

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 5

DAYCON PRODUCTS COMPANY, INC.,

Respondent

and

Case 5-CA-35043

DRIVERS, CHAUFFEURS AND HELPERS LOCAL  
UNION NO. 639 A/W INTERNATIONAL  
BROTHERHOOD OF TEAMSTERS,

Charging Party

**GENERAL COUNSEL'S BRIEF**  
**IN SUPPORT OF EXCEPTIONS TO THE**  
**DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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National Labor Relations Board  
Region 5

Dated: February 19, 2010

**I. TABLE OF CONTENTS**

**I. TABLE OF CONTENTS.....i**

**II. TABLE OF CASES.....iii**

**III. STATEMENT OF THE CASE ..... 1**

**IV. ISSUES PRESENTED ..... 2**

**V. STATEMENT OF FACTS..... 2**

**A. Background ..... 2**

**B. The Wage Rate Reduction ..... 3**

**VI. ARGUMENT ..... 7**

**A. Respondent Modified the Terms of the 2007-2010 Collective-Bargaining Agreement..7**

**1. Respondent Did Not Comply with the Provisions of Section 8(d) of the Act..... 8**

**2. Wage Rates Prior to May 2009 Were the Correct Rates According to the Terms of  
the Existing Collective-Bargaining Agreement. .... 9**

**3. Respondent’s Modification to Wage Rates Was Not a Permissible “Correction.”... 13**

**4. The Union Never Consented to a Modification to Wage Rates While the 2007-2010  
Collective-Bargaining Agreement Was in Existence..... 17**

**B. Respondent’s Unilateral Change to Terms and Conditions of Employment ..... 17**

**1. Wage Rates Prior to the Modification Had Been Established Through Past Practice.  
..... 18**

**2. Respondent Did Not Provide the Union with Timely Notice of Its Intent to Reduce  
Wage Rates..... 19**

**3. Respondent Did Not Engage in Good-Faith Bargaining with the Union..... 20**

**4. The Parties Did Not Reach Good-Faith Impasse ..... 23**

**C. The Administrative Law Judge Failed to Consider Respondent’s Animus Toward the Union..... 24**

**D. The Administrative Law Judge Failed to Correctly Apply Board Precedent ..... 24**

**1. The Administrative Law Judge Erred in Relying on His Misinterpretation of *Eagle Transport Corp.*, 338 NLRB 489 (2002). ..... 24**

**2. The Administrative Law Judge Failed to Consider the Board’s Directive in *Oak Cliff-Golman*, 207 NLRB 1063 (1973). ..... 26**

**VII. CONCLUSION ..... 26**

## II. TABLE OF CASES

### CASES

<i>Allied Signal, Inc.</i> , 330 NLRB 1216 (2000).....	22
<i>Apache Powder Co.</i> , 223 NLRB 191 (1976).....	11
<i>Atlas Metal Parts Co.</i> , 252 NLRB 205 (1980).....	23
<i>Bryant &amp; Stratton</i> , Bus. Inst., 321 NLRB 1007 (1996).....	17
<i>C &amp; S Indus., Inc.</i> , 158 NLRB 454 (1966).....	7, 13, 17
<i>Detroit Edison Co.</i> , 440 U.S. 301 (1979) .....	21
<i>Dorsey Trailers, Inc.</i> , 327 NLRB 835 (1999).....	23
<i>Eagle Transport Corp.</i> , 338 NLRB 489 (2002).....	24, 25
<i>Edison Co. v. N.L.R.B.</i> , 460 U.S. 693 (1983) .....	22
<i>Farmers Coop. Compress</i> , 169 NLRB 290 (1968).....	24
<i>Foster Transformer Co.</i> , 212 NLRB 936 (1974).....	15, 16
<i>General Electric Co.</i> , 296 NLRB 844 (1989).....	22
<i>Georgia Power Co.</i> , 342 NLRB 192 (2004).....	20
<i>Herman Bros., Inc.</i> , 273 NLRB 124 (1984).....	23
<i>Hotel Roanoke</i> , 293 NLRB 182 (1989).....	20
<i>Hydrotherm, Inc.</i> , 302 NLRB 990 (1991).....	22
<i>JPH Mgmt., Inc.</i> , 337 NLRB 72 (2001).....	19
<i>K Mart Corp.</i> , 242 NLRB 855 (1979).....	20
<i>Mays Printing Co., Inc &amp; Local 2/289-m, Graphic Communications Conference, Dist. Council 3, Int'l Bhd. of Teamsters</i> , 354 NLRB No. 23 (May 29, 2009).....	18
<i>Meharry Med.</i> , Coll., 236 NLRB 1396 (1978).....	19

<i>Mercy Hosp. of Buffalo,</i> 311 NLRB 869 (1993).....	17
<i>Milwaukee Spring Div.,</i> 268 NLRB 601 (1984).....	7, 10, 17
<i>N. L. R. B. v. Katz,</i> 369 U.S. 736, 82 S. Ct. 1107, 8 L. Ed. 2d 230 (1962) .....	17
<i>N.L.R.B. v. Acme Indus. Co.,</i> 385 U.S. 432 (1967) .....	21
<i>Nassau County Health Facilities Ass'n.,</i> 227 NLRB 1680 (1977).....	12, 13, 17
<i>Oak Cliff-Golman Baking Co.,</i> 207 NLRB 1063 (1973).....	7, 13, 17, 26
<i>Reppel Steel &amp; Supply Co., Inc.,</i> 239 NLRB 358 (1978).....	11
<i>Res-Care, Inc.,</i> 280 NLRB 670 (1986).....	21
<i>Resco Products, Inc.,</i> 331 NLRB 1546 (2000).....	10, 11
<i>Sonic Automotive,</i> 343 NLRB 1058 (2004).....	18
<i>St. Vincent Hosp.,</i> 320 NLRB 42 (1995).....	23
<i>Taft Broadcasting Co.,</i> 163 NLRB 475 (1967).....	23
<i>Waxie Sanitary Supply,</i> 337 NLRB 303 (2001).....	17, 18
 STATUTES	
29 U.S.C. § 158(d).....	8, 20

**COMES NOW** Shelly C. Skinner, counsel for the General Counsel, and respectfully files this Brief in Support of Exceptions to the Decision of the Administrative Law Judge.

