UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

DAYCON PRODUCTS COMPANY, INC.

and

Case No: 5-CA-35043

DRIVERS, CHAUFFEURS AND HELPERS LOCAL
UNION NO. 639 a/w INTERNATIONAL
BROTHERHOOD OF TEAMSTERS

CHARGING PARTY, TEAMSTERS LOCAL NO. 639'S REPLY TO RESPONDENT'S ANSWERING BRIEF TO CHARGING PARTY'S EXCEPTIONS,

AND BRIEFS FILED IN SUPPORT THEREOF

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Date: April 2, 2010

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I. INTRODUCTION

In accordance with Rule 102.46 of the National Labor Relations Board's Rules and Regulations, Teamsters Local No. 639 ("Union") hereby submits this Reply Brief to the Respondent's Answering Brief to Charging Party's Exceptions, filed in response to the January 8, 2010 Decision and Order ("Decision") of Administrative Law Judge ("ALJ") Bruce D. Rosenstein. As stated in Charging Party's Exceptions, the ALJ's Decision was in error, and Respondent Daycon Products Company Inc. ("Daycon" or "Respondent") violated the National Labor Relations Act ("NLRA") by unilaterally reducing the wages of eight employees.

Charging Party has laid out the factual background of this matter in full detail in its Brief in Support of Exceptions and Answering Brief to Respondent's Cross-Exceptions, and will not repeat them here. Charging Party replies to Respondent's Answering Brief as follows.

II. ARGUMENT

A. RESPONDENT'S DEPICTION OF THE EVENTS OF THE HEARING ARE OUT OF CONTEXT AND INAPPROPRIATE

1. *Webber's testimony, or lack thereof, is not an admission of guilt or an endorsement of Respondent's theory of the wage error.*

In its Answering Brief, Respondent quotes testimony of Douglas Webber, the Business Agent for the Union to Daycon, in an attempt to characterize Webber's testimony as an "admission" that eight employees' wage rates were the result of an error, and that the Union had personal knowledge of this error. The relevant quoted section from Respondent's Answering Brief is as follows:

Q: So the [current wage rate for Ms. Burton] is likely incorrect, isn't it?
A: It appears that it is.

See RAB 5.[1] Had Respondent quoted the totality of Webber's testimony regarding this matter, it would appear as follows:

Q: So the [current wage rate for Ms. Burton] is likely incorrect, isn't it?
A: It appears that it is.
Q: Can you think of any reason why Ms. Burton would've been making $2.48 more than she should've been making under the contract?
A: **All I know is the contract sets minimum standards, and if Ms. Burton had gotten any raises during the course of this contract form '04 to '07, for whatever reason, I'm not aware of it.**

See Tr. 88 (**emphasis added**). As a witness under oath, Webber was shown a number of documents and figures by Respondent's Counsel. Respondent laid out its own theory of why the eight employees' wages were allegedly erroneous; and immediately after that explanation, Respondent's Counsel asked Webber if there appeared to be an error in the wages solely based on Respondent's explanation. Webber answered in the objective sense, "It appears that it is," as he had no personal knowledge, nor did he necessarily agree with or fully understand the error being discussed.

Charging Party has emphasized that Webber was not Business Agent at the time of the prior Collective Bargaining Agreements ("Agreements"); and that he was only present for the negotiation of the current 2007 Collective Bargaining Agreement ("2007 Agreement"). *See Tr.* 40. Webber had no personal knowledge as to the circumstances of any of the pre-2007 Agreement wages. As shown in his follow-up statement, Webber

[1] Throughout this brief, henceforth, all references to Respondent's Answering Brief shall be listed as "*RAB* [page no.]." All references to General Counsel's Exhibits at hearing shall be listed as "*GCX* [no.]." All references to Respondent's Exhibits at hearing shall be listed as "*RX* [no.]." All references to the Transcript from Hearing shall be listed as "*Tr.* [page no.]."

stated in clear terms that "all [he] know[s] is that the contract set minimum standards," and if one of the employees had received inappropriate wage increases, he was not aware of it. *See Tr.* 88. Respondent has taken Webber's testimony and twisted it into an admission of guilt; and attempts to deceive the National Labor Relations Board ("NLRB") into believing that this error was obviously apparent to all parties, notwithstanding the fact that Daycon abided by these wages for a period of two years without a single complaint or comment that such wages might be erroneous.

