STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: ALTOUR SERVICE, INC., Petitioner, To Review Under Section 101 of the Labor Law: An Order to Comply with Article 6 of the Labor Law, dated August 22, 2005, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 05-067 RESOLUTION OF DECISION

APPEARANCES

Justin M. Scher, Esq., for petitioner.

Pico Ben-Amotz, Acting Counsel, NYS Department of Labor, (Jeffrey Shapiro of counsel), for respondent.

WITNESSES

Margaret Maloney, Freddy Monzon, and Steadroy Shaw, for petitioner.

Raymond Hulen; Noureddine Ouarda; and Lety Escobar, Senior Labor Standards Investigator, for respondent.

WHEREAS:

The petition for review in the above-captioned case was filed with the Industrial Board of Appeals (Board) on October 17, 2005. An answer was filed on November 16, 2005. Upon notice to the parties, a hearing was held on June 14 and 15, 2011, in New York City before Anne P. Stevason, Esq., Chairperson of the Board and the designated hearing officer in this proceeding. Each party was afforded a full opportunity to present

documentary evidence, to examine and cross-examine witnesses, to make statements relevant to the issues, and to file closing briefs. The final brief was filed on October 11, 2011.

The Commissioner of Labor (Commissioner, DOL [Department of Labor], or respondent) issued an Order to comply with Article 6 of the Labor Law against petitioner Altour Service, Inc. (Altour or petitioner) on August 22, 2005. The Order directs payment to the Commissioner for tips due and owing to employees of petitioner in the amount of $259,349.84 with interest continuing thereon at the rate of 16% calculated to the date of the Order, in the amount of $38,866.75, and assesses a civil penalty in the amount of $259,349.00 for a total amount due on the Wage Order of $557,565.59.

The main allegation of the petition is that the 20% charge billed to clients of petitioner's limousine service is not a gratuity which must be paid to the employees, and is not governed by Labor Law § 196-d because the charge is not voluntary and discretionary. The petition also alleges that the order was unreasonable because it conflicts with controlling judicial and administrative precedent at the time it was issued. Petitioner also argues that the drivers waived their right to receive any party of the "gratuity" when they signed their employment letters agreeing to get a higher wage plus benefits in exchange for giving up their "gratuities."

In its answer, the Commissioner alleges that the 20% charge is "purported to be a gratuity" within the meaning of Labor Law § 196-d because it was labeled a gratuity and petitioner's customers were purposely led to believe that the gratuity was meant for the drivers. Therefore, the 20% charge recouped by the employer is now due to the employee drivers.

In 2008, respondent stipulated at a prehearing case management conference that it would amend the Order to eliminate the civil penalties assessed. This amendment was confirmed by letter and in respondent's bill of particulars. Therefore, the civil penalty is no longer an issue in this matter. Initially, the parties suggested that the case proceed by stipulated facts and legal briefing but after some time, they were unable to finalize an agreement on the facts and an evidentiary hearing was set.

In December 2010 in response to the Board's request that the parties brief the legal issues, petitioner filed a motion to dismiss the order prior to hearing, arguing that the order is unreasonable and invalid as a matter of law. In response, respondent argued that a motion to dismiss is not available under the Board's rules, in addition to arguing the allegations raised in its answer.

After briefing on the motion was complete, the Board asked the parties to brief the implications of the case of *Ramirez v Mansions Catering, Inc.*, 905 NYS2d 148 (1st Dept 2010) which held that the Court of Appeals decision in *Samiento v World Yacht, Inc.*, 10 NY3d 70 (2008) holding that a mandatory charge can be a gratuity under Labor Law § 198-d, has retroactive application. The Board also requested a list of the facts that are still at issue for the hearing. The motion to dismiss was denied, which the Board herein adopts, and the case was set for hearing.

I. SUMMARY OF EVIDENCE

Most of the facts in this case are not in dispute. Petitioner Altour, Inc. operates a chauffeur/limousine service which has been in operation since 1997. It pays its drivers a higher hourly wage than most limousine companies; offers benefits, including vacation, sick days and health insurance, which is also unusual for the industry; and in addition, pays its drivers the same rate of pay for drive time as well as wait time.