### **III. STATEMENT OF THE CASE**

This proceeding involves one charge filed by Drivers, Chauffeurs and Helpers Local Union No. 639 a/w International Brotherhood of Teamsters, a labor organization.<sup>1</sup> The Charge in Case 5-CA-35043 was filed on June 4, 2009. (GC Exh. 1-A.) Based upon the foregoing Charge, a Complaint and Notice of Hearing (Complaint) issued on August 31, 2009. (GC Exh. 1-C.) Respondent filed an Answer to this Complaint that was received in the Region on September 14, 2009. (GC Exh. 1-E.)

The hearing in this proceeding took place on November 9th and 10th, before the Honorable Bruce D. Rosenstein, Administrative Law Judge.<sup>2</sup> On January 8, 2010, the Administrative Law Judge issued his decision (Decision), in which he dismissed the Complaint in its entirety.

The Administrative Law Judge's Decision contained findings that are contrary to Board law. The Decision was based on erroneous findings of fact and misapplied case law. For the reasons described below, the Complaint should not have been dismissed, and the Decision should be reversed.

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<sup>1</sup> Daycon Products Company, Inc., will be referred to as "Respondent." Unless first names are necessary for clarity, individuals will be referred to by their last names after their initial identification. References to the transcript of the hearing will be cited as "Tr." followed by the appropriate page designation. Exhibits will be cited as "GC Exh.," "R Exh.," and "CP Exh.," followed by the exhibit number, for the General Counsel's, Respondent's, or Charging Party Union's exhibits, respectively. References to the Administrative Law Judge Decision will be cited as "ALJD" followed by the appropriate page designation and line number(s).

<sup>2</sup> At the hearing, Respondent made a motion to amend the Second Defense in the Answer so that it stated that Respondent had no obligation to bargain with the Union before changing the eight employees' wage rates and that if an obligation to bargain did exist, it was waived by the Union. (Tr. 15.) The motion was granted. (Tr. 17.)

General Counsel made a motion to amend Paragraph 8(f) of the Complaint so that the term "10(b)" was deleted from the paragraph and replaced with the term "8(a) through (d)." (Tr. 25.) The motion was granted. (Tr. 26.)

In addition, at the hearing the Administrative Law Judge approved a settlement by Consent Order of paragraphs 7 and 9 of the Complaint, which alleged Respondent had made unlawful threats and had engaged in direct dealing. This settlement was taken over the objection of the General Counsel and the Charging Party Union. (Tr. 8-9.)

#### **IV. ISSUES PRESENTED**

The issues raised in the instant matter are the following:

1. Whether the Administrative Law Judge erred in his finding of certain facts upon which he based his decision?<sup>3</sup>
2. Whether the Administrative Law Judge erred in interpreting Board precedent upon which he based his ruling?<sup>4</sup>
3. Whether the Administrative Law Judge erred in not addressing relevant Board precedent in his decision?<sup>5</sup>
4. Whether the Administrative Law Judge erred in failing to find that Respondent unilaterally reduced the wage rates of eight employees while a collective-bargaining agreement was in existence?<sup>6</sup>
5. Whether the Administrative Law Judge erred in failing to find that Respondent violated Sections 8(a)(5) and 8(d) of the Act?<sup>7</sup>

#### **V. STATEMENT OF FACTS**

##### **A. Background**

Respondent Daycon Products Company, Inc., is a Maryland corporation engaged in the production of cleaning supplies. From March 3, 2007, until January 31, 2010, Respondent and Drivers Chauffeurs and Warehousemen Teamsters Local 639 a/w International Brotherhood of Teamsters (Union) were parties to a collective-bargaining agreement (“2007-2010 collective-bargaining agreement” or “2007-2010 contract”). (GC Exh. 6.) Prior to 2007, Respondent and

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<sup>3</sup> Exception Nos. 1, 2, 3, and 4.

<sup>4</sup> Exception Nos. 7, 8, and 9.

<sup>5</sup> Exception No. 10.

<sup>6</sup> Exceptions Nos. 5 and 6.

<sup>7</sup> Exception Nos. 11 and 12.

the Union had been parties to collective-bargaining agreements from 2001-2003 and from 2004-2007. (GC Exh. 7 and GC Exh. 3.)

The 2007-2010 contract was entered into in good-faith after several months of negotiations. During those negotiations, Respondent provided the Union with a document listing the wage rates for each of its employees. (GC Exh. 5; Tr. 43-44.) The Union based its bargaining proposals on this information. (Tr. 44.) Respondent never told the Union that this list contained incorrect wages. (Tr. 50.)

## **B. The Wage Rate Reduction**

In March 2009, Respondent, through Human Resources Director Jodie Kendall, notified Union Business Agent Douglas Webber that there was an issue concerning an overpayment of wages to some employees in the bargaining unit. Kendall did not explain the error to Webber as she was still trying to determine which employees had been supposedly overpaid and to verify that her calculations were correct. (Tr. 130).

On or about April 17, 2009, Respondent gave the Union a document containing the names of eight employees whom Respondent claimed it had overpaid. (GC Exh. 8; Tr. 54). The document did not identify the payroll errors, if any, that had affected the eight employees' wages. (GC Exh. 8.) The document did not state the total amount allegedly overpaid to each employee, nor did it state the amount of time for which each employee had been supposedly overpaid. (GC Exh. 8.) Respondent did not proffer an explanation of the purported error to the Union, nor did it show the Union any calculations, charts, or logs that illustrated the supposed error.

Around April 22, 2009, Webber attended a meeting at Respondent's facility to discuss several items including the wage issue. Jay Krupin, Respondent's counsel, Bo Nottage,

Respondent's transportation director, John Poole, Respondent's president, and Jodie Kendall were also present at this meeting. (GC Exh. 18). Krupin stated that someone had pushed the wrong numbers on a calculator, causing some employees to be overpaid. (Tr. 60-61). While Krupin asserted that Respondent reserved the right to seek repayment of the alleged overpaid monies, none of Respondent's representatives explained how Respondent would seek repayment. (Tr. 62). Neither did any of Respondent's representatives offer to illustrate the purported error, though Webber asked for a schedule of the supposed clerical errors. (Tr. 62, 214-215; GC Exh. 18). Webber objected to any wage reduction or recoupment of the alleged overpaid wages because the Agreement was in effect. Webber also proposed that no wage reduction occur until the parties could resolve the issue. (Tr. 214). The meeting ended with Krupin stating that the Union should involve its attorney in this issue. (Tr. 62). After the meeting on April 22, 2009, Webber sent a letter to Respondent stating that the Union did not consent to a wage reduction and that the Union did not understand the supposed payroll mistake that Respondent was alleging. (GC Exh. 9.) The letter also stated that during bargaining in 2007, Respondent provided the Union with a list of the existing pay rates for each employee and that the parties negotiated wage rates based on this list. (GC Exh. 9).