Respondent further asserts that despite his status as Business Agent to Daycon, "Webber never asserted a legitimate reason for any of the pay raises at issue." *See RAB* 8. Respondent fails to acknowledge that Webber testified that neither he, nor any of the employees affected, *ever received* an explanation as to why these wages were erroneous.[2] To their knowledge and belief, these wages were *correct*. Webber testified that he requested a "schedule of the clerical errors and how and when the wages were adjusted" at a meeting on April 22, 2009. *See Tr.* 215. Asked if Daycon ever responded, Webber answered, "No." *Id.*[3]

To summarize, Webber was shown an explanation of Daycon's alleged wage errors for the first time at hearing, given an unclear, rushed and conclusory explanation,

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[2] Furthermore, Respondent Counsel asserts that "neither General Counsel nor Charging Party called to the stand any of the eight affected employees." The eight affected employees were never provided an explanation as to why these errors existed, and any testimony by the employees would have been redundant and futile in trying to determine why the wages were in error.

[3] Webber's notes from April 22, 2009 showed that he requested an explanation at this meeting. *See GCX* 18. Further questioning on the details of this meeting, as they related to Webber's notes was disallowed by the ALJ. *See Tr.* 216-17.

and was asked under oath if any of this made sense.[4] Under oath, Webber answered that it appeared so according to Respondent Counsel's statements, with follow-up comments stating that he didn't know more than what the 2007 Agreement required. Respondent's use of Webber's statements, as well as statements such as, "The Union's business agent acknowledged that an error was the *only* explanation for these overpayments (*emphasis* added)" (*See RAB* 10) is a gross exaggeration and distortion of reality, and should be disregarded.

2. *Kendall's testimony does not prove the existence of an error, but rather confuses the issue of the true cause of the error.*

Kendall testified that the overpayment came about due to "clerical errors, misapplication of the contract." *See RAB* 6; *See Tr.* 123. Respondent's own words reinforce the main issue that was present at hearing: at no time does Kendall nor Daycon ever explain in clear terms *why* the alleged wage error occurred. The definition of the phrases "clerical errors" and "misapplication of the contract" are wildly divergent; and as case law states, the only Board precedent that supports unilateral correction of wage rates is when an employer is correcting an error that is specifically an "administrative error." *See Eagle Transport Corp.*, 338 N.L.R.B. 489 (2002).

At hearing, Kendall presented a spreadsheet that summarized the wage increases that were paid to each employee, compared with the wage increases that should have been paid according to Respondent. *See RX* 10. Kendall testified that she prepared this summary based on her "investigation and audit of payroll records." *See Tr.* 123.

[4] In fact, General Counsel objected to Respondent Counsel's questioning of Webber, in that his asking of Webber's further opinion on the document and explanation of the errors would call for speculation. The ALJ sustained the objection. *See Tr.* 90.

However, Kendall failed to present any documentation of an internal audit or investigation at hearing.

Additionally, Kendall testified that she offered to explain the error in detail to the Union, but failed to produce any documentation that would have been used to explain the error to the Union. Charging Party finds it hard to believe that a professional corporation the size of Daycon's would not have any documentation or physical evidence that could support the summary presented at hearing.[5]

Respondent's Answering Brief focuses on catch up raises as the main reason that this error existed. Kendall testified to such, as follows:

> Q: . . .in your testimony, you said that there were general clerical errors.
> A: Yes
> Q: . . . And by general clerical errors, did you mean that some people were getting paid catch-up raises that they supposed weren't entitled to.
> A: Yes.
> Q: And you stated that - - you told the Judge that these errors were the same in nature in general for all of the eight employees.
> A: All very similar.

See Tr. 184-185. However, at hearing, Kendall's testimony referenced "health supplements" (*Tr.* 168-89), "foreman pay," (*Tr.* 169), "transition bonuses" (*Tr.* 173), "CDL bonuses" (*Tr.* 181), "night differential pay" (*Tr.* 201), and "short term disability" (*Tr.* 201) all as reasons as to why an employee's wage could be different from the minimum as listed in the 2007 Contract.[6] Yet, Respondent, by its witness's testimony

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[5] Furthermore, General Counsel requested any and all supporting documentation to explain the alleged error through subpoena prior to hearing, and Daycon did not produce any such documents. *See Subpoena Duces Tecum to John Poole*, Request 16.

[6] Respondent references the "paradoxical" result of a junior union employee earning $0.40 per hour more than a less senior co-worker. *See RAB* 10. As stated before, Webber was the Business Agent for 2007, and had no knowledge of the wages prior to 2007, and only sought to bring employees in line to make the wage

and Answering Brief, still holds to the belief that catch-up raises are the only cause of the error at issue.