When Altour invoices its customers, it includes an item listed as a "GRATUITY" which amounts to 20% of the price for the service; an item labeled "PARKING TOLLS"; an item labeled "SERVICE/CHG;" and an item for "TELEPHONE USAGE." The item labeled gratuity, in addition to the other items listed in the invoice, is a mandatory non-discretionary fee which is retained by the company and not passed on to the drivers.

A flyer listing limousine rates and prices is left in each car, and reads: "Rates do NOT include 6% Fuel/Insurance surcharge, 20% gratuity, tolls and parking."

Commencing in May 2002, the limousine drivers signed an Employment Offer letter or an Amended Employment Offer letter, if they were currently employed, which provided the driver's hourly rate of pay and in addition included the following statement:

> "It is expressly agreed and understood that you, as the employee, are not eligible to receive any part of any "gratuity" or "service charge" collected from a customer through the Altour Service, Inc. invoice system. Altour does charge a "gratuity" which is not optional for our customer to pay and is not to be viewed nor treated as a tip as this fee belongs solely to Altour Service, Inc."

All drivers were given the letters to sign. The terms of the letters were devised by Altour and did not result from negotiation. The drivers were aware that the gratuities added to the invoices were kept by Altour. They were also aware that they were being paid a better wage than most drivers in the industry. Freddy Monzon, a former driver for Altour, testified that he specifically came to Altour for a job because he knew that he would be making a higher hourly wage and he would be paid that same wage for waiting time. Claimant Hulen, on the other hand, testified that signing the letter was a condition of continued employment and that he objected to signing the letter since he had expected to get the gratuity.

Altour's drivers at times were given tips by the customers at the end of the service, which they were free to keep. Testimony at hearing by Steadroy (Roy) Shaw, petitioner's executive vice-president and general manager who testified on behalf of Altour, was that the customers were led to believe that the gratuities included in the invoice also constituted tips.

> "Q. Did the customers ever ask you whether the tips were included?
>
> "A. They did ask that question.
>
> "Q. What did you tell them?

"A. I told them, yes, that it was already included in the bill. Most of the times when the clients are in the car before they get out they will say you are taken care of and I would say – I instructed the drivers to say, yes, that the tip was included in the bill and, again, they would say that this is something else for you based on what you did for me today. This is a cash tip which I already told the drivers that if you get a cash tip from the clients it's yours. It's found money."

Shaw also testified, on redirect, as follows:

"Q. Did [the customers] ever ask whether or not that 20 percent gratuity was being paid to the driver as a tip or gratuity?

"A. Yes.

"Q. What did you respond?

". . .

"A. My response was, yes."

Shaw's testimony concerning the instructions that were given to the drivers on how to respond to customer questions regarding the gratuity was confirmed by claimant. Shaw also testified that the tips were built into the higher hourly wage but could not explain how that was calculated. Shaw also testified that the higher hourly wage was used to attract and keep good drivers since they wanted to create a "high end" service.

In May 2004, claimant Raymond Hulen, a driver formerly employed by Altour, filed a claim with DOL for tip appropriation, alleging that when he was hired in 2000 he was told that he would be earning a lot of money in tips. However, this never came to pass since the gratuities billed to the customers were retained by Altour. Hulen's initial hourly rate was $15.00. Hulen later submitted two letters to DOL from different customers which stated that it was their understanding that the billed gratuities were to be paid to the drivers.

On August 11, 2004, DOL investigator Alin Lobl visited Altour's offices, however, no drivers or principals of the business were present so a Notice of Revisit was left so that DOL could return and do a records inspection. Employment records and invoices were reviewed by DOL in December 2004. Employees were interviewed in January 2005. An audit was then conducted which resulted in a letter to Altour demanding the payment of $259,349.84 to the drivers. The audit was based on the invoices and Driver Sales Detail Reports that DOL received from petitioner. On May 16, 2005, a compliance conference was held between DOL and petitioner. There was no resolution of this case and thereafter, DOL issued its order to comply, which is the subject of this proceeding.

In March of 2005, Altour changed its pay practices; reduced the drivers' hourly pay; and passed the billed gratuities on to the drivers.