In mid to late April 2009, Kendall met with each of the eight affected employees individually and explained that Respondent would be reducing their wage rates. (Tr. 216.) She told the employees that if the Union kept pushing the matter, then Respondent would reserve the right to seek repayment of the alleged overpayment. (Tr. 216-217.) During this time period, Respondent's calculation of the purported errors continued to change. (Tr. 181.) For instance, during her meetings with employee Alvin Phoenix and employee Robert Redmond, Kendall had

to modify the wage rate she had told them was correct because she realized her calculations were still erroneous. (GC Exh. 15; GC Exh. 16; GC Exh. 17; Tr. 191-192.)

Around April 24, 2009, Respondent's president John Poole spoke to the workforce about the eight employees' wage rate reduction. (Tr. 189-190). He used talking points, which he created in conjunction with Kendall and Respondent's attorneys, when speaking with the employees and stated that Respondent had overpaid employees by "greater than \$100,000.00." (GC Exh. 14; Tr. 189-190). This figure corroborates Webber's notes from the April 22, 2009, meeting, which indicate that Krupin claimed the eight employees were overpaid by \$102,000. (GC Exh. 18). This figure does not, however, corroborate Respondent's other communication with the employees and the Union. For instance, Kendall testified that she and Poole had a meeting in February 2009, in which they decided that the eight employees had been overpaid by around \$80,000.00. (Tr. 123.) Kendall further testified that her calculations changed at least four or five times from February 2009 through May 3, 2009. (Tr. 179, 180-182.) By mid-April 2009, when Respondent supplied the Union with a document showing each employees' current wage rate, supposed correct wage rate, and the difference between the two wage rates, Respondent possessed all of the information necessary to calculate the alleged overpayment. (GC Exh. 11.) At the end of April, Poole met with the plant's employees and stated that the employees had been overpaid by \$100,000.00. (GC Exh. 14; Tr. 189-190). On or about May 1, 2009, however, Respondent sent the Union a letter containing the total amount each employee had been allegedly overpaid. (GC Exh. 11.) The sum of these totals equals \$82,360.80. Respondent's calculation evidently changed drastically and rapidly. Clearly, it was difficult for Respondent to determine the amount of money it asserted had been overpaid, and at the hearing, Respondent provided testimony that contradicted documentary evidence regarding its belief of

the amount overpaid. (TR. 123; GC Exh. 11; GC Exh. 14.) The Administrative Law Judge plainly erred in finding that Kendall's calculations had shown the eight employees had been overpaid by \$80,000.00, because Kendall testified that her calculation kept changing and because that Respondent's president and attorney had calculated the supposed overpayment as greater than \$100,000.00.<sup>8</sup> (Tr. 181; ALJD 3: 20-21; GC Exh. 14; GC Exh. 18.)

Respondent's May 1<sup>st</sup> letter to the Union, which contained the total amount each employee had been allegedly overpaid, also stated Respondent's a plan to give a bonus to some of the affected employees. However, the letter did not list the amount of the bonus payment, nor did the letter describe or illustrate the supposed errors that had occurred in the eight employees' wage rates. This letter was Respondent's first notification to the Union that it would definitely reduce the wage rates of the eight affected employees. On May 3, 2009, Respondent reduced the wage rates of the eight employees. (Tr. 139).

The Union never consented to a decrease in the eight employees' rates of pay. (Tr. 72.) Respondent never provided the Union with calculations, detailed descriptions, or summary charts to explain the nature of the supposed errors to the eight employees' wage rates. (Tr. 73-74.) At the hearing, Respondent entered into evidence a collection of charts containing summaries of purported errors in the eight employees' wage rates. (R. Exh. 10). These charts were created by Kendall and Respondent's counsel in May or June 2009, after Respondent had changed the employees' wage rates. (Tr. 166).

During the hearing, Human Resources Director Jodie Kendall testified that the supposed payroll errors had been implemented before she began working for Respondent. (Tr. 131.) (Kendall began working for Respondent in June 2007. [Tr. 122.]) Kendall further testified that employee Lynette Burton had received catch-up raises in 2004, 2005, and 2006, and Kendall

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<sup>8</sup> Exception No. 2.

stated that Respondent had never intended to grant these raises to Burton. (Tr. 123.) Kendall also claimed that someone had pushed the wrong button on a calculator when computing pay rates, and this typographical error led to an overpayment in wages. (Tr. 124.) The Administrative Law Judge referred all other questions from the General Counsel and the Union, regarding the nature of the purported errors, to the above-mentioned charts created with counsel in May or June 2009. (Tr. 185-186.)

Webber never received notification from the Federal Mediation and Conciliation Service about a midterm contract modification or a re-opening of the contract. (Tr. 74). Respondent never told Webber that any of the purported errors had to do with employees receiving catch-up raises to which they were not entitled. (Tr. 113).

## **VI. ARGUMENT**

### **A. Respondent Modified the Terms of the 2007-2010 Collective-Bargaining Agreement.**

In his decision, the Administrative Law Judge found that Respondent reduced the wage rates of eight employees while a collective-bargaining agreement between Respondent and the Charging Party Union was in existence (ALJD 2: 29-30; 5: 2.) The Board has consistently held that an employer's modification to wages during the term of a collective bargaining agreement is unlawful if the union does not consent to such a change. *Milwaukee Spring Div.*, 268 NLRB 601, 602 (1984); *Oak Cliff-Golman Baking Co.*, 207 NLRB 1063, 1064 (1973); *C & S Indus., Inc.*, 158 NLRB 454, 458 (1966). The Administrative Law Judge erred in finding that Respondent did not engage in a mid-term modification of the parties' collective-bargaining agreement. (ALJD 5: 42-44.)<sup>9</sup> Contrary to the Administrative Law Judge's findings, and as will be discussed in greater detail below, Respondent's reduction in the wage rates of eight employees unlawfully

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<sup>9</sup> Exception No. 6.

modified the collective-bargaining agreement in contravention of Section 8(d) of the Act. Even if the reduction is not viewed as a mid-term modification, the eight employees' wage rates had been established by past practice and because the parties had not bargained to good-faith impasse, Respondent's unilateral change to the wage rates violated Section 8(a)(5) of the Act. As such, the Administrative Law Judge's dismissal of the complaint should be reversed.

**1. Respondent Did Not Comply with the Provisions of Section 8(d) of the Act.**

Section 8(d) of the National Labor Relations Act generally prohibits parties to a collective-bargaining agreement from modifying the terms of the agreement while it is in effect.

