

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 ANSWERING BRIEF**  
**TO RESPONDENT'S CROSS-EXCEPTIONS**

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Dated: April 2, 2010

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**COMES NOW** Shelly C. Skinner, Counsel for the General Counsel, and respectfully files this Answering Brief to the Cross-Exceptions.

## **I. 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.

On February 19, 2010, both Counsel for the General Counsel and the Charging Party filed Exceptions to the Administrative Law Judge's Decision and Briefs in Support

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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.)

of Exceptions. On March 19, 2010, Respondent filed an Answering Brief to the Exceptions and Briefs Filed in Support Thereof. Additionally, Respondent filed Cross-Exceptions to the Administrative Law Judge's Decision on March 19, 2010.

In its cross-exceptions, Respondent claimed that the Administrative Law Judge should not have limited its questioning of the Charging Party's business agent. Respondent listed baseless speculation, contradicted by the record evidence, as to what its questioning would have shown. Respondent did not file a brief in support of its cross-exceptions to explain its position or provide evidentiary support. During the hearing, Respondent did not make appropriate offers of proof or objections to the Administrative Law Judge's rulings which limited Respondent's questions. Without more, Respondent's Cross-Exceptions should be dismissed. Additionally, because the Administrative Law Judge's Decision was based on erroneous findings of fact and contained conclusions that are contrary to Board law, the Complaint should not have been dismissed, and the Decision should be reversed.

## **II. ISSUES PRESENTED**

1. Did the Administrative Law Judge err in limiting questioning of the Charging Party's business agent regarding the wage negotiations on the current and prior collective-bargaining agreements?
2. Did the Administrative Law Judge err in limiting questioning of the Charging Party's business agent regarding the contractual minimums of wage rates?
3. Did the Administrative Law Judge err in limiting questioning of the Charging Party's business agent regarding the method in which union dues are calculated?

### **III. ARGUMENT**

#### **A. The Issues Raised by Respondent's Cross-Exceptions Were Not Properly**

##### **Preserved and Can No Longer Be Considered.**

Respondent's three cross-exceptions involve rulings made by the Administrative Law Judge which limited Respondent's questioning of Douglas Webber, Business Agent for the Charging Party. Any objections that Respondent had to the Administrative Law Judge's rulings should have been made during the hearing. Respondent should have made an offer of proof regarding any questions that it wished to ask Webber. Respondent did not make an offer of proof regarding Cross-Exceptions #1 and #2. Board law is clear that issues are not preserved if an offer of proof is not made during the hearing. *Indianapolis Mack Sales and Service, Inc.*, 292 NLRB 136 (1988); *Indianapolis Mack Sales and Service, Inc.*, 272 NLRB 690 (1984). Thus, the issues raised in Respondent's Cross-Exceptions #1 and #2 have not been preserved and warrant no consideration now.

Furthermore, with regard to Respondent's claim that further questioning would have shown Webber did not specifically tailor his proposals for the parties' wage negotiations,<sup>3</sup> Respondent introduced Webber's 2007 wage proposal at the hearing. (Tr. 103) When the Administrative Law Judge indicated that he would not receive the document into evidence, Respondent elected not to place the 2007 wage proposal into the rejected exhibit file. (Tr. 105) However, now, Respondent seems to believe that Webber's January 2007 wage proposal is of such importance that it merits a cross-exception. Respondent has waived its ability to raise the issue, though, since it chose not to place the document in the rejected exhibit file.

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<sup>3</sup> Respondent's Cross-Exception #1.

Finally, Respondent made an inappropriate offer of proof at the hearing relating to the issue raised in Cross-Exception #3. In its offer of proof, Respondent declared that its questioning “would show that the union dues are based on an hourly -- a multiple of the hourly wage rate of the employees and that the Union should know the hourly wage rates of the employees throughout the administration of these contracts.” (Tr. 118) Such a statement is merely conclusory. The Board rejects offers of proof that are merely conclusory and fail to set forth specific facts. *SCNO Barge Lines, Inc.*, 287 NLRB 169 fn.22 (1987). Certainly Respondent could have placed a document supporting its contention into the rejected exhibit file. However, Respondent failed to produce any supporting evidence. In fact, Respondent did not even state the specific relationship between Union dues and hourly wages (i.e., the specific “multiple” used to calculate Union dues), nor did Respondent demonstrate how this information bore any relevance at all to the issue at hand. As Respondent did not provide anything more than an overbroad conclusion with no evidentiary support, its offer of proof is meaningless and the related Cross-Exception #3 deserves no consideration.

**B. Questioning Regarding Wage Negotiations for the Current and Prior Collective-Bargaining Agreements Would Not Have Shown That Wage Proposals Were the Same as in Prior Negotiations.**

Wage negotiations for the current collective-bargaining agreement are irrelevant to the instant case, especially because there is no current collective-bargaining agreement. Wage proposals submitted by either party during current contract negotiations have no bearing on the case at hand, which deals with a wage reduction that occurred in 2009, while the 2007-2010 collective-bargaining agreement was in effect.