II. STANDARD OF REVIEW AND BURDEN OF PROOF

The Labor Law provides that "any person ...may petition the board for a review of the validity or reasonableness of any ... order made by the [C]ommissioner under the provisions of this chapter" (Labor Law 101 §[1]).

A petition filed with the Board that challenges the validity or reasonableness of an Order issued by the Commissioner must state "in what respects [the order on review] is claimed to be invalid or unreasonable" (Labor Law § 101[2]). It is a petitioner's burden at hearing to prove the allegations that are the basis for the claim that the order under review is invalid or unreasonable (Board's Rules of Procedure and Practice § 65.30 at 12 NYCRR § 65.30 ["The burden of proof of every allegation in a proceeding shall be upon the person asserting it"]; State Administrative Procedure Act § 306 [1]; *Angello v Natl. Fin. Corp.*, 1 AD 3d 850, 854 [3d Dept 2003]).

It is therefore petitioners' burden to prove the allegations in the petition by a preponderance of evidence.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. The 20% "Gratuity" added to the Customer's Bill was a Charge which "purported to be a gratuity" under Labor Law § 196-d.

Labor Law § 196-d provides:

> "No employer or his agent or an officer or agent of any corporation, or any other person shall demand or accept, directly or indirectly, any part of the gratuities, received by an employee, or retain any part of a gratuity or of any charge purporting to be a gratuity for an employee. . . ."

By its plain language, this provision prohibits employers from keeping (1) "any part of a gratuity;" or (2) "any charge purported to be a gratuity for an employee." This section was enacted in 1968 for the dual purpose of protecting service employees and also "[t]he drafters . . . sought to end the 'unfair and deceptive practice' of an employer retaining money paid by a patron 'under the impression that he is giving it to the employee, not the employer' (See Mem of Indus Commr, June 6, 1968, Bill Jacket, L 1968, ch 1007, at 4)." *Samiento v World Yacht Inc.*, 10 NY3d 70, n4 (2008).

In *Samiento,* the Court of Appeals clarified how Labor Law § 196-d was to be interpreted:

> "We hold that the statutory language of *Labor Law § 196-d* can include mandatory charges when it is shown that employers represented or allowed their customers to believe that the charges were in fact gratuities for their employees. An employer cannot be allowed to retain these monies."

Samiento, 10 NY3d at 81.

Petitioner argues that prior to the decision in *Samiento*, binding precedent, as enunciated in *Bynog v Cipriani*, 298 AD2d 164 (1st Dept 2002), *aff'd on other grounds* 1 NY3d 193 (2003), held that in order to be a gratuity, the charge had to be voluntary and discretionary. Since the charge at issue here is mandatory it could not be a gratuity under *Bynog* and therefore, argues petitioner, the order which was issued prior to the holding in *Samiento*, was invalid and unreasonable.

Prior to discussing the retroactive effect of *Samiento* and the state of the law in 2005 when the order was issued, a plain reading of Labor Law § 196-d would almost certainly lead one to the conclusion that the "gratuity" at issue in this case is covered by the statute. The charge is called a gratuity in the invoice and it is in addition to a service charge. In *Bynog*, the charge was labeled a service charge. In addition, the drivers are instructed to tell their customers that the gratuity or tip is included in the bill. Although one may argue that since it is mandatory, it is not in the true nature of a tip, the statute's inclusion of a charge "purported to be a gratuity" certainly applies.

In any event, petitioner's argument that the judicial and administrative precedent prior to the holding in *Samiento* was overwhelming and therefore, binding on DOL is not accurate. DOL did not ignore controlling law in effect at the time when it issued its Order. Although the first department in *Bynog* held that a mandatory charge could not be a gratuity, when the case was appealed to the Court of Appeals, that court affirmed the lower court's ruling but on other grounds. It found that the charges were not due because the waiters were independent contractors and not employees. The court specifically stated: "Although we hold that the MJA waiters were not Cipriani employees, we reserve judgment as to whether those waiters would be entitled to a share of Cipriani's service charge under *Labor Law section 196-d* if they were employees." *Bynog v Cipriani*, 1 NY3d at n4. The Court of Appeals decision put into doubt the continued validity of the holding of the first department in *Bynog* by its "explicit hesitance to endorse it" (*Spicer v Pier Sixty LLC*, 269 FRD 321, 330 [SDNY 2010]).