29 U.S.C. § 158(d). Section 8(d) of the Act, in relevant part, states:

Where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, *unless* the party desiring such termination or modification-

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; *and*

(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later.

29 U.S.C. § 158(d) (emphasis added).

In order to satisfy the Act when modifying the terms of the 2007-2010 collective-bargaining agreement, Respondent needed to comply with all of the exceptions enumerated in Section 8(d); however, Respondent did not comply with any of the exceptions. First, Respondent did not serve written notice of the proposed wage change on the Union 60 days before the expiration of the collective-bargaining agreement. The contract expired on January 31, 2010, but Respondent reduced the wages rates on May 3, 2009.

Second, Respondent did not offer to meet and confer with the Union for the purpose of negotiating a contract containing reduced wage rates. Respondent never even pointed out the purported errors to the Union; thus, it did not truly confer with the Union over the issue. (Tr. 73-74.)

Third, Respondent did not notify the Federal Mediation and Conciliation Service of its dispute with the Union concerning wage rates for eight bargaining unit employees. Additionally, Respondent did not inform any Maryland agency established to mediate and conciliate disputes about its conflict with the Union over wage rates.

Respondent also failed to comply with its obligation to continue, in full force and effect, all terms and conditions of the existing collective-bargaining agreement until the expiration of the Agreement. For the reasons listed above, it is clear that Respondent did not act in accordance with any provision of Section 8(d) of the Act.

## **2. Wage Rates Prior to May 2009 Were the Correct Rates According to the Terms of the Existing Collective-Bargaining Agreement.**

Respondent seems to argue that it did not have to comply with Section 8(d) because it did not modify a term of the collective-bargaining agreement. Respondent asserts that the wage reduction caused the eight employees' wages to comply with the wage provision of the 2007-

2010 collective-bargaining agreement. However, as explained below, the employees' correct wage rates under the 2007-2010 collective-bargaining agreement were those granted prior to the May 2009 change.

When determining whether an employer has modified a term of an existing collective-bargaining agreement, the specific term contained therein must first be identified. *Milwaukee Spring*, 268 NLRB at 602. In the present case, Respondent modified wage rates, a term contained in Article IX and in Schedule A of the Agreement. Article IX, titled "Wages," describes the raises to which employees are entitled, and Schedule A contains a listing of minimum wage rates for each job classification. (GC Exh. 6.) These sections of the contract do not list specific wage rates for each classification. Rather, the language of Article IX states, "Retroactive to February 1, 2007, and effective on March 3, 2007, each employee shall receive the following increase to his/her rate of pay." (GC Exh. 6.) The language in Article IX then enumerates the amount of the pay raises but does not list actual wage rates. (GC Exh. 6.)

To determine the rate of pay upon which pay raises were to be added when the 2007-2010 contract went into effect, the parties' intent is "paramount and is given controlling weight." *Resco Products, Inc.*, 331 NLRB 1546, 1548 (2000). "To determine the parties' intent, the Board looks to both the contract language and to relevant extrinsic evidence, such as the parties' bargaining history and past practice." *Resco Products, Inc.* at 1548. No testimony regarding the parties' intent was permitted at the administrative law hearing. (Tr. 47-48.) The only extrinsic evidence regarding the parties' intent that was admitted at the hearing was a list of base wage rates that Respondent had given to the Union while they bargained for a collective-bargaining agreement in 2007. (GC Exh. 5). The Union utilized this information when bargaining over wages for the 2007-2010 contract.

The Union had no knowledge that the base wage rates supplied by Respondent could have been erroneous. Thus, any mistakes on the list of wage rates do not invalidate the binding nature of the collective-bargaining agreement. See *Reppel Steel & Supply Co., Inc.*, 239 NLRB 358 (1978) (where the Board held that the employer could not refuse to execute a contract though the employer claimed the contract was based on a mistaken wage proposal it submitted to the union during bargaining; the administrative law judge stated, “ ... even assuming, *arguendo*, a ‘mistake’ by Respondent, the Union did not know, nor was it in a position to even have suspected that Respondent did not mean what it initially stated and subsequently confirmed in writing”); see also *Apache Powder Co.*, 223 NLRB 191 (1976) (“The rescission for unilateral mistake is, for obvious reasons, a carefully guarded remedy reserved for those instances where the mistake is so obvious as to put the other party on notice of the error”). No obvious mistakes existed on the list of base wage rates. In fact, Respondent did not believe there were any mistakes on the list; Respondent waited until 2009 to determine that the base wage rates it provided to the Union in 2007 were erroneous. (Tr. 123.) Respondent cannot claim the benefit of supplying supposedly erroneous information to the Union, from which the parties negotiated new wage rates for the 2007-2010 contract, and then changing its mind in favor of lower wage rates after the contract had been in existence for two years. Any erroneous wage rates included in the list provided by Respondent were incorporated into the 2007-2010 contract and therein became binding on all parties.

In the absence of any other evidence of the parties’ intent regarding the wage rates upon which employees should receive raises when the 2007-2010 contract went into effect, the Administrative Law Judge should have determined the employees’ correct wage rates by looking to “the ordinary meaning of relevant contract terms as applied to the facts of the case.” *Resco*

*Products, Inc.*, 331 NLRB 1546, 1548. See also *Nassau County Health Facilities Ass'n.*, 227 NLRB 1680 (1977) (where the employer claimed it was not obligated grant wage raises listed in the collective-bargaining agreement when the government had cut its funding as such a contingency was implicit in the agreement, the Board found that because no contingency term was contained in the contract and there was no evidence that the parties had intended to include a contingency provision in the agreement during contract negotiations, the employer was obligated to pay the raises). The ordinary meaning of the phrase, “each employee shall receive the following increase to his/her rate of pay” was that employees would receive increases to the wage rates they were receiving on February 1, 2007, the first date of the Agreement. (GC Exh. 6.) Additionally, neither the 2007-2010 collective-bargaining agreement nor the previous two collective-bargaining agreements between Respondent and the Union contained a provision stating that employees could not receive pay increases beyond those specifically described in the contract. (GC Exh. 6, GC Exh. 3, GC Exh. 7.) Moreover, as Schedule A contains the “minimum” wage rates, but the contract contains no maximum rates, it is implicit that employees could earn more than minimum wage rates guaranteed by the contract. (GC Exh. 6.)

