UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Drivers, Chauffeurs, and Helpers, Local Union No. 639, a/w International Brotherhood of Teamsters	Charging Party,	Case No. 5-CA-35043
- and -		
Daycon Products Company, Inc.	Respondent.	

RESPONDENT'S ANSWERING BRIEF TO THE EXCEPTIONS AND BRIEFS FILED IN SUPPORT THEREOF

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Daycon Products Company, Inc. ("Respondent" or "Daycon" or "the Company") submits this Answering Brief to the Exceptions and Briefs in Support Thereof filed by the General Counsel and the Charging Party to the January 8, 2010 Decision and Order ("Decision") of Administrative Law Judge ("ALJ") Bruce D. Rosenstein. For the reasons set forth below, the Decision should be affirmed. The ALJ correctly found that Daycon's correction of overpayments to employees that were mistakenly paid due to administrative errors required no collective bargaining.

I. STATEMENT OF THE CASE[1]

Common sense and prior Board precedent dictates that parties to a collective bargaining relationship be allowed to correct errors in the administration of collective bargaining agreements. This principle should be given full application in the instant case. Try as they might, the General Counsel and Charging Party cannot avoid one simple yet essential fact – namely, the wages of the eight employees at issue were improperly inflated over the course of several years by the mistaken granting of "catch up" raises.

These errors translated into bargaining unit members being mistakenly and drastically overpaid for several years. As there is no dispute about the employees' overpayment, there was no obligation to bargain before implementing the true wages on which there was an actual meeting of the minds between the bargaining parties.

[1] Throughout this Brief, references to General Counsel's exhibits shall be "G.C. Ex. __"; references to Respondent's exhibits shall be "R. Ex. __"; references to Charging Party's exhibits shall be "C.P. Ex.__", references to the ALJ's exhibits shall be "ALJ Ex. __" and references to the Transcript of Proceedings shall be "Tr. __." Citations to the Administrative Law Judge's Decision shall appear as "ALJD" followed by the page number. Citations to the General Counsel's Brief in Support of its Exceptions appear as "GCB ___" followed by the page number, and citations to the Charging Party's Brief in Support of its Exceptions appear as "CPB ____" followed by the page number. Citations to the General Counsel's Exceptions shall be referred to as "GCEXC __". Citations to the Charging Party's Exceptions shall be referred to as "CPEXC __."

Without trying to be flip, how can restoring erroneous wages to the proper levels negotiated by the parties (and in force with the remainder of the bargaining unit) violate a duty to bargain? To allow the erroneous wage rates to trump those negotiated between the parties would be to elevate mistakes in the administration of a contract above the terms of the contract itself. Such a rule would encourage gamesmanship (oops! – I made another error, and this one is in my favor! Too bad we have to bargain before we correct it…) and thereby destabilize collective bargaining relationships. The principle that a party must bargain before restoring the terms from which it has not purposefully strayed, and that have already not only been bargained for, but agreed to in a written contract refutes itself. The decision of the ALJ allowing Daycon to correct the simple mistake was plainly proper.

II. STATEMENT OF FACTS

As mentioned at numerous intervals by the ALJ, there is really no dispute about the underlying facts.[2] (Tr. 188:12-13) ("I don't see a lot of facts in dispute in this case. I really don't."); and (Tr. 204:2) ("The facts in this case I don't see at all in dispute."). Indeed, the ALJ found upon ample, mostly uncontradicted evidence the following facts.[3]

In January 2009, a Company employee raised an issue about being underpaid by a dollar. (ALJD 3.) Prompted by this complaint, Jodie Kendall ("Kendall"), the Company's Director of Human Resources, conducted an exhaustive review to determine whether other

[2] The most pertinent and salient facts are contained within paragraph 8 of the Complaint, which alleged that (a) in or around March 2009, Daycon notified the Union of its decision to reduce the wages of certain employees, (b) on or about April 17, 2009, by letter, Daycon again notified the Union of its decision, and (c) on or about May 22, 2009 Daycon implemented its decision. (G.C. Ex. 1-C, ¶ 8.)

[3] As noted by Judge Rosenstein to counsel for the General Counsel, "I have evidence that you put in as General Counsel, exhibits where the Employer has indicated that there were clerical errors over a three year period which inflated the wages of eight employees. That's what they said, and that's what you put in evidence. So, I don't understand what you're now trying to do, to go back and undermine your own exhibits." (Tr. 186:18-24.)

bargaining unit members were being paid properly under the contract. Id. Kendall discovered that during the duration of the prior contract, eight employees had mistakenly received "catch up" increases even though that contract did not provide for such increases, as prior contracts had. Id.

On March 5, Kendall informed the Union's business agent Douglas Webber ("Webber") of the overpayments, and on April 14 met with Webber and the union steward to discuss the overpayment and her calculations. (ALJD 3.) By letters dated April 16, Kendall informed both the Union and the eight affected employees that they had been paid above the contractual minimums due to a clerical error.[4] (ALJD 3-4.) On April 17, Kendall and the company attorney met with Webber and the steward to discuss the overpayment. (ALJD 4.) On April 23, Webber wrote the company attorney that it would consider any action to reduce the wages an unfair labor practice and violation of the agreement. On April 25, the Union met with its members to inform them of the ongoing issue and to discuss the taking of a strike vote. (ALJD 4.)