Again in *Samiento*, the Court of Appeals stated that in *Bynog*:

> "[W]e left open the question as to whether *Labor Law §196-d*, which forbids an employer from retaining any part of a gratuity or 'any charge purported to be a gratuity' for an employee applies only to a voluntary gratuity or tip presented by a customer or whether it may also apply to a service charge that is held out to the customer as a substitute for a tip. We conclude that a charge that is not a voluntary payment may be a 'charge purported to be a gratuity' within the meaning of the statute."

Petitioner also cites to the Miscellaneous Minimum Wage Order and regulation, 12 NYCRR 142-2.21, which defines "*Tips, or gratuities*" as "voluntary contributions received by the employee" for the proposition that it is not a gratuity if it is mandatory. However, the regulation further provides that "[n]o gratuities or tips shall be deemed received for the purpose of this Part if their acceptance is prohibited by law." The definition is, therefore,

being used to clarify when an employer may claim an allowance for the tips, received by an employee, against the minimum wage as provided in 12 NYCRR 142-2.5. This is a different provision with a different purpose and it cannot be forgotten that Labor Law §198-d also applies to charges purporting to be a gratuity.

Petitioner's reference to *Matter of Kotimsky & Tuchman, Inc.*, 30 AD2d 727 (3d Dept 1968) (issue was whether fee was to be considered part of employee's wages) and *Weinberg v D-M Rest. Corp.*, 53 NY3d 499 (issue of whether coat check charge was fee or gratuity for purposes of determining the level of the employer's liability for a lost item) are inapposite; and the Board's decisions in *Matter of Columbia Sussex Corp,*, PR 59-87 (July 19, 1991) and *Matter of Unique Catering of Albany, Inc.*, PR 160-92 (December 7, 1994) do not support its argument in that they concern whether the charge can be considered payment of minimum wage and not Labor Law § 198-d. In *Unique Catering*, the employer trained its personnel to inform the customers of the nature of the service charge and that it was not a tip. In *The Matter of Wintergarden & Associates,* PR 58-89 (June 19, 1992), the Board held in a case directly on point that since the fixed percentage, added to the customer's bill, was labeled a gratuity, then it had to be passed on to the employees.

Petitioner cites to a 1995 DOL internal memo that states that service charges do not equal gratuities and argues that DOL should be bound by this memo. However, the memo is not on point and the Board has already held that DOL is not estopped from correcting a prior erroneous interpretation (See *Matter of Maddalone & Assoc. Inc. and Maddalone Construction Inc.,* PR 08-157 [February 7, 2011]). In addition, the Court of Appeals decision in *Samiento* cites to a NYSDOL opinion letter dated March 26, 1999 which stated that:

> "[i]f the employer's agents lead the patron who purchases a banquet or other special function to believe that the contract price includes a fixed percentage as a gratuity, then that percentage of the contract price must be paid in its entirety to the waiters, busboys and 'similar employees' who work at that function, even if the contract makes no reference to such a gratuity."

Samiento, 10 NY3d at 79-80.

Therefore, although the Court of Appeals reserved judgment in *Bynog* as to whether a mandatory charge could be a gratuity under Labor Law § 198-d, the interpretation of the statute that the mandatory charge could be a charge which "purported to be a gratuity" was certainly not novel or contrary to established precedent. In *Ramirez v Mansion Catering, Inc.*, 905 NYS2d 148 (1st Dept 2010), the court held that the Court of Appeals holding in *Samiento* is to be given retroactive effect. The court found that the argument that *Samiento* should not be applied retroactively since it announced a "new rule" lacked merit.

> "A judicial decision announces a 'new rule' where it 'overrul[es] established precedent' or constitutes 'such a sharp break in the continuity of law' or 'a dramatic shift away from customary and established procedure' that its 'impact will wreak more havoc in society than society's interest in stability will tolerate.