The aforementioned argument restates the main issue: Daycon does not have a clear, cogent explanation for the alleged error, and has attempted to cloak its own confusion and incompetence under a conclusory document prepared for trial. *See RX* 5. This document was presented without background documentation or evidence, and is nothing but a declaration that an error exists, without any explanation as to the "why" or "how." Daycon cannot simply hide behind the excuse that it is correcting an "administrative error" when no true error can be explained or found. As a result, Daycon's unilateral actions have modified the terms of the contract, and such unilateral modifications are strictly prohibited by the NLRA.

3. *General Counsel and Charging Party Counsel both attempted to challenge the validity of Kendall's wage error document, and were disallowed by the ALJ.*

Respondent's Answering Brief states that Kendall's spreadsheet of wage errors (*RX* 10) went "essentially unchallenged at the hearing." *See RAB* 6. Nothing could be further from the truth, as General Counsel and Charging Party sought to thoroughly challenge the document at hearing. Upon moving *RX* 10 into evidence, General Counsel objected to its admission, asking for more authentication. *See Tr.* 165. General Counsel conducted a voir dire examination regarding this document. *Id.* General Counsel and Charging Party allowed introduction of the exhibit after *voir dire* was performed; and upon cross-examination, General Counsel attempted to have Kendall walk her through

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structure easier to understand by all parties. Respondent is relying on a negative as proof for a positive, or in other words, is trying to state that the lack of testimony somehow proves that this "paradoxical" result is an error. Without knowledge of all financial records, circumstances, or relevant evidence, neither result can be definitively assumed as the absolute truth, and Respondent is in error to make such a gross overstatement of the facts at hand.

the spreadsheet after Respondent Counsel's incomplete questioning and Kendall's unclear testimony left much to be desired. *See Tr.* 185. At this time, the ALJ disallowed further questioning, stating that "if [General Counsel is] trying to establish well there might have been mistakes in the calculations, which I think you're trying to do, from my perspective, that doesn't impact on the underlying issue . . ." *See Tr.* 185.

General Counsel responded by stating that she merely wanted an explanation as to where the administrative errors occurred, and if these were similar in nature or varied across all eight affected employees. *See Tr.* 186. General Counsel and ALJ engaged in a lengthy conversation regarding why she should be allowed to further question Kendall regarding *RX* 10, and in the end, the ALJ simply stated that he "[didn't] see a lot of facts in dispute" and that she should "move on and see what other questions [she had] for this witness." *See Tr.* 185-188. At the end of this discussion, General Counsel stated that she believed that "Respondent's Exhibit 10 will show the different types of errors that occurred to each individual and how they're all unique," after which she moved on in questioning Kendall on cross-examination. *Id.*

The record clearly shows that General Counsel and Charging Party's attempts to challenge *RX* 10 were firmly stopped by the ALJ. Any testimony and questioning allowed went straight to the Union's contention that Daycon has failed to explain the administrative errors and their exact cause.

B. RESPONDENT HAS INCORRECTLY CLASSIFIED THE ISSUE AS A CASE OF CONTRACT INTERPRETATION, AND INCORRECTLY ASSERTS THAT DAYCON CAN UNILATERALLY MODIFY WAGES IN VIOLATION OF THE NLRA

Respondent attempts to classify this as a case of contract interpretation. *See RAB* 11. Respondent fails to acknowledge that for a case of contract interpretation to be

argued, there must be a provision that actually allows action to be taken in the way that an arguing employer contends. *See Bath Iron Works*, 345 N.L.R.B. 499, 506 (2005) (stating that the issue of contract interpretation hinged on whether the contract contained a provision that allowed the employer to take the unilateral action at issue). Nowhere does Respondent raise the argument that the 2007 Agreement allowed an employer to unilaterally reduce the effective wages of employees. Respondent further states that the alleged error here dealt with "the *administration* of the negotiated terms, not in the terms themselves." *See RAB* 18.