On May 1, in a letter from counsel to Webber, the Company explained that it was neither deducting money from the employees' wages nor renegotiating the previously agreed-upon wages; instead it was seeking to correct an obvious clerical payroll error. (ALJD 4.) The letter again informed the Union of the Company decision to correct the wages, as well as the decision to pay a bonus payment to soften the impact on effected employees. Id. Effective May 22, the Company corrected the wages of the eight employees. (ALJD 5.)

[4] Notably, at no time did the Union or any employee ever assert that they had been properly receiving pay above the contractual minimums, a simple enough assertion to make, if true. As will be discussed further *infra*, all record evidence establishes that the established practice was to pay the contractual amounts only; no merit raises were given.

The ALJ also found that despite being informed of the decision to correct the overpayment on at least four separate occasions, and nearly three months prior to its implementation, the Union never orally or in writing requested to bargain over the decision to correct the wages. (ALJD 4 n.8)("It is noted that the Union did not orally or in writing request to negotiate the reduction of wages."); (Tr. 57:23-58:2.) Instead, the union filed its ULP shortly after the wages were corrected.

Relying on the fact that the wages were plainly not in line with the wage structure embodied in the written contracts, the ALJ concluded that the Company's action merely "restored the agreed upon wages to conform them to those previously negotiated by the parties," holding that "the correction of overpayments to employees that were incorrectly paid due to administrative errors requires no collective bargaining." (ALJD 5, 6.) The General Counsel and Charging Party each filed exceptions.

III. LEGAL ARGUMENT

A. THE ALJ CORRECTLY FOUND THAT THE WAGES PAID TO THE EIGHT EMPLOYEES WERE IMPROPER ACCORDING TO THE NEGOTIATED AGREEMENTS

All the evidence and testimony supported the following three findings: (1) the eight employees received erroneous wage increases over several years; based primarily on the findings that (2) the contract in place from 2004-2007 did not contain "catch up" raises; and (3) the eight employees received "catch up" raises (and other erroneous raises) during that time.

While the briefs of both the General Counsel and Charging Party cling to the charade that the inflated wage rates (which resulted in one instance in an employee being paid more than another employee twelve years his senior) were warranted, the actual evidence

demonstrates otherwise. Even a cursory examination of the testimony and documentary evidence reveals the central dispute raised by counsel to be no dispute at all.[5]

Even though their sole witness admitted the pay raises given to and taken by the eight employees were erroneous, attorneys for both the General Counsel and the Charging Party still will not. Instead, they devote page after page to vacuous legal argument, studiously ignoring the fact that the payroll error was both admitted and proven. This "head in the sand" approach to the case cannot overcome the facts, or the law. To begin with, the sole witness offered by the General Counsel admitted outright that the wage rates were erroneous. Webber testified:

> Q: Now, let's go back to Exhibit 5, and down there at the bottom where that box is that has Ms. Burton's wage boxed in, it's $16.67, isn't it?
>
> A: Yes.
>
> Q: But we just went through the contract and went through the contractual raises, and the wage rates should've been $14.19 under that contract. I thought we agreed on that, right?
>
> A: That's what the figures show.
>
> Q: **So the $16.67 is likely incorrect isn't it?**
>
> A: **It appears that it is.**

(Tr. 88:6-13; Tr. 88:25-89:10; G.C. Ex. 5) (emphasis added).[6]

Webber also admitted that the wage rates for Trevor Holder were erroneous for the same reasons. (Tr. 90:18-93:3.) Furthermore, and perhaps more telling, despite being the business agent overseeing the contract for the previous five years, Webber offered no testimony

[5] As noted by Judge Rosenstein to counsel for the General Counsel, "I have evidence that you put in as General Counsel, exhibits where the Employer has indicated that there were clerical errors over a three year period which inflated the wages of eight employees. That's what they said, and that's what you put in evidence. So, I don't understand what you're now trying to do, to go back and undermine your own exhibits." (Tr. 186:18-24.)

[6] Following Webber's admission of the error, Judge Rosenstein stated without challenge that "I think the witness has agreed as to what the wage rate would've been under that contract as it existed before its expiration." (Tr. 90:14-16.)

that any of the raises received by the eight employees were granted for any legitimate reason. Nor did he rebut the specific and detailed testimony and documentary evidence that the vast majority of the raises received by the eight employees were erroneous "catch up" raises, not called for under the contract, and not received by any other employees.

On the Company side, Kendall testified that the overpayment came about due to "clerical errors, misapplication of the contract." (Tr. 123:19-21.) The following exchange then took place:

> Q. Misapplication of what specifically?
>
> A. For example, someone like Lynette Burton or Trevor Holder, they received catch-up increases during years that there was no catch-up in the contract.
>
> Q. Do you know how much those catch-up increases were?
>
> A. I think they were about 80 cents.
>
> Q. 80 cents each?
>
> A. Each, each time. So during the course of the contract, I think they got at least three 80-cent increases when not warranted. [7]

(Tr. 123:22-124:6.)

Kendall testified that Respondent's Exhibit 10 was an accurate summary of her findings as to the erroneous wage increases received by the eight employees, based upon her investigation and audit of the payroll records. (Tr. 164:20-165:5.) That exhibit, which went essentially unchallenged at the hearing,[8] establishes the erroneous nature of the raises, and that

[7] The record evidence establishes beyond doubt that other employees also received unwarranted "catch up raises." (R. Ex. 10, R. Ex. 11, R. Ex. 6(a), R. Ex. 5(b).)