The Administrative Law Judge, therefore, erred in stating that a reduction in the eight employees’ wage rates would “restore the agreed upon wages to conform them to those previously negotiated by the parties.” (ALJD 5: 41-42.)<sup>10</sup> Based on the evidence presented at the hearing, it can only be concluded that the rates paid to employees on February 1, 2007, were incorporated into the 2007-2010 contract as base wage rates, to which contractual and discretionary pay increases would be applied. It is clear that the eight employees' wage rates, prior to the May 2009 change, were correctly paid in accordance with the terms of the collective-bargaining agreement. Additionally, the Agreement contained no provision permitting the

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<sup>10</sup> Exception No. 4.

reopening of the contract for modification or alteration. Accordingly, Respondent's implementation of a wage reduction affected the terms of the collective-bargaining agreement that was in effect at the time of the change.

### **3. Respondent's Modification to Wage Rates Was Not a Permissible "Correction."**

The Board has consistently held that mid-term contract modifications violate the Act. See *Oak Cliff-Golman*, 207 NLRB at 1063 (where the employer reduced employees' wage rates while a collective-bargaining agreement was in existence because it faced financial problems, the Board held that the employer had unlawfully modified the wage provisions of the contract); see also *Nassau County Health Facilities Ass'n.*, 227 NLRB at 1680 (where the employer did not grant pay raises to employees in accordance with the collective-bargaining agreement that was in effect, the Board held that the employer had unlawfully modified the terms of the contract); see also *C & S*, 158 NLRB at 457 (where the employer implemented a new wage incentive system though the union opposed it, and a collective-bargaining agreement was in effect, the Board held the employer violated the Act because it had already struck a bargain with the union over terms and conditions of employment for the contract period, and thus the employer was "no longer free to modify the contract over the objection of the [u]nion"). In the present case, Respondent modified eight employees' wage rates in May 2009, while a collective-bargaining agreement was in existence.

Respondent defends its actions by asserting that during the terms of the 2001-2003 collective-bargaining agreement and the 2004-2007 collective-bargaining agreement, it paid eight employees erroneous wage rates. Respondent claims it was allowed to correct these various purported errors many years after they occurred. The Administrative Law Judge erred

when characterizing the nature of Respondent's alleged payroll errors in his decision.<sup>11</sup> (ALJD 3: 15-17.) The Administrative Law Judge found that Respondent had mistakenly overpaid the eight employees since 2004 when it granted them catch-up raises during the term of the 2004-2007 collective-bargaining agreement. (ALJD 3: 15-17.) However, Respondent never claimed that the same payroll error impacted each of the eight employees, nor that each employee's pay had been in error since 2004.<sup>12</sup> In fact, Respondent presented testimony and documentary evidence claiming that it made different payroll errors over differing periods of time for each affected employee.

For example, Respondent states it granted catch-up raises to employee Lynette Burton during the term of the 2004-2007 collective-bargaining agreement, though it was not contractually obligated to do so. (Tr. 123.) Respondent claims these three years of pay raises were a mistake. Additionally, Respondent claims that a typographical error caused by someone adding 1.03 to a wage rate instead of multiplying it by 1.03 led to an error in computing pay rates. (Tr. 124.) However, Respondent does not provide the identity of the person who made the alleged error, nor does it produce any evidence confirming that any pay raise was unintentional.

In fact, Respondent's Human Resources Director Jodie Kendall testified at the administrative law hearing that the purported payroll errors were made before she began working for Respondent. Thus, she does not possess first-hand knowledge as to whether the wrong button was pushed on a calculator. Moreover, Respondent may have intentionally granted pay increases to certain bargaining unit employees before Kendall was hired and of which Kendall is unaware. Indeed, Kendall herself stated that certain payroll actions occurred which she could not have known about by just following the wage progression listed in the previous collective-

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<sup>11</sup> Exception No. 1.

<sup>12</sup> While the Administrative Law Judge stated that the eight employees had been overpaid since 2004, Respondent claimed that some of the eight employees had been overpaid since 2003. (R Exh. 10.)

bargaining agreement. (Tr. 181). As such, Kendall's testimony regarding payroll actions and supposed errors was mere speculation.

It is noteworthy that Respondent's president, John Poole, who was present during the entire hearing before the Administrative Law Judge, did not testify. (Tr. 26.) The record is in fact void of testimony from supervisors or payroll employees who worked for Respondent during the time period when the supposed payroll errors were administered. Respondent's argument that the eight employees were paid above the contractual minimum is irrelevant without evidence demonstrating that Respondent never intended to grant the employees any wage increases beyond those listed in collective-bargaining agreements.

Though it is highly dubious that Respondent committed payroll errors since 2003, even if it had, Board law would not permit Respondent to unilaterally change wage rates in 2009. Under Board law, an employer may correct a payroll error when the error is clear and cognizable, no animus exists, and no collective-bargaining agreement exists. See *Foster Transformer Co.*, 212 NLRB 936 (1974).

In *Foster Transformer Co.*, 212 NLRB 936, the employer proved that it had a past practice of paying employees at the instructor rate when they performed instructing duties and at the production rate when they performed production duties. Through a union handbill, the employer discovered that employee Milburn was being paid the instructor rate when she performed both instruction and production duties. Therefore, the employer changed her wage rate so that she received the instructor rate only when she performed instructor duties. The circumstances in *Foster Transformer Co.*, are quite different from those in the present case. First, no collective-bargaining agreement was in existence during the relevant period in *Foster Transformer Co.* 212 NLRB 936 at 938, n. 3 (“...the Union was certified. However, Respondent

has never recognized the Union.”) Thus, the Administrative Law Judge clearly erred in finding that a collective-bargaining agreement was in existence in that case.<sup>13</sup> (ALJD FN 10.) Because the employer in *Foster Transformer Co.* did not modify the terms of a contract but merely conformed Milburn’s pay to its policy established through past practice, its actions cannot be compared to those of Respondent’s actions in the current case, where notably, a collective-bargaining agreement was in existence when the wage rates were reduced. The Administrative Law Judge erred by not addressing the fact that a collective-bargaining agreement was in effect when Respondent changed employees’ wage rates.<sup>14</sup> (ALJD 5-6.) This issue is of key importance because the General Counsel alleged Respondent violated the Act by modifying 2007-2010 collective-bargaining agreement without satisfying all of the exceptions enumerated in Section 8(d) of the Act. (GC Exh. 1-C.)

