory Ricks, and Darrick Smith for all losses suffered as a result of their unlawful discharges, with interest, in the manner set forth in the settlement agreement approved by the Regional Director on February 24, 2005.

WE WILL, if we have not already done so, within 14 days from the date of the Board's Order, offer James Crain, Albert Flora, Nathaniel Motley, Cory Ricks, and Darrick Smith full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of James Crain, Albert Flora, Marquis Hankins, Nathaniel Motley, Cory Ricks, and Darrick Smith; and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to rules that were unlawfully reissued and enforced against employees because of their Section 7 activities including drug testing and prohibitions against employees using the Respondent owner's vehicle for personal use; WE WILL within 14 days from the date of the Board's Order, withdraw all written warnings and other disciplinary actions issued

pursuant to these rules against Aaron Baker, Tyrone Banks, Atif Canty, Cory Carter, James Crain, Tommy Cutler, Albert Flora, Russell Flowers, Marquis Hankins, Nathaniel Motley, Cory Ricks, Keith Sumblin, and Greg Williams; and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the disciplinary actions will not be used against them in any way.

WE WILL make Nathaniel Motley and Darrick Smith whole for any losses suffered as a result of their suspensions, with interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful suspensions of Nathaniel Motley and Darrick Smith, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the suspensions will not be used against them in any way.

TAP EXPRESS, INC.