United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: October 30, 2006

TO : Alan Reichard, Regional Director
Region 32

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Hertz Transporting, Inc. 530-6001-5000
Case 32-CA-22620-1 530-6050-0180
530-8045-6201
725-6717-5000
725-6733-1500

This case was submitted for advice as to whether the Employer violated the Act when it failed to implement a recently agreed-upon wage provision.

We conclude that the Employer violated Sections 8(a)(5) and 8(d). It is well settled that the unilateral modification of a contractual wage term violates these sections of the Act.[1] Here, in November 2005, the Union and the Employer entered into negotiations for separate contracts covering the employees who work at the Employer's San Jose airport location (the "on-airport" unit) and those who work at the Employer's Walsh Avenue facility (the "off-airport" unit). In December, after three bargaining sessions, the parties signed a "Memorandum of Agreement" (MOA) that included the following wage provision:

> **Wages:**
> Off Airport
> Start $8.00
> 6mos $8.50
> 12mos $9.00
>
> All employees who have reached the twelve month step above will receive their annual contractual increases on the dates below:

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[1] See, e.g., Oak Cliff-Golman Baking Co., 207 NLRB 1063, 1064 (1973), enfd. mem. 505 F.2d 1302 (5th Cir. 1974), cert. denied 423 U.S. 826 (1975) (rejecting employer's contention that its midterm wage reduction was solely a matter for judicial review, the Board concluded that the repudiation of a contractual wage provision is more than a mere contractual breach; rather, it "amounts, as a practical matter, to the striking of a death blow to the contract as a whole, and is thus, in reality, a basic repudiation of the bargaining relationship").

1/1/06	1/1/07	1/1/08	1/1/09	1/1/10	1/1/11
.45	.45	.45	.45	.45	.45

Despite these clear terms, the Employer has refused to pay off-airport employees under the agreed-upon wage provision. Instead, the Employer merely increased by $.45 per hour the primarily lower wages that were paid under the expired collective-bargaining agreement. The Employer defends its refusal to comply with the terms of the wage provision by asserting that that the three-step wage scale set out in the MOA was intended to apply only to new hires in the off-airport unit, and that the parties agreed that current employees would only receive an increase to their existing wages of $.45 per hour.

We conclude that these claims are contrary to the plain language of the off-airport wage provision -- which states that "***[a]ll employees*** who have reached the twelve month step ***above***" are to receive a $.45 wage in each year of the agreement -- and which does not refer to new hires at all.[2] In contrast, the very next provision of the MOA discusses wages for the on-airport unit and expressly differentiates between existing employees and new hires.

The parties' bargaining notes, including those of the Employer's own lead negotiators, are strikingly consistent and follow the same basic structure as the MOA, further supporting the conclusion that the parties did not intend a two-tier wage structure for the off-airport unit. Thus, each side's notes from the critical last bargaining session follow the same pattern: under "off airport," each sets out the identical 3-step wage schedule and a reference to "$.45" or "45¢." This is immediately followed by the on-airport wage provision, in which each side's bargaining notes refer to a 4-step wage progression expressly for on-airport new hires. Significantly, nothing in the bargaining notes supports the Employer's claimed agreement that the 3-step wage schedule set out for the off-airport unit was intended to apply only to new hires, or that

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[2] Indeed, the word "new" appears only twice in the MOA -- first, in the probationary period provision (grievance procedure does not apply to "***[n]ew*** employees terminated" during their 90 day probationary period) and, second, in the on-airport wage provision, which sets forth different wages for current and new employees (current employees to be paid the San Jose "living wage," while "all ***new hires*** into the on airport classification" to be paid under a 4-step wage progression leading to the "living wage" after 18 months of employment).

current off-airport employees' wages would consist solely of their existing wages plus an annual $.45 increase in each year of the contract.[3]