[8] While Charging Party has excepted to the evidence which details the nature of the erroneous raises (CPEXC 1-3), counsel for the General Counsel has not. As the General Counsel controls the handling and prosecution of the case, Charging Party's exceptions beyond the scope of those raised by the General Counsel cannot be reviewed. Nott Co., 345 NLRB 396, 398 (2005)("It is well established, however, that the General Counsel's theory of the case is

nearly every one was a "catch up" increase which the General Counsel's sole witness admitted did not apply during the term of that contract:

> Q: And was a catch-up raise included in the previous contracts?
>
> A: Not the immediate previous one.
>
> Q: Okay. So not the contract from 2004 to 2007?
>
> A: Correct.

(Tr. 49:18-22.)

While counsel for the General Counsel initially sought to discredit the underlying numbers, the payroll errors identified in Exhibit 10 were never seriously challenged at the hearing. In fact, after some questioning, counsel for the General Counsel stated that she believed "Respondent's Exhibit 10 will show the different types of errors that occurred to each individual and how they're all unique, and I'll move on your Honor." (Tr. 187:19-22.) Judge Rosenstein then stated:

> I don't disagree with you. I mean it's in evidence. That's how they made their computations and gave rise to their position that the wages of eight employees were inflated mainly because of the catch-up raises, and there were other errors as it reflects on certain employees.

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controlling, and that a charging party cannot enlarge upon or change the General Counsel's theory."). Even if they could, the objections have no merit. For example, although General Counsel conducted voir dire regarding the methodology underlying R. Ex. 10, after doing so, neither she nor counsel for Charging Party objected to the introduction of the exhibit. (Tr. 166:15-21.) Consequently even if this evidence were somehow defective, which it most certainly is not, any objection to its validity has been waived. See Sec. 10394.5 of the NLRB Case Handling Manual (failure to object on grounds of incompetence, such as hearsay, may be found to be a waiver of the defect);

While counsel for the Charging Party made an offer of proof that his questioning of Kendall would establish that "there are no written documents or records that show Ms. Burton's wage changes since her date of hire in the HR records," this proves nothing since, as Kendall testified, the union employees at the Company "follow the contract," and their contractual pay raises are reflected directly in the "payroll system," rather than in documents in their files. (Tr. 202:3-203:3; 208:3-7.) Characterizing the testimony of Webber and Kendall, Judge Rosenstein stated without objection: "The witness has explained, without going over each individual employee, what the methodology was in arriving at those figures, and there's no dispute that the individuals, going forward, were brought back to the wages that should've been paid under the collective bargaining agreement[.]" (Tr. 151:12-16.)

(Tr. 187:23-188:3.)

Given that neither counsel for General Counsel or Charging Party challenged or cast doubt on the validity of R. Ex. 10, or the testimony from Webber and Kendall, it is hardly surprising that the ALJ found they failed to carry the burden of proof in establishing the claimed violation. In any event, the sole witness put forth by General Counsel admitted that excluding the erroneous raises Burton received, she would have received everything due under the contract:

> Q: So for Ms. Burton, who we know started at $12.99 and got three raises over the course of this contract, she would've gone from $12.99 to approximately $14.19 or about 40 cents a year of the contract?
>
> A: Correct.
>
> Q: And **if that were her wage, she would have been paid everything that she'd been due under that contract, correct?**
>
> A: **Correct.**

(Tr. 88:6-13) (emphasis added).

Moreover, despite his status as business agent, Webber never asserted a legitimate reason for any of the pay raises at issue, and even admitted that "as far as what's called for under the contract, Ms. Burton would have received everything that's called for if she was making approximately $14.19 at the end of that contract" – but Burton was instead making $16.67 at the end of that contract. (Tr. 89:18-22; G.C. Ex. 5.) This discrepancy reduces counsel for the General Counsel to asserting lamely, with absolutely no support in the record, that "Respondent *may have* intentionally granted pay increases to certain bargaining unit employees before Kendall was hired and of which Kendall is unaware."[9] (GCB 14) (emphasis added). Presumably, if this were the case, Webber (as the business agent overseeing the contract) could have easily testified as much. Instead, Webber testified that the wages were in error, and that "if

[9] This assertion has other implications, as discussed in Section III(D), *infra*.

Ms. Burton had gotten any raises during the course of this contract from '04 to '07, for whatever reason, I'm not aware of it." (Tr. 89:14-17.)

In addition, neither General Counsel nor Charging Party called to the stand any of the eight affected employees, even though they had all appeared pursuant to subpoena. Presumably, any one of the eight employees could have testified that the raises they received were granted by the Company for some particular reason. The fact that they did not, and that counsel chose not to even put them up when they were available and under subpoena, allows the inference that the employee's testimony would have revealed that their raises were not legitimate. See Int'l Automated Machines, Inc., 285 N.L.R.B. 1122, 1123 (1987)("when a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge.").

Ignoring the failure to produce plainly relevant evidence through its own witnesses, the General Counsel points to the fact that Daycon President John Poole ("Poole") did not testify at the hearing, hinting that this somehow supports the notion that the raises were perhaps justified. (GCB 15.) Beyond the fact that this is baseless speculation, it also ignores the fact that the General Counsel could have called Poole as an adverse witness pursuant to Fed. R. Evid. 611(c), but did not. In addition, General Counsel, not Respondent, bore the burden of proof. See Sec. 101.10 ("The Board's attorney has the burden of proof of violations of section 8 of the National Labor Relations Act[.]"). As the general Counsel had failed to carry this burden, Respondent simply made the decision not to have Poole testify to offer evidence cumulative to the strong testimony of another Company official.[10] See International Union, et al. v. NLRB, 459 F.2d 1329, 1338 (D.C. Cir. 1972)("Of course, if a party has good reason to believe his

[10] (Tr. 208:20-24.)

opponent has failed to meet his burden of proof, he may find no need to introduce his strong evidence.").

