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

HANSON AGGREGATES BMC, INC.

and

Cases 4–CA–33330–1,
4–CA–33508,
4–CA–33547,
4–CA–34290,
4–CA–34362,
4–CA–34363, and
4–CA–34378

INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 542, AFL–CIO

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 542'S MOTION FOR MODIFICATION OF BOARD'S ORDER

Pursuant to Section 102.49 of the Board's Rules and Regulations, the undersigned Counsel for International Union of Operating Engineers, Local 542 ((the "Union" or "Charging Party)l seeks modification of the Board's Order issued in the above–captioned matter on September 30, 2008 (353 NLRB No. 28). In support of the Motion, Counsel for the Union submits the following:

The Board, consisting of only two members, Leibman and Schaumber, affirmed the findings of the Administrative Law Judge on various violations under Section 8(a)(5) of the Act, but deleted the portion of the Judge's recommended Order that directed Respondent to bargain upon request over terms and conditions of employment — perhaps inadvertently, since no explanation for the change is set forth. In its Decision and Order, the Board specifically discussed and reversed the Judge's dismissals on two particular information issues — the

Request for Blue Cross Information, and the request for Aetna documents. Conversely, the Board reversed the Judge's finding that Respondent had unlawfully failed to supply information about dual health coverage and dismissed that allegation. Thus, with respect to the 8(a)(5) issues decided by the Judge, the Board added two counts and deleted one. In the final analysis, consistent with the Board's rulings on both parties' exceptions, and addressing only the set of findings under Section 8(a)(5), there were a number of information request allegations found to have merit, a number of allegations of unilateral changes at various times found to have merit, and a refusal to bargain over the dental premium holiday.

In the Board's Order, beginning at slip op. p.4, Respondent was ordered to cease and desist from two general categories of 8(a)(5) violations: making various unilateral changes without having bargained to impasse, and failing to furnish (and timely furnish) various items of information. In addition to the cease and desist order, Respondent was affirmatively directed to: give the Union an opportunity to bargain before making any change in terms and conditions of employment; rescind changes unilaterally implemented on October 24, 2005 (dental holiday change) and January 1, 2006 (final offer changes); rescind changes under the unilaterally implemented attendance policy and make employees whole for those changes; and obtain and furnish information concerning various health care coverage issues to the Union.

As the two member Board's modified Order deleted the Judge's general language requiring Respondent to bargain with the Union upon request over terms and conditions of employment, and in view of the number and scope of the Section 8(a)(5) violations found by the Board, Counsel for the Union requests that the Board restore the broad general language

concerning Respondent's bargaining obligations originally recommended by the Administrative Law Judge in this case.

Specifically, the Administrative Law Judge, having found the same categories of 8(a)(5) violations ultimately found by the Board, recommended at Section 1 (b) of his recommended Order that the Respondent cease and desist from "Refusing to negotiate with the Union over mandatory subjects of collective bargaining." Respondent was also affirmatively directed at 2 (a) to "bargain with the Union as the exclusive representative of the employees concerning terms and conditions of employment." The Judge's recommended Notice to Employees also included language intended to communicate to bargaining unit employees the remedy for these violations: "WE WILL NOT refuse to negotiate with the Union over mandatory subjects of collective bargaining" and "WE WILL on request bargain with the Union as the exclusive representative of the employees concerning terms and conditions of employment." (id., slip op. at pp. 17–18)

Although Respondent filed exceptions to the Administrative Law Judge's Decision with respect to the finding that Respondent failed to bargain over the dental premium holiday, the absenteeism policy, failed and refused to obtain and furnish the Union with numerous items of information, and implemented its contract offer without having reached impasse, no specific arguments were raised by Respondent concerning the inclusions or exclusions under the Judge's recommended Order.[1] The Board did not discuss any modifications to the Judge's proposed

[1] At the conclusion of Respondent's Exceptions to the Decision and Recommended Order of the Administrative Law Judge, filed on December 20, 2006, was a one sentence paragraph entitled "Remedy" which reads in full: "As set forth in these Exceptions and in the accompanying Brief, Hanson excepts to the entire remedy." (p. 20) There is no further mention of the remedial Order in the brief. It is submitted that this general exception did not raise any specific issue with respect to the Judge's recommended Order directing that the Employer "on request, bargain with the Union as the exclusive representative of the employees concerning terms and conditions of employment."

remedy for these findings. In adopting the Judge's Order "as modified," the Board made adjustments to take into account the reversal of the Judge's findings on the information requests. However, the Board's Order omitted the above–cited broad bargaining directives included by the Judge. In the absence of exceptions to Judge's recommended Order on this finding, and in keeping with established remedies, it is submitted that a modification of the Order to include a general directive to cease and desist from refusing to negotiate with the Union concerning terms and conditions of employment is warranted.

On October 27, 2008, the General Counsel filed a Motion to Modify the Board's Order regarding the decision not to Order the Employer to bargain upon request from the Union. The Board, consisting of two members, denied the General Counsel's request. The Charging Party now seeks that a quorum of the Board overturn its previous decision and implement the ALJ's decision implementing a broad general bargaining order setting forth the Employer's overall bargaining obligation.