The Administrative Law Judge also erred in stating that the facts in *Foster Transformer Co.* were similar to those in the case at hand.<sup>15</sup> (ALJD 6: 2-3.) In *Foster Transformer Co.*, the Board noted that the union called attention to the inequity caused by Milburn receiving a higher rate of pay than other similarly situated employees. The employer, therefore, was motivated by the union’s publicity of the inequity to correct Milburn’s pay. In the case at hand, however, Respondent did not find out about the alleged errors through a communication from the Union, but rather it conducted an audit of its entire payroll on its own volition. (Tr. 172.) Furthermore, the facts in the two cases are vastly different with regard to the nature of the wage changes. The wage adjustment in *Foster Transformer Co.* merely involved matching job duties to their correct rates of pay. In contrast, an explanation of Respondent’s purported errors in the instant case requires speculation, varying mathematical calculations, and numerical manipulation.

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<sup>13</sup> Exception No. 9.

<sup>14</sup> Exception No. 5.

<sup>15</sup> Exception No. 8.

The facts that classify an employer's wage change as a wage correction are absent from the facts in the present case. Therefore, Respondent's change to wage rates was a mid-term contract modification and cannot be characterized as a payroll correction. The wage reduction was a significant modification to eight employees' rates of pay, which were established through long-standing past practice and the terms of the 2007-2010 collective-bargaining agreement.

**4. The Union Never Consented to a Modification to Wage Rates While the 2007-2010 Collective-Bargaining Agreement Was in Existence.**

An employer violates the Act by making a mid-term modification, without the union's consent, even when the employer offers to bargain with the union and the union refuses. *Milwaukee Spring*, 268 NLRB at 602; *Nassau County Health Facilities Ass'n.*, 227 NLRB at 1680; *Oak Cliff-Golman*, 207 NLRB at 1064; *C & S*, 158 NLRB at 458. In the present case, the Union never consented to the reduction in wage rates. During communications with Respondent in April 2009, Union steward Douglas Webber stated the Union's opposition to any change in employees' wage rates while a collective-bargaining agreement was in effect. Human Resources Director Jodie Kendall corroborated this fact by testifying that the Union objected to Respondent's plan to reduce the wage rates of the eight employees. (Tr. 136.)

**B. Respondent's Unilateral Change to Terms and Conditions of Employment**

It is well-settled law that an employer violates Sections 8(a)(1) and 8(a)(5) of the Act by unilaterally changing the wages, hours, and other terms and conditions of employment of bargaining unit employees without first providing their collective-bargaining representative with notice and a meaningful opportunity to bargain about the change. *N. L. R. B. v. Katz*, 369 U.S. 736, 82 S. Ct. 1107, 8 L. Ed. 2d 230 (1962); *Waxie Sanitary Supply*, 337 NLRB 303 (2001); *Bryant & Stratton Bus. Inst.*, 321 NLRB 1007 (1996); *Mercy Hosp. of Buffalo*, 311 NLRB 869

(1993). The employer and the union must reach good faith impasse before the employer implements a unilateral change. *Mays Printing Co., Inc & Local 2/289-m, Graphic Communications Conference, Dist. Council 3, Int'l Bhd. of Teamsters*, 354 NLRB No. 23 (May 29, 2009).

Of course, not every unilateral change constitutes an unfair labor practice. The change must be “a material, substantial, and a significant one and must have a real impact on, or be a significant detriment to, the employees or their working conditions.” *Waxie*, 337 NLRB at 303 (internal quotations omitted). In the case at hand, the eight affected employees relied upon the receipt of wage rates in accordance with a wage structure that had been in place for several years prior to May 2009. See *Sonic Automotive*, 343 NLRB 1058 (2004) (where the Board held that an employer's unilateral change to pay periods, which caused employees to receive a three-day paycheck instead of a the usual five-day paycheck, constituted a material and substantial change in working conditions because employees had planned their personal finances around the receipt of a five-day paycheck). Thus, Respondent's unilateral change is substantial and has caused a significant detriment to employees. (Tr. 143.)

Here, Respondent did not provide timely notice to the Union of its plan to reduce eight employees' wage rates, nor did Respondent bargain with the Union about the wage rate issue. As such, Respondent and the Union never reached good faith impasse, and Respondent's unilateral implementation of reductions to eight employees' wage rates violated the Act.

**1. Wage Rates Prior to the Modification Had Been Established Through Past Practice.**

The Board has held that when employees receive a pay increase for an extended period of time, the increase becomes a past practice which the employer may not unilaterally change. *JPH*

*Mgmt., Inc.*, 337 NLRB 72 (2001); *Meharry Med. Coll.*, 236 NLRB 1396 (1978). In *JPH Mgmt., Inc.*, the employer unilaterally rescinded a raise it had given employees for five weeks. 337 NLRB 72. The Board held the five-week term was long enough to establish the raise as a past practice and thus found the unilateral rescission was unlawful. *Id* at 73. In the present case, Respondent rescinded wage rates that it had paid to eight employees since 2003. Those wage rates had clearly become a term of employment through past practice.

In *Meharry Med. Coll.*, 236 NLRB at 1401, the Board held that even if employees received an improper raise, the employer violated the Act by rescinding the raise because they had been in effect for “several months” and thus “clearly constituted terms and conditions of employment which [the employer] was not free to unilaterally change.” In that case, the collective-bargaining agreement did not list specific wage rates for the employees in question; thus, the wage term was somewhat ambiguous. Despite this ambiguity in the contract, the Board believed that wage rates that had been paid consistently over the course of several months had become a part of the agreement through past practice. In the present case, therefore, the wages that Respondent paid employees for over half of a decade had been unmistakably established as the terms and conditions of employment to which Respondent is now bound.

**2. Respondent Did Not Provide the Union with Timely Notice of Its Intent to Reduce Wage Rates.**

Respondent did not give the Union timely notice of its intent to reduce the wage rates of eight bargaining unit employees. None of the parties’ wage-related discussions provided timely notice that Respondent would reduce wages because as late as April 2009, Respondent had not set forth its plan to the Union. The Union first received notice that Respondent definitely planned to reduce wages through Respondent’s letter dated May 1, 2009. (GC Exh. 11.) On

May 3, 2009, Respondent implemented the wage reduction. (Tr. 139.) This two-day<sup>16</sup> notice can hardly be viewed as timely. See *Georgia Power Co.*, 342 NLRB 192 (2004) (where the employer notified the union of its proposed change to a term of employment on May 30, 2001, and implemented the change on June 1, 2001, the Board held that the employer did not provide the union with notice and an adequate opportunity to bargain). The weighty issue of a wage rate reduction would reasonably merit several meetings between the Union and its counsel and membership, and two months did not provide enough time for these meetings, let alone for meaningful discussions with Respondent.