Finally, neither counsel for the General Counsel or the Charging Party has even attempted to explain the evidence that indisputably showed the seemingly paradoxical and singular result of a junior union employee earning $0.40 per hour more than a co-employee twelve years his senior under the contract. (R. Ex. 11; Tr. 169:12-15.) Given all this, the after-the-fact contrived effort to undermine the clear evidence submitted at the hearing is not enough. Roper Corp. v. NLRB, 712 F.2d 306, 310 (7th Cir. 1983)("When relevant evidence is not presented by the party with the burden of proof, it is simply not enough to rely on discrediting adverse testimony presented by the opposition.").

In sum, it is irrefutable that the 2004 contract did not provide for catch up raises. (G.C. Ex. 3; Tr. 49:17-25, 77:16-22, 85:12-19, 87:12-16, 123:22-124:6, 163:9-18.) Payroll records confirm certain employees received a "second" increase on their anniversary dates of employment. (R. Ex. 10; Tr. 162-164.) Counsel for General Counsel herself introduced evidence confirming that these individuals were paid above the agreed upon rates. (G.C. Ex. 5; Tr. 49:18-22, 88:6-13, 186:18-24.) The Union's business agent acknowledged that an error was the only explanation for these overpayments. (Tr. 88:25-89:10, 93:20–94:7.) Despite this mountain of evidence, both Charging Party and General Counsel ask the Board to accept that from 2004-2007 randomly selected employees were without explanation entitled to a second "mystery" raise, and that by pure coincidence this raise was given on these individuals' anniversary dates of employment, the same time "catch up" raises were previously given. (CPB 14-15; GCB 24-25; G.C. Ex. 7.) Which makes more sense – that a relatively small segment of the bargaining unit were individually and miraculously awarded pay raises for no known reason,

or that a payroll error occurred? The answer to this question is axiomatic. General Counsel and Charging Party's attempts to blur the reality that an administrative error occurred should be ignored.[11]

B. THE ALJ CORRECTLY FOUND THAT THE COMPANY'S WAGE CORRECTION RESTORED THE PROPER NEGOTIATED WAGE RATES, RATHER THAN MODIFYING THE TERMS OF THE CONTRACT

As demonstrated above in Section III(A), the Company *restored*, rather than modified the proper wage rates. Accordingly, there was no unilateral change to the existing conditions of employment as negotiated by the parties. In these circumstances, there can be no statutory violation, as it is well settled that an employer may unilaterally correct an administrative error resulting in employees being paid more than what has been agreed under a collective bargaining agreement.

It is undisputed that in correcting the erroneous wage rates, the Company has adhered to (albeit belatedly), and not departed from the negotiated contract**.** Thus, the case boils down to a simple matter of contract interpretation. In such instances, "[w]here 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, the Board ordinarily will not find a violation." Bath Iron Works Corp., 345 N.L.R.B. 499, 502 (2005). See also Yellow Freight Systems, 313 N.L.R.B. 309, 331 (1993); Westinghouse Elec. Corp., 313 N.L.R.B. 452 (1993); NCR Corp., 271 N.L.R.B. 1212 (1984). Because there is no ambiguity whatsoever regarding whether the Company correctly interpreted the contract, there can be no 8(d) violation here. See NLRB v. U.S. Postal Serv., 8 F.3d 832, 836 (D.C. Cir. 1993) (noting that "where the matter is covered by the collective bargaining agreement, the union has exercised its bargaining right[.]")(emphasis by court).

[11] Since the Company is not seeking to recoup any of the amounts erroneously paid, General Counsel's exception to the ALJ's finding that the total overpayments amounted to approximately $80,000 is irrelevant. (GCEXC 2.)

Of course, it is recognized that in a typical Section 8(a)(5) "unilateral change" cases, the Board generally applies the "clear and unmistakable waiver" standard, under which the question is whether the union has clearly and unmistakably relinquished its legal rights to bargain over the subject at issue. See e.g., Trojan Yacht, 319 N.L.R.B. 741, 742 (1995). However, this is not a typical 8(a)(5) case, as there is no allegation that any particular employee is not being paid according to the legitimate terms of the negotiated contract terms. Under these circumstances, Respondent submits that the "sound arguable basis" analysis is even more appropriate. See Bath Marine Draftsmen's Ass'n v. NLRB, 475 F.3d 14, 23-24 (1st Cir. 2007) (holding that where the union has "already exercised their right to bargain … the appropriate standard for the Board to apply is the sound arguable basis standard."). Under this standard, it is clear that Respondent has not violated the Act.

Nevertheless, it is of little import under which standard the facts are analyzed, inasmuch as the result is the same under either approach. Under either standard, Respondent's decision demonstrated adherence to – rather than departure from – the contractual terms which were indisputably agreed to between the parties. See Bath Iron Works, 345 N.L.R.B. at 501 (holding an employer did not violate 8(a)(5) or 8(d) of the Act when it unilaterally merged its pension plans without the consent of the union, the Board stated that "the issue here is whether the contract *forbade* the conduct.").