Respondent argues that the "Company *restored*, rather than modified the proper wage rates" due to an "administrative error" that, as the record shows, the Company has failed to adequately explain or prove in any fashion. *See RAB* 11. Respondent cites to a number of cases that allow the correction of an administrative error, so long as the "reduction" restored the "proper wage rate negotiated by the union." *See RAB* 19. The Union does not argue this principle, and again emphasizes that Daycon's wage reduction was just that: a "reduction" from the proper wage rates as mandated by the 2007 Agreement. The cases cited to by Daycon reference the correction of administrative errors which are not analogous to the facts at hand.[7]

The issue at hand is not a contract interpretation matter; rather, the issue is whether the employer's wage reduction was allowed under the terms of the NLRA. Respondent attempts to argue that its wage reduction required no collective bargaining. *See RAB* 14. The Union would again agree, and simply state that when the issue of the

[7] Respondent has raised challenges to the case law cited by Charging Party and General Counsel in Section C of its Argument (*RAB* p. 14, *et seq.*). Charging Party's argument regarding these cases has not changed from the stances taken in its Brief in Support of Exceptions, and references its Argument there as the Union's final stance on these cases.

wage reduction was raised with the Union, the Union's clear and unambiguous refusal to consent to the proposed action ended the matter entirely, bargaining or not. *See Kohler Co.*, 292 N.L.R.B. 716 (1989) ("in the absence of a reopener provision in the contract, parties to a contract are under no obligation to bargain during the term of an agreement.").

C. RESPONDENT HAS INCORRECTLY RELIED ON CASE PRECEDENT IN AN EFFORT TO PREVENT GENERAL COUNSEL AND CHARGING PARTY FROM MAKING THEIR FULL AND FAIR ARGUMENT BEFORE THE NLRB

Respondent argues that Charging Party's exceptions beyond the scope of those raised by General Counsel cannot be reviewed. *See RAB*, 6-7, fn. 8 (citing to *Nott Co.*, 345 N.L.R.B. 396, 398 (2005)). Respondent has misapplied Board precedent in an effort to prevent General Counsel and Charging Party from making their full and fair argument before the NLRB.

In *Nott Co.*, the Board included a footnote that stated that the "General Counsel's theory of the case is controlling, and that a charging party cannot enlarge upon or change the General Counsel's theory." 345 N.L.R.B. at fn. 10. *Nott* was a case where the union and general counsel were arguing two divergent legal theories regarding whether the union in the case had majority status: general counsel's argument asserted that the union did not have majority status, while the union contended that they did. 345 N.L.R.B. at 398. In the instant matter, General Counsel and Charging Party are arguing the same theory: that Daycon unilaterally modified the terms of the Collective Bargaining Agreement, and as a result the Union's lack of consent meant that the wage reduction was in violation of the NLRA.

At hearing, Charging Party made an offer of proof that further questioning of Kendall would establish that there were no written documents or records in an employee's file that showed specifically why any wage changes had occurred since the date of hire. *See Tr.* 202. This detail furthers General Counsel's theory of the case: that Daycon lacks adequate explanation of the erroneous wage increases received by the eight employees, and as a result, Daycon's wage reductions were modifications of the terms of the Agreement.

Furthermore, NLRB case precedent clearly states that the Board shall consider the merit of the Charging Party's Exceptions, regardless of the status of the General Counsel's Exceptions.[8] Respondent is attempting to hide behind a misapplication of Board precedent in the hopes that a decision will be reached in its favor based on an incomplete argument on the Charging Party's side. Respondent's use of *Nott* is off-base, and should be disregarded.

III. CONCLUSION

For all the foregoing reasons, the Union requests that the Board overturn the ALJ's Decision, and find for the Union regarding all the allegations in the Complaint.

Respectfully Submitted,

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[8] *See Goya Foods*, 347 N.L.R.B. 1118, 1121 (2006) (NLRB considered the merit of the Charging Party's exceptions, although General Counsel had not filed any exceptions); *see Hansen Brothers Enterprises and Chauffeurs*, 279 N.L.R.B. 741 (1986) (NLRB considered the Charging Party's exceptions although General Counsel had not filed an exceptions); *see National Association of Letter Carriers, AFL-CIO*, 328 N.L.R.B. 952 (1999) (Charging parties made exceptions that the General Counsel did not make, and the NLRB considered these exceptions wholly in making its final decision).

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 2nd day of April, 2010, a copy of the foregoing was electronically filed with the National Labor Relations Board.

Furthermore, the undersigned party hereby certifies that on the 2nd day of April, 2010, a copy of the foregoing was served, via electronic copy, on the following parties:

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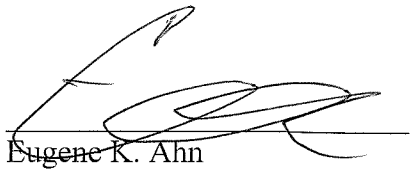

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