Additionally, testimony from Union witnesses also supports the conclusion that the off-airport wage provision was not limited to new hires. According to these witnesses, the Employer did not differentiate between current employees and new hires when it proposed the seniority-based wage progression and the schedule of annual increases set forth in the MOA. Rather, they state that the Employer explained that employees in the off-airport unit who already had 12 months of seniority would be paid $9.00 per hour and receive the $.45 increase as soon as the agreement went into effect, while off-airport employees with less than 12-months seniority with Hertz would go through the proposed wage progression. Therefore, based on the plain language of the MOA itself, the parties' bargaining notes, and creditable Charging Party testimony regarding the negotiations, the parties clearly agreed upon a single wage scale and annual hourly increase for the off-airport unit employees, and a separate two-tier structure for the on-airport unit.[4]

Moreover, there is no sound arguable basis for the Employer's contention that the wage scale for off-airport employees in the MOA was intended to be limited to new hires, thereby precluding the Board from finding an unfair

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[3] We note that the parties earlier discussed and rejected a two-tier wage proposal, before they proceeded to negotiate over and ultimately agree upon the single-tier Employer wage proposal. This change further supports our conclusion that the wage scale finally agreed upon was not intended to apply only to new hires.

[4] In interpreting a labor agreement, "the parties' actual intent underlying the contractual language in question is always paramount." Kmart Corporation, 331 NLRB 362, 362 (2000), quoting Mining Specialists, 314 NLRB 268, 268 (1994) (examining notes, proposals, and other bargaining history to determine whether parties intended only certain employees to get raises under contractual wage provision). Intent is determined by examining "both the contract language itself and relevant extrinsic evidence, such as a past practice of the parties in regard to the . . . implementation of the contract provision in question, or the bargaining history of the provision itself." 314 NLRB at 269.

labor practice.[5] The Employer attempts to support its argument with an alleged off-the-record conversation between the Employer's negotiators and one of the Union's two negotiators. During this meeting, the Union representative asked the Employer whether any of the current employees could wind up being paid less than a new hire under the proposed off-airport wage provision; the Employer acknowledged that there might be and offered to discuss raising the wages of such employees.[6] This claim, in the absence of other evidence that the parties intended to distinguish current employees and new hires, is insufficient to rebut the other ample evidence, set forth above, that the off-airport wage provision was not intended to be limited to new hires. This is particularly so here, since the Employer drafted the MOA after the conversation is alleged to have taken place and nonetheless failed to include any language distinguishing between current employees and new hires.

Also unavailing is the Employer's attempt to support its claim that the parties intended two-tier wage structures in both bargaining units by relying on the two-tier systems set forth in the MOA's on-airport wage provision, in the newly executed airport contract, and the similar two-part wage structure under the predecessor agreement. Rather, the fact that the Union and the Employer have agreed elsewhere to two-tier wage structures at most shows that the parties know how to specify a two-tier system when they want to, and sheds no light on the meaning of the MOA's off-airport wage provision. The Employer's argument might have some plausibility if the on-airport wage provision preceded the off-airport provision, because the two-part structure and specific mention of new hires in the on-airport provision arguably might be viewed as modifying the subsequent provision. However, since the on-airport provision follows the off-airport provision, it is unlikely that the parties intended it to modify the

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[5] See, e.g., NCR, 271 NLRB 1212, 1213 (1984) (where an employer has a "sound arguable basis" for its interpretation of a contract and is not motivated by union animus or acting in bad faith, Board will not seek to determine which of two plausible contract interpretations is correct); Bath Iron Works Corp., 345 NLRB No. 33, slip op. at 3-5 (2005) (where General Counsel and employer each presented reasonable interpretations of the applicable contract language, the Board declined to pass on which of the two was the better view).

[6] The Union negotiator denies that such a conversation took place.

preceding provision. Therefore, we conclude that the Employer does not have a sound arguable basis for its position and the Board is not precluded from finding a violation of Sections 8(d) and 8(a)(5).

Accordingly, the Region should issue complaint, absent settlement, alleging that the Employer's failure to pay its off-airport employees pursuant to the agreed wage provision violated Sections 8(d) and 8(a)(5).

B.J.K.