Applying principles of contract interpretation,[12] the vast majority of arbitrators faced with situations such as the one at hand find no violation of the collective bargaining

[12] Where as here the allegation is one of unilateral change in violation of Section 8(a)(5) and the employer defends on the basis that it had an arguable basis under the contract for its actions, and there is no evidence of union animus, a contract interpretation issue is raised. Bath Marine Draftsmen's Ass'n, 475 F.3d at 25-26; NLRB v. U.S. Postal Serv., 8 F.3d at 836-37. The Board has long recognized the expertise of arbitrators in contract interpretation questions. See American Commercial Lines, 291 N.L.R.B. 1066, 1076 (1988) (explaining the same); Litton Fin. Printing Div. v. NLRB, 501 U.S. 190, 202 (1991) ("Arbitrators and courts are still the principal sources of contract interpretation.").

agreement when an employer merely corrects an erroneous wage rate. For example, in Burger Iron Company Dayton, Inc., 91-1 ARB ¶ 8063 (Heekin, 1990), the employer unilaterally reduced the wage rate of an employee who had been receiving the erroneous higher rate for at least 12 years. As the union failed to establish any reason for the deviation from the contract, and there was no mutually understood past practice, the arbitrator ruled that the higher wage rate "appears to have been a longstanding mistake situation since it was not established to be the product of any sort of joint accord." Burger Iron, 91-1 ARB ¶ 8063. Accordingly, the arbitrator ruled that the Company "acted properly" in reducing the rate. Id.

Other arbitrators have followed similar principles in reaching similar outcomes.[13] The proposition is so well established that the foremost arbitral authority, Elkouri & Elkouri's How Arbitration Works, notes:

> Where an employer makes a mistake in the employee's favor, the employer may seek to correct it for the future and sometimes will seek recoupment. It appears clear that the employer will be permitted to correct mathematical or clerical errors in wage computation where the payment has not yet been made; and there is a probability that the arbitrator will find some right of recoupment in the employer as to those erroneous payments that were made before the error was detected.

Elkouri & Elkouri, How Arbitration Works 574 (5th ed. 1997)(emphasis added).

As stated by one highly respected long-time arbitrator, "Errors are unavoidable, and where such occur, neither side should be permitted to claim the benefit resulting from

[13] See e.g., Pines Trailer Ltd. Co., 91-1 ARB ¶ 8196 (Rice 1991)(corrected wage right, company "had a right to correct this mistake because in doing so they did not violate any rights of the bargaining unit members that were expressly set forth in the collective bargaining agreement that was agreed to"); USS, A Division of USX Corp., 00-2 ARB ¶ 3524 (Vernon, 2000)(employer properly ceased paying employees at a rate of pay to which they were not entitled); Ralphs Grocery Co., 94 Lab. Arb. Rep. 880 (Kaufman, 1990)(employer adjusted wage rates based on "administrative snafu," arbitrator noted "there is ample authority for the proposition that employers are permitted to adjust wages when employees are mistakenly paid above the contractual rate"); J.I. Holcomb Mfg. Co., 40 Lab. Arb. Rep. 91 (Willingham, 1963)(employer permitted to correct erroneous merit increase given as a result of clerical error by withholding subsequent negotiated wage increase); and Jo-Ann Stores, Inc., 07-1 ARB ¶ 3751 (Miles, 2006)(error "justifiably corrected by the Company once it was discovered.").

inadvertence and perpetuate the advantage gained thereby." Wooster Sportswear Co., 45 Lab. Arb. Rep. 1015, 1019 (1965).

C. THE ALJ CORRECTLY FOUND THAT THE CORRECTION OF AN ADMINISTRATIVE PAYROLL ERROR REQUIRES NO COLLECTIVE BARGAINING

The ALJ properly decided that the correction of overpayments to employees mistakenly overpaid due to administrative errors required no collective bargaining. (ALJD 6: 20-13.) It is well settled that an employer may unilaterally correct an administrative error resulting in employees being paid more than what is required under a collective bargaining agreement. Dierks Forests, Inc., 148 N.L.R.B. 923, 925-926 (1964) (holding a unilateral reduction in wages to correct an administrative error did not violate the Act). See also Foster Transformer Co., 212 N.L.R.B. 936 (1974). In the Foster Transformer case, an employee was erroneously paid above the proper pay rate for nearly four years. When the error was discovered, without bargaining with the union, the employer corrected the rate and told the employee she would not be required to repay the erroneous payments. In affirming the ALJ's decision that the company was permitted to reduce the wage rate to its correct level without bargaining with the union, the Board stated:

> Whatever Respondent's intent 3 years earlier, it was not bound to continue in effect a plainly inequitable rate structure. **Nothing in our law requires the perpetuation of such inequities merely because a respondent may have at some time in the distant past embarked upon a mistaken course.**

Foster Transformer Co., 212 N.L.R.B. at 936 (emphasis added).

Charging Party seeks to limit Foster solely to issues regarding mistaken classification. (CPB 31-32.) This argument conveniently ignores the Board's approval in Foster of the ALJ's analogy to an instance when employees are mistakenly overpaid, and an employer seeks to correct this mistake. Foster Transformer Co., 212 N.L.R.B. at 936, 941 ("The situation

is no different than had the employer corrected an overpayment to an employee under an existing contract. To conform an employee's pay rate to an existing policy as was done here requires no collective bargaining"). Ironically, this is the exact scenario at hand. Accordingly, Charging Party's assertion that the facts at hand are outside the ambit of Foster is simply wrong. (CPB 32.)