The 2007-2010 collective-bargaining agreement expired on January 31, 2010. (GC Exh. 6) Webber specifically tailored his wage proposals during negotiations for that contract. (Tr. 117) Webber stated that the 2004-2007 collective-bargaining agreement provided for 3% wage increases and that he wanted wage increases listed in dollar amounts instead of percentages in the 2007-2010 contract. (Tr. 117) Therefore, during negotiations for the 2007-2010 collective-bargaining agreement, Webber proposed wage increases enumerated in dollar amounts. The wage increases contained in the 2007-2010 collective-bargaining agreement are, in fact, listed as dollar amounts (i.e. 55 cents). (GC Exh. 6) Clearly, Webber specifically tailored his wage proposals for the 2007-2010 collective-bargaining agreement. Respondent's nonsensical claim that further questioning would have revealed something directly in contradiction to the collective-bargaining agreements in evidence and Webber's testimony is inexplicable and warrants no consideration.

**C. Questioning Regarding the Contractual Wage Minimums Would Not Have Shown that Respondent Had the Right to Unilaterally Raise and Lower Wages.**

When Respondent's counsel asked whether Respondent could unilaterally lower employees' wages to the contractual minimum, Douglas Webber clearly testified that Respondent could not do so. (Tr. 99-100) Respondent's position that further questioning would have convinced the Union's Business Agent that Respondent had the right to unilaterally reduce wages is incomprehensible.

Moreover, the 2007-2010 collective-bargaining agreement did not authorize Respondent to unilaterally reduce wages to the contractual minimum. (GC Exh. 6) In fact, to date, Respondent has not pointed out any language in the collective-bargaining

agreement which permits Respondent to decrease wage rates on its own volition. Respondent's desire to ignore Board law cannot protect it from decades of precedent stating that wages are a mandatory subject of bargaining. *NLRB v. Katz*, 369 U.S. 736 (1962); *Bryant & Stratton Business Institute*, 321 NLRB 1007 (1996); *Mercy Hospital of Buffalo*, 311 NLRB 869,873 (1993); *Associated Services for the Blind*, 299 NLRB 1150, 1150-51 (1990); *Chevron Oil Company*, 168 NLRB 574 (1967) (where the employer's reduction to some employees' wages created a change in working conditions that constituted a mandatory subject of bargaining).

As such, Respondent's contention its further questioning of Webber would have revealed that wage reduction is a permissive subject of bargaining is ungrounded and contrary to long-held Board precedent. Respondent unlawfully derogated from the authority of Charging Party Union as the exclusive bargaining agent of the employees by issuing threats, engaging in direct dealing, and reducing the wage rates of eight employees. Now, Respondent wrongly believes it can now derogate from the authority Board precedent. Certainly Respondent does not have the authority to rebuff decades of Board law by claiming that Respondent could unilaterally lower wages under its foolhardy assertion that wages are not a mandatory subject of bargaining.

**D. Questioning Regarding the Relationship Between Union Dues and Hourly Wage Rates Would Not Have Shown that the Union Was Kept Abreast of the Employees' Various Wage Rates at All Times of the Contract.**

The Charging Party Union and Respondent have different roles with regard to employees. While it is Respondent's duty to pay employees, it is the Charging Party's obligation to represent the employees' interests. While Respondent may try to shirk its

payroll duties and inexplicably assign them to the Charging Party, it is nonsensical to believe that the Charging Party kept track of each paycheck received by each of the many employees it represents.

Regardless, even if it were shown that the Charging Party Union knew each employee's wage rates during the entire period of the 2007-2010 collective-bargaining agreement, the Charging Party Union would have had no reason to believe that the rates were erroneous. Before that time, the wage rates complied with the terms of the 2007-2010 collective-bargaining agreement, as they were \$0.55 more per year than they had been at the end of the 2004-2007 collective-bargaining agreement. Furthermore, if the Charging Party had knowledge of the wage rates for several years, so too, did Respondent, particularly since it is responsible for issuing paychecks. Respondent had knowledge of its employees' wage rates and of the collective-bargaining agreement in effect, and Respondent paid wage rates in accordance with the collective-bargaining agreement from 2007 until May 2009. The Union's knowledge of its members' union dues has no relevance to the case at hand.

#### **IV. CONCLUSION**

Respondent's cross-exceptions, all of which concern the Administrative Law Judge's rulings to limit its questioning of Douglas Webber, are without merit as Respondent failed to properly preserve the issues at the administrative law hearing. Moreover, Respondent filed cross-exceptions but did not file a brief in support thereof; thus, there is no reasoning offered to support Respondent's conjecture as to what evidence Webber would have provided if the Administrative Law Judge had not limited Respondent's questions. Respondent's cross-exceptions attempt to distract from the fact

that in May 2009, Respondent decided to reduce eight employees' wage rates on a whim and in violation of the Act. The cross-exceptions should not be given any weight and the Administrative Law Judge's Decision should be reversed on the grounds stated in General Counsel's Exceptions to the Decision of the Administrative Law Judge, General Counsel's Brief in Support of Exceptions to the Decision of the Administrative Law Judge, Exceptions of Charging Party, and Brief in Support of Exceptions of Charging Party.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that this Answering Brief to Respondent's Cross-Exceptions was electronically filed on April 2, 2010, and, on that same day, copies were electronically served on the following individuals by email:

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