### **3. Respondent Did Not Engage in Good-Faith Bargaining with the Union.**

While the Union was under no obligation to do so, the Union tried to discuss the wage issue with Respondent before the implementation of reduced wage rates. The Administrative Law Judge erred in ignoring and failing to address these attempts by the Union while noting that the Union “did not orally or in writing request to negotiate the reduction of wages.”<sup>17</sup> (ALJD FN8.) The Union was under no obligation to request bargaining of a proposed wage reduction during the term of a collective-bargaining agreement. See 29 U.S.C. § 158(d) (stating that the party desiring to modify the terms of the collective-bargaining agreement must meet and confer with the other party). Furthermore, the Union called Respondent, sent written communications to Respondent, and met with Respondent to discuss the wage rate issue.

In examining the Union's actions, it should first be noted that hard bargaining is lawful. *Hotel Roanoke*, 293 NLRB 182, 193 (1989); *K Mart Corp.*, 242 NLRB 855, 876 (1979). While the Union told Respondent that it opposed wage reductions during the term of a collective-

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<sup>16</sup> Union Business Agent Douglas Webber testified at the hearing that he did not receive Respondent's letter until around May 9 or 10, 2009. (Tr. 67). Thus, Respondent's letter served, at best, two-day's notice on the Union, but in reality, the Union was informed of Respondent's plan after it had been implemented.

<sup>17</sup> Exception No. 3.

bargaining agreement, the Union nevertheless engaged in give-and-take conduct which demonstrated its commitment to good-faith bargaining.

Webber's request that Respondent explain the purported errors during the meeting on April 22, 2009, constituted an overture for discussion of the wage rate issue. This request for explanation, had Respondent complied, would have allowed meaningful bargaining to ensue. See *N.L.R.B. v. Acme Indus. Co.*, 385 U.S. 432 (1967) (where the Supreme Court held that an employer, in satisfying its duty to bargain in good faith, must comply with a union's request for information that will assist the union in fulfilling its responsibilities as the employees' statutory representative). Additionally, after the meeting on April 17, 2009, when Kendall commented that she would like to see the Union's legal sources, the Union quickly sent her statutes in support of the Union's position. (Tr. 136). By sending documents in support of its position, the Union tried to explain its viewpoint and to engage Respondent in a discussion of the wage rate issue. Furthermore, by providing such documents, the Union participated in the give-and-take that is requisite for good faith bargaining. *Res-Care, Inc.*, 280 NLRB 670 (1986) (“...give and take...is a central requirement of good-faith bargaining, and...makes bargaining meaningful”).

Respondent, on the other hand, never provided the Union with documents explaining the purported payroll errors it had supposedly discovered. Rather, Respondent unlawfully ignored the Union's request for an explanation of the alleged error. *Acme*, 385 U.S. 432; *Detroit Edison Co.*, 440 U.S. 301 (1979). Moreover, while Respondent expended the time to meet with each of the eight affected employees individually and explain that it would be reducing their wage rates, and while Respondent made the effort to send letters to the Union reserving its rights to recoup the alleged overpayment, Respondent never made the effort to describe the purported errors to the Union. As Jodie Kendall frequently showed Respondent's President John Poole an electronic

spreadsheet illustrating the supposed errors she had found, Respondent could have easily printed this spreadsheet and provided it to the Union at one of the parties' meetings or in one of Respondent's mailings to the Union.

Additionally, because Respondent was continuously changing its calculation of the alleged overpayment, it provided different numerical figures to the employees and to the Union at various times. Respondent, therefore, was not providing an honest or clear account of which computation it planned to apply when reducing the employees' wage rates. Respondent's lack of truthful disclosure muddled the Union's understanding of the issue and highlights Respondent's unwillingness to partake in good-faith discussions with the Union over its unilateral change to wage rates.

It is reasonable that a company would, at the very least, reveal a payroll error to the bargaining representative of its employees if the company intended to reduce wage rates while a collective-bargaining agreement was in effect. The fact that Respondent did not provide any documents, such as spreadsheets or audit reports, that would illustrate the error to the Union reveals that Respondent did not engage in the give-and-take process, which is at the heart of good faith negotiations. *Hydrotherm, Inc.*, 302 NLRB 990, 994 (1991) (in determining whether a party has engaged in good faith bargaining, it must be determined whether they have "evince[d] a mindset open to agreement or one that is opposed to true give-and-take.")

Lastly, the Union never waived its right to bargain over changes in wage rates. A waiver of a party's right to bargain must be "clear and unmistakable." *Metro. Edison Co. v. N.L.R.B.*, 460 U.S. 693, 708 (1983). Proof of a contractual waiver is an affirmative defense, and it is the Respondent's burden to show that the contractual waiver is explicitly stated, clear, and unmistakable. *Allied Signal, Inc.*, 330 NLRB 1216, 1228 (2000); *General Electric Co.*, 296

NLRB 844, 857 (1989). Respondent does not assert that the Union waived its right to bargain over the wage issue, and at no point did the Union state it would give up its right to bargain over any contractual term, particularly wage rates. The evidence instead establishes that the Union was open to meeting and conferring with Respondent over the wage issue.

#### **4. The Parties Did Not Reach Good-Faith Impasse**

The Board has held that in cases involving a unilateral change to an existing collective-bargaining agreement, the issue of impasse is irrelevant because bargaining is not required. *St. Vincent Hosp.*, 320 NLRB 42 (1995); *Herman Bros., Inc.*, 273 NLRB 124 (1984). However, even if it is found that Respondent and the Union were required to bargain over the wage rate issue, Respondent was only permitted to implement the wage reduction if the parties had reached good-faith impasse. *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967).

“A bargaining impasse occurs when good-faith negotiations have exhausted the prospects of reaching an agreement.” *Dorsey Trailers, Inc.*, 327 NLRB 835, 858 (1999). It is not enough for Respondent to merely assert that its attempts to bargain with the Union were unsuccessful and thus impasse had been reached. The Board considers many factors when determining whether good-faith impasse has occurred, including bargaining history, the parties' good faith in negotiations, the length of the negotiations, and the importance of the issue over which there is a dispute. *Taft*, 163 NLRB at 475.

Respondent took no action to negotiate a resolution to the wage rate dispute with the Union. Instead, Respondent implemented the wage reduction without regard for the Union's position on the matter or for the bargaining relationship. As such, good-faith bargaining over the wage rate issue never occurred, and thus, good faith impasse was never reached. See *Atlas Metal Parts Co.*, 252 NLRB 205, 223 (1980) (“a finding of "impasse" requires antecedent good-faith

bargaining”); see also *Farmers Coop. Compress*, 169 NLRB 290, 295 (1968) (“There can be no impasse without good-faith bargaining”).