The General Counsel's efforts to distinguish Foster are equally misguided. (GCB 15-17.) Counsel asserts Foster is inapplicable because in that case a collective bargaining agreement was not in place. (GCB 16.) This argument disregards the fact that once a union is certified, an employer possesses a bargaining obligation, even in the absence of an agreement. NLRB v. Proof Co., 242 F.2d 560, 562 (7th Cir. 1957) ("An employer must bargain with the duly designated representative of his employees…"). Respondent's bargaining obligation thus emanates not from the collective bargaining agreement, but from the Union's status as the employees' bargaining representative. The existence or nonexistence of a contract was therefore irrelevant to the seminal question decided in Foster, namely whether an employer had a duty to bargain with a union before correcting an error in its pay rate.

The General Counsel also argues the instant matter is distinguishable because Respondent discovered the error through its own volition. (GCB 16.) The Record does not contain a scintilla of evidence supporting the misguided notion that the payroll review was based on union-animus. Instead, it arose out of an employee's grievance regarding his pay rate. (Tr. 122:15-123:8, 128:8-19.) The fact that the Company chose to perform a payroll audit in response to an employee's complaints of being improperly paid is laudable, and certainly a legitimate business response. If one is to draw anything from the Company's decision, the fact that the Company undertook such a review following a complaint of underpayment demonstrates

good faith, rather than union animus, as it could have legitimately feared it might uncover *under* rather than *over*payments.

Finally, Counsel for the General Counsel contends that Foster "merely involved matching job duties to their correct rates of pay" compared to the instant case in which it is asserted that the errors required "speculation" and "numerical manipulation." (GCB 16.) Again, this is a flawed distinction.[14] The nature of the errors at hand is simple and indisputable. The 2004-2007 Contract did not require "catch up raises." (Tr. 49:17-25, 49:77-79, 85:12-19, 87:12-16, 123:22-124:6, 163:9-18, 77:16-22; G.C. Ex. 3.) Yet, during this period such raises were mistakenly paid to certain individuals. As noted above, General Counsel's classification of this mistake as "speculative" is a gross distortion of the actual facts and should be disregarded. As the Company was merely correcting the overpaid wages, no bargaining obligation ever arose. Foster Transformer Co., 212 N.L.R.B. at 936.[15]

D. THE PRECEDENT AND ARGUMENTS ASSERTED TO OVERCOME THE ALJ'S DECISION ALL MISS THE MARK

Charging Party and General Counsel erroneously criticize Judge Rosenstein's reliance on Eagle Transport Corporation, 338 N.L.R.B. 489 (2002) (finding the correction of a wage miscalculation did not require collective bargaining). (ALJD 5:44-48; GCEXC 6; CPEXC 7; GCB 24-25; CPB 26-30.) But Charging Party immediately undermines its own argument when it acknowledges that in Eagle Transport, the correction of the administrative error did not

[14] One might just as blithely characterize the instant case as "merely matching employees with their correct rate of pay," a true statement.

[15] Even if an obligation to bargain had arisen, Charging Party waived any right to bargain by failing to request it. The undisputed facts demonstrate that Charging Party was informed of the decision on repeated occasions as early as three months before the decision was implemented, yet failed to request bargaining. It is well established that upon learning of a proposed change in terms and conditions in employment, a union must act with due diligence to pursue bargaining over the employer's decision. The Boeing Company, 337 NLRB 758 (2002)("we agree with the judge … that the Union effectively waived bargaining by declining to discuss the issue based on its filing of the instant unfair labor practice charge."). Here, Webber expressly admitted, and the ALJ found that the union never requested to bargain, orally or in writing. (Tr. 57:23-58:2; ALJD 4 n.8.)

change the existing terms and conditions of employment and was therefore lawful. (CPB 26-27.) As noted earlier, the same is true here.

Charging Party argues the instant matter is distinguishable from Eagle because here the wage information provided during negotiations in 2007 was relied upon to tailor a specific proposal on wages, and was incorporated into the terms of the Agreement. (CPB 27-29.) This theory cannot be supported. First, the evidence shows the agreed wage increase was the same as in prior contracts. The contract provided for a $0.55 per hour across the board wage increase. (G.C. Ex. 6.) This equated to a three percent (3%) wage increase. Under the 2004 contract, employees also received a three percent (3%) annual raise. (G.C. Ex. 3.) It is pure speculation to believe the same percentage increase that was agreed to in 2004 would have been unacceptable to the Union in 2007 if it knew employees had been paid above those rates they were contractually entitled to receive.[16] It is more likely that the Company would have had an issue paying the same increase had it known of the mistake at that time.

Second, under a proper focus the theory that the erroneous wages were somehow incorporated into the contract collapses under its own weight. General Counsel asserts that "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." (GCB 11.) However, no underlying rates were "incorporated" into the contract; instead, the current agreement merely provides for a $0.55 cent increase to the prior negotiated wage rate for each employee. There is no dispute over whether these raises were properly paid.

[16] Daycon has filed a cross-exception that it should have been allowed to pursue further questioning of Webber regarding the history of bargaining proposals to show that the proposals were the same as in prior contract negotiations. (Tr. 104-105.)

Furthermore, the information provided was not inaccurate (indeed, the implication that it was undercuts the assertion that that the raises wee proper), but instead represented a correct snapshot of the wages (some correct, some not) being paid to the bargaining unit at that time. A review of the scale at the hearing, which Counsel for General Counsel herself introduced, confirmed bargaining unit employees were being overpaid. (Tr. 88-89, 186:18-23; G.C. Ex. 5.) Plainly, this case about erroneous *administration* is distinguishable from those in which a party seeks to correct a term mistakenly agreed upon.