> "The Court of Appeals' holding in *World Yacht* is '[a] judicial decision construing the words of a statue,' and, as such 'does not constitute the creation of a new legal principle'. . . .
>
> ". . .
>
> "[P]rior to the Court of Appeals' decision in "World Yacht, the issue of whether mandatory service charges could constitute 'gratuities' under Section 196-d had not been authoritatively resolved."

Therefore, the Board finds that the 20% "gratuity" added to the customer's bill is a gratuity within the meaning of Labor Law § 198-d and must be paid to the employee drivers.

B. There was no Waiver of the Employees' right to the 20% Gratuity

Petitioner argues that the Order to Comply is unreasonable because the drivers waived their right to receive the 20% gratuity when they signed the Employment Offer Letter which specifically stated that "it is expressly agreed and understood" that the employee will not receive any part of the 20% charge collected from the customer and that the charge is not a tip and belongs solely to Altour. In support of this argument, petitioner cites to *American Broadcast Co. v Roberts*, 61 NY2d 244 (1984).

In *American Broadcasting*, the Court of Appeals held that employees had validly waived their right to a second meal period during a specific hour through the collective bargaining process. The Court stated that in the area of the "State's regulation of . . .the minimum working condition, this court has been cautious in permitting a waiver of a benefit statutorily conferred upon workers." 61 NY2d at 248. However, the court determined that:

> "The strong public policy of the statute was not undermined, however, where the waiver of statutory benefits was freely, knowingly and openly arrived at, without taint of coercion or duress [and]. . . the statute itself contained no express provision precluding waiver of its benefits [and] significant benefits [were received] in return for the waiver."

Thus, the court provided that a waiver may be valid if it is based on a bona fide agreement, negotiated by the parties without duress, coercion or bad faith; by which the employee receives a desired benefit in return for the open and knowing waiver of the right; and; in addition, the waiver does not compromise legislative intent. The waiver in *American Broadcasting* was arrived at through negotiation by the employees' collective bargaining representative. The issues of duress, coercion or bad faith and the open and knowing nature of the waiver are of less concern to the courts where the waiver has been given by a collective bargaining representative after careful and counseled negotiation. *See, e.g. Welch v Carson Productions Group*, 791 F2d 13 (1986). This is not the case here. The drivers were presented with a letter to sign and there was no negotiation.

Waivers must also be open and knowing. This requires that the employee is aware of the nature of the right that he is waiving. *See, e.g. Abramovich v Board of Education*, 46 MY2d 450 (1979). Although the letter expressly states that the driver will not be entitled to any of the "gratuity" charged as part of the invoice, there is no indication, either verbally or in writing, that the driver was aware of its statutory right to the fee under Labor Law § 198-d.

Even if the waiver was open and knowing and the result of negotiation, it would still not be valid since it is contrary to one of the purposes behind the legislation. Labor Law § 198-d was enacted to rectify the "'unfair and deceptive practice' of an employer retaining money paid by a patron 'under the impression that he is giving it to the employee, not to the employer" (*Samiento,* 10 NY3d at n4). The testimony of Altour's vice-president and general manager was clear that the customers were purposely led to believe that the "gratuity" added to the bill was going to the drivers. This was confirmed by the letters of the customers that it was their belief that the drivers were receiving the 20% gratuity.

There was no valid waiver of Labor Law § 198-d rights by the drivers.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The Order of the Commissioner is hereby affirmed, as amended; and

2. The Petition for review be, and the same hereby is, otherwise denied.

Anne P. Stevason, Chairperson

J. Christopher Meagher, Member

Jean Grumet, Member

LaMarr J. Jackson, Member

ABSENT
Jeffrey R. Cassidy, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
September 10, 2012.

ABSENT

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NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The Order of the Commissioner is hereby affirmed, as amended; and

2. The Petition for review be, and the same hereby is, otherwise denied.

Anne P. Stevason, Chairperson

J. Christopher Meagher, Member

Jean Grumet, Member

LaMarr J. Jackson, Member

Jeffrey R. Cassidy, Member

Dated and signed by a Member
of the Industrial Board of Appeals
at Rochester, New York, on
September 10, 2012. .