**C. The Administrative Law Judge Failed to Consider Respondent’s Animus Toward the Union.**

From March 2009 through May 2009, Respondent made unlawful threats to employees and engaged in direct dealing regarding the wage reduction. These actions were alleged in the Complaint, and the Administrative Law Judge approved a settlement of these allegations, over the objection of the General Counsel and the Union, through a Consent Order at the administrative law hearing. (ALJD 5: 34-36.) Through its threats and direct dealing, Respondent showed its disregard for the Union’s role as the exclusive bargaining agent for the employees. Respondent’s course of conduct of also displayed its desire to derogate from the Union’s authority. As such, the allegations settled through the Consent Order demonstrate Respondent’s animus in the instant case. *St. Mary’s Acquisition Co., Inc.*, 343 NLRB 979 (2004).

**D. The Administrative Law Judge Failed to Correctly Apply Board Precedent**

**1. The Administrative Law Judge Erred in Relying on His Misinterpretation of *Eagle Transport Corp.*, 338 NLRB 489 (2002).**

In the present case, the Administrative Law Judge erred in not considering the facts in *Eagle Transport Corp.*, 338 NLRB 489 (2002) when applying its conclusion to the case at hand.<sup>18</sup> (ALJD 5: 44-48.) The Administrative Law Judge failed to place the Board’s holding in the context of the facts presented in *Eagle Transport Corp.* In that case, the Board held that the employer lawfully rescinded a 5 percent increase it had mistakenly granted all bargaining unit employees in one paycheck. The employer showed that it was about to enter into collective-

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<sup>18</sup> Exception No. 7.

bargaining negotiations with a union that represented the workers at one of its facilities. *Id.* at 491. As a bargaining tactic, the employer decided to grant a 5 percent wage increase to the workers at its other facilities but to withhold the raise from the workers at the unionized site. *Id.* Due to a computer error, the 5 percent wage increase was applied to the workers at the unionized facility, as well. *Id.* at 489. The employer immediately rescinded the increase for the unionized workers so that the workers did not receive the raise in the next pay period. *Id.* at 491.

Because the employer clearly demonstrated that the 5 percent raise was a mistake, the Board found that the case involved a “miscalculation” rather than a “granting and subsequent rescission of a wage increase.” 338 NLRB 489, 489-90. In the present case, however, Respondent offered no explanation of the events leading to the supposed payroll mistakes and provided no proof that the eight employees’ wage increases since 2003 were erroneous. Respondent merely presented one chart for each of the eight employees containing a list of pay raises that it claimed were unintentional. These charts do not prove that the case at hand involves miscalculations. Rather, the facts demonstrate a granting and subsequent rescission of wage increases. Respondent failed to produce categorical evidence that it had unintentionally granted pay increases to the eight employees over a period of six years.

Furthermore, Respondent did not rescind the raises within one pay period after the raises were granted. While some of the purported mistaken pay increases were given in 2003, Respondent did not rescind them until 2009.<sup>19</sup> The facts in the instant case are clearly distinguishable from the facts in *Eagle Transport Corp.*

The Administrative Law Judge, while relying on the facts and analysis in *Eagle Transport Corp.*, did not address the following relevant facts in the instant case: (1)

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<sup>19</sup> As previously stated, supra n. 12, though the Administrative Law Judge found that the eight employees had been overpaid since 2004, Respondent claimed that some of the errors began in 2003.

Respondent's failure to demonstrate that its intent was to withhold the raises the eight employees received over six years; and (2) the rescission of wage increases after six years of implementation.

**2. The Administrative Law Judge Failed to Consider the Board's Directive in *Oak Cliff-Golman*, 207 NLRB 1063 (1973).**

While the Administrative Law Judge found that Respondent had overpaid the eight employees since 2004, he failed to comport his reasoning with that of the Board's in *Oak Cliff-Golman*, 207 NLRB 1063 (1973).<sup>20</sup> In *Oak Cliff-Golman*, the Board stated that it does not have authority to "excuse the commission of the [mid-term modification of the contract's wage provision] because of a showing either that such action was compelled by economic need or that it may have served what may appear to us to be a desirable economic objective." 207 NLRB at 1064. Thus, the Administrative Law Judge's desire to prevent economic loss to Respondent does not permit a mid-term modification to terms and conditions of employment.

Moreover, the economic detriment to the eight employees must not be overlooked. During a period of six years and three collective-bargaining agreements, the employees made financial decisions based on their wage rates. Respondent's sudden and radical departure from wage rates it had paid employees for over half a decade severely impacted the employees' economic stability. The Administrative Law Judge failed to consider these policy implications and erred in not even addressing the Board's directive in *Oak Cliff-Golman*.

## **VII. CONCLUSION**

It is evident that Respondent made a mid-term modification to the terms of the 2007-2010 collective-bargaining agreement by reducing eight employees' wage rates on May 3, 2009.

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<sup>20</sup> Exception No. 10.

Respondent did not obtain the Union's consent nor did it satisfy Section 8(d) of the Act before implementing the wage reduction. The Union was under no obligation to bargain with Respondent over the wage change. However, even if it is found that there was an obligation to bargain, Respondent acted unlawfully as it unilaterally implemented the change without bargaining to good-faith impasse. The Administrative Law Judge erred by relying on his misinterpretation of Board law and by failing to address relevant Board law and policy issues.

For all the reasons described above, counsel for the General Counsel respectfully requests that the Board reverse the Administrative Law Judge's incorrect finding that Respondent permissibly reduced wage rates while a collective-bargaining agreement was in existence. Counsel for the General Counsel also respectfully requests that the Board reverse the Administrative Law Judge's dismissals of the 8(a)(5) and 8(d) allegations as set forth above. Accordingly, a cease and desist order is appropriate, as well as an order to make the eight employees whole for losses sustained by reason of Respondent's unlawful activity.<sup>21</sup>

Respectfully submitted,

/s/ Shelly C. Skinner  
Shelly C. Skinner  
Counsel for the General Counsel

Dated: February 19, 2010

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<sup>21</sup> Exception Nos. 11 and 12.

## CERTIFICATE OF SERVICE

I hereby certify that this Counsel to the General Counsel's Brief in Support of Exceptions to the Decision of the Administrative Law Judge was electronically filed on February 19, 2009, and, on that same day, copies were electronically served on the following individuals by email:

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