Thus, the contention that the wage scale supplied in anticipation of negotiations in 2007 somehow supplanted the terms of the CBA is illogical. (CPB 27.) Despite this, Charging Party seemingly believes this administrative mistake is irreversible. (CPB 23-25.) Accepting this position is tantamount to the ridiculous and inconceivable notion that Charging Party would be precluded from enforcing agreed upon terms if employees were underpaid for an extended period of time.

To be clear, the mistake here is in the *administration* of the negotiated terms, not in the terms themselves. The precedent relied upon by both Charging Party and General Counsel demonstrates either a lack of understanding or a refusal to accept this critical distinction.[17] (GCB 9-13, 17-18, 26; CPB 19-23.) It is beyond dispute that the parties never negotiated for the eight employees to receive the raises they received; in fact, the opposite is true – the negotiated agreements did *not* call for the raises. Thus, the employees have received all that was due to them under the contract, and more; no one (credibly) asserts otherwise.

[17] See Reppel Steel & Supply Co., 239 N.L.R.B. 358 (1978) (mistaken wage proposal used as basis to **avoid** contractual obligation); Apache Powder Co., 223 N.L.R.B. 191 (1976) (rescission of mistake used as means to **modify** the contract); Oak Cliff Golman, 207 N.L.R.B. 1063 (1973)(mid-term **modification** not allowed); North Hills Office Servs., 344 N.L.R.B. 523, 525 (2005) (party to a contract cannot **avoid** it on the grounds that he made a mistake).

Recognizing as we must that any so-called "reduction" was **only to the proper wage rate negotiated by the union**, it is plain that the Company has not violated the Act See e.g., Daily News of Los Angeles, 315 N.L.R.B. 1236, 1237 (1994)("The vice involved in [a unilateral change] is that the employer *has changed the existing conditions of employment*.") (emphasis added); In re Golden Foundry & Mach. Co., 340 N.L.R.B. 1176, 1183 (2003)(dismissing complaint because the government failed to demonstrate a unilateral change to employees' clock-in time; Carolina American Textiles, Inc., 219 N.L.R.B. 457, 459 (1975) (holding the general counsel failed to sustain the burden of proof that the employer implemented a change in its attendance policy).

Along this same vein of reasoning, and although her sole witness admitted the opposite, the General Counsel asserts that "Respondent may have intentionally granted pay increases to certain bargaining unit employees before Kendall was hired and of which Kendall is unaware." (GCB 14.) However, even if this rank speculation could be credited, it would not extricate the union from the quicksand in which it finds itself.

This is so because either the raises were errors, and thus could be corrected; or they were legitimately given for some (as yet unexplained) reason. While the evidence conclusively establishes the former, even if the latter notion could somehow be believed, despite the complete lack of evidence, the reduction of wages to the contractually called-for minimums is a permissive subject of bargaining which would not give rise to a bargaining obligation.

The Board has held that contract terms which allow an employer to engage in direct dealing with employees to set wages above minimums in the contract constitute permissive bargaining subjects. See Midwest Television, Inc., d/b/a KFMB Stations, 343 N.L.R.B. 748 (2004)("KFMB I") and Midwest Television, Inc., d/b/a KFMB Stations, 349

N.L.R.B. 373 (2007)("KFMB II"). In KFMB I, the Board held that an employer had properly reduced the above-scale wages of an employee back to the contractual minimums without engaging in bargaining with the union, stating "given the permissive nature of the direct dealing provision, the Respondent had the right under the Act to unilaterally reduce the wages of employees … to union scale at any time, during the term of the contract or thereafter[.]" 343 N.L.R.B. at 753.

The contracts negotiated between the parties have all contained the same provision allowing the Company, in its discretion, to pay above the contractual minimums. (Art. IX of G.C. Ex. 3, 6 and 7) and (Tr. 94:8-96:5) (Webber agreed the Company could grant raises above minimums without bargaining "Because the only thing that the Employer has to do under this contract is to pay the contractually called for minimums"). Because this right of the Company was a permissive subject of bargaining, even if the raises had been legitimate (and they were not), it could still reduce the wages of anyone paid above the minimum to the contractual rate without bargaining. KFMB I, 343 N.L.R.B. at 753; Allied Chem. & Alkali Workers v. Pittsburgh Plate Glass, 404 U.S. 157, 184-88(1971) (a party may unilaterally rescind or modify an agreement on a permissive subject of bargaining without bargaining or reaching impasse).

E. PAST PRACTICE CANNOT BE USED TO OVERCOME THE CLEAR TERMS OF THE NEGOTIATED AGREEMENT

The General Counsel's argument that the inflated wage rates were established through past practice ignores the rules governing the creation of a past practice. For a past practice to be codified there must be a *mutual* understanding, and an *ambiguous* contract term. See Quick v. NLRB, 245 F.3d 231, 247 (3d Cir. 2001) (explaining past practice can be used to interpret a contract where one party acts with knowledge and the other party had an opportunity

to object); Standard Holmes, 249 N.L.R.B. 1085 (1977) (a past practice can only be created when there is an ambiguous contract provision); and Margaret Wagner House, 94 Lab. Arb. Rep. 1253 (Sharpe 1990) ("the amendment of clear and unambiguous contract language by past practice must be based upon the mutual agreement of the parties."). Neither is present here.