On June 17, 2010, the United States Supreme Court decided ***New Process Steel, L.P. v. NLRB***, 177 L. Ed. 2d 162 (U.S. 2010). The Court invalidated all cases decided by the two member Board. Since the present matter was decided by the two member Board, this matter should be redecided by a quorum of members. The Union submits that the decision by the two member Board not to order the Employer to bargain over terms and conditions of employment was incorrectly decided. The Union urges the Board to modify its Order of September 30, 2008, and order the Employer to bargain with the Union.

Traditionally, in cases where an Employer has failed and refused to bargain over terms and conditions of employment, the Board has ordered a remedy which includes a directive to cease and desist from its failure to bargain and has included in the Notice to Employees language advising the bargaining unit of this general obligation to bargain. In ***Laurel Bay Health & Recreation Center***, 353 NLRB No. 24 (2008), issued on the same day as the Board's ***Hanson*** decision, the Board affirmed findings that the Employer had, inter alia, made unilateral changes, failed and refused to supply information, and implemented changes without first having bargained to impasse. The Board adopted the Administrative Law Judge's recommended Order that the Employer cease and desist from such refusals. In addition, the Order directed the Employer generally to:

> On request, bargain with the Union as the exclusive representative of the employees in the [] unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

The adopted Order in *Laurel Bay* also included corresponding negative and affirmative language concerning the bargaining obligation in the Notice to Employees. (id., slip op. pp. 2, 21–22) In ***Whitesell Corp***., 352 NLRB No. 138, slip op. at 4 (2008), the Board also ordered the Employer, who had engaged in numerous 8(a)(5) violations not limited to the implementation of changes without having reached impasse, to "On request, bargain in good faith with the Union as the exclusive bargaining representative of the employees." Thus, the proposed modification herein to include the general directive to bargain is consistent with established Board precedent.

Counsel for the Union notes that there have been 8(a)(5) cases where the Board has declined to issue a general order to bargain, but submits that those cases are distinguishable on ground that they are limited to situations where there are *single* instances of Section 8(a)(5)

violations. For example, in ***ACF Industries***, 347 NLRB No. 99 fn. 28 (2006), the Respondent made threatening statements under section 8(a)(1) but the only 8(a)(5) violation was the premature unilateral modification or termination of the collective bargaining agreement. The Board held:

> Because the Respondent has been found to have committed only specific unilateral actions under Section 8(a)(5), however, it is not appropriate to issue a general order to bargain. ***Arvinmeritor, Inc***., 340 NLRB 1035 fn. 2 (2003).

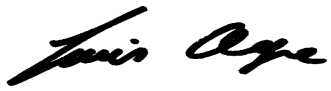
Likewise in ***Arvinmeritor***, the Respondent had engaged threats violative of section 8(a)(1), but its 8(a) (5) violation was limited to the unilateral repudiation of past practice, or contractual obligation, relating to grievance-processing. In ***Arvinmeritor***, the Administrative Law Judge had recommended a broadly worded directive that Respondent bargain with respect to "all terms and conditions of employment," which the Board deleted in its modified Order, noting "It is not an appropriate remedy for the Respondent's specific unlawful action." Again, the distinction is that no additional 8(a)(5) violation was found. See also ***Southern Ohio Coal Co***., 315 NLRB 836 fn. 3 (1994), in turn citing ***Knappton Maritime Corp.,*** 292 NLRB 236, 240 (1988), and ***Transcript Newspapers,*** 286 NLRB 124 (1987). All three of these cases involve a single refusal to supply requested information (concerning copies of agreements of sale of each Respondent's business), with no further 8(a)(5) violations.

As the Hanson case includes three specific types of 8(a)(5) violations — refusal to furnish information, refusal to bargain over the dental premium holiday, and implementation of various unilateral changes — the cases in which the Board has declined to include a broad directive to bargain upon request with the Union over terms and conditions of employment are inapposite. Rather, precedent supports the argument that the Order herein should include a broad

general directive to bargain upon request, consistent with the Board's decisions in ***Whitesell Corp***. and ***Laurel Bay Health & Recreation Center.*** The same broad language that the Board included in those cases as the appropriate remedy for findings of multiple violations under Section 8(a)(5) should be included in the Hanson case, as Hanson presents parallel findings of multiple 8(a)(5) violations.

Based on the lack of exceptions to the Judge's recommended Order including such language, the absence of any discussion by the Board addressing the omission of that language in its Order as modified, and established case law, Counsel for the Union urges a modification of the Board's Order to include Respondent's overall obligation to bargain upon request over terms and conditions of employment.

Respectfully submitted,



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DATED: July 19, 2010

CERTIFICATE OF SERVICE

I, Louis Agre, Esquire, hereby certify that I served a true and correct copy of Charging Party's Motion for Modification , via Electronic mail, on the date indicated below upon:

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