The applicable contracts spell out the exact mechanisms and amounts of wage increases agreed upon. Until the audit was performed both sides were unaware of the miscalculations. (G.C. Ex. 3, 6, 7.) The cases General Counsel refers to are thus inapposite, and a past practice theory should not be entertained as a means to overrule the Decision. (GCB 19.) For example, in Meharry Med. Coll., 236 N.L.R.B. 1396 (1978), the employer acted with knowledge in granting raises, and was thus precluded from "taking back" the raise. In the present case, there is no corresponding knowledge; indeed, it is clear the "raises" were simple mistakes. In addition, that case involved demoting the employees to different classifications. Similarly, in JPH Mgmt., Inc., 337 N.L.R.B. 72 (2001), the rescission was unlawful not because of past practice but because it clearly modified the terms and conditions of employment. Such is not the case here.

In reality, equitable principles strengthen the case for the Company's right to correct the mistake. If a party has for several years purchased a certain brand of soup mislabeled by a supermarket, the fact that the party has grown accustomed to the reduced price is of no avail when the grocer realizes the mistake and corrects the price. The same is true here. Why should eight employees who have already been enriched by more than $80,000.00 over five years be entitled to perpetuate the mistake *ad infinitum*? If collective bargaining is required to fix such mistakes, what party will ever willingly agree to take less than the mistake in their favor?

It goes without saying if the error were in the Union's favor, it would not be asserting it had to persuade the Company to agree in order for the wages to be corrected, and would instead point to the negotiated terms of the agreement. To accept Charging Party's argument that an error in its favor once made is forever fixed, while a detrimental error must be corrected immediately (with back pay, no doubt), would be to sanction nothing more than a "heads I win, tails you lose" argument.[18]

F. THE RECORD SUPPORTS THE ALJ'S CREDIBILITY RESOLUTIONS

Charging Party takes exception to the ALJ's finding that Kendall was more precise with her recollection of events than Webber. (ALJD 3:48-51; CPB 10-12, 17-19.) The Board's established policy is not to overrule a credibility resolution unless the clear preponderance of all the relevant evidence reveals it to be incorrect. Standard Dry Wall Prods., 91 N.L.R.B. 544 (1950).

The lone factual issue in dispute is whether Charging Party was given an opportunity to verify an error occurred. As noted by Judge Rosenstein, Kendall's notes support her recollection of when she first referenced the overpayment to Webber and his subsequent response when she offered to provide information confirming the error. (R. Ex. 2, 3; Tr. 128:20-130:5, 134:11-135:12.) Conversely, no contemporaneous notes supporting Webber's testimony that he was denied an opportunity to review the results of the Company's audit were

[18] In two almost unbelievable footnotes, Charging Party asserts in its brief that "even had there been a mistake, [the union's] failure to bargain over such terms ended the matter entirely." (CPB 14-15 nn.5-6.) A moment's reflection demonstrates the sheer absurdity of the argument advanced – under this line of reasoning, every payroll error and clerical mistake is chiseled in stone, requiring collective bargaining for resolution. Such an inefficient approach to labor relations is counterproductive to say the least.

introduced.[19] The Record supports the ALJ's credibility resolutions. Charging Party has presented no reason for disturbing the Decision on this point

G. GENERAL COUNSEL'S REFERENCE TO THE SETTLEMENT AGREEMENT IS IMPROPER AND SHOULD BE STRICKEN

Counsel for General Counsel's contention that the ALJ-approved Settlement Agreement demonstrates Respondent's animus is disingenuous. (GCB 24.) It is well settled that settlement agreements cannot be used to establish a tendency to violate the Act. Sheet Metal Workers Local 28 (Astoria Mechanical), 323 N.L.R.B. 204 (1997); Tri-State Building Trades Council (Structures, Inc.), 257 N.L.R.B. 295, 297 (1981). Here, the terms of the Settlement agreement are entirely unrelated to Daycon's right to correct the error. (ALJ Ex. 1.) Moreover, it is undisputed that Daycon does not have a proclivity to violate the Act. (Tr. 9: 9-17.) Counsel for the General Counsel's reliance on the Settlement Agreement to suggest otherwise is thereby misleading and should be stricken, and given no consideration whatsoever. See Pennant Foods Co., 352 N.L.R.B. 451, 455 (2008) (rejecting General Counsel's proffer of an informal non-admissions settlement agreement on "grounds that the settlement of unfair labor practice charges where the Respondent did not admit it had violated the Act was irrelevant to determining whether the Respondent violated the Act as alleged in the instant complaints") (emphasis added).

[19] Even if Webber's recollection regarding this issue was correct, which it is not, it would have no bearing on the question of whether the correction of the error required collective bargaining.

IV. CONCLUSION

The promotion of labor harmony would be frustrated by a wooden application of a rule that required bargaining to fix every clerical error made in today's hectic and fast-paced workplace, even those clearly in opposition to the prior agreement of the parties. Are we to take from the arguments asserted here that every payroll error in an organized workforce results in an immediate and irreversible raise for the lucky employee? Such a notion is utterly absurd, and contradicts, rather than reinforces the labor stability which the Act is designed to create. Common sense and well settled and irrefutable precedent dictates that errors should be fixed, not frozen in perpetuity.

For the foregoing reasons, Respondent respectfully requests that this Honorable Board uphold the decision of Judge Rosenstein in all respects.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of March, 2010, I caused a true and correct copy of this Answering Brief to be served electronically upon the following:

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