

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

THE AMERICAN NATIONAL RED CROSS,  
GREAT LAKES BLOOD SERVICES REGION  
and MID-MICHIGAN CHAPTER,

Respondents,

and

LOCAL 459, OFFICE AND PROFESSIONAL  
EMPLOYEES INTERNATIONAL UNION, AFL-CIO

CASES           7-CA-52033  
                      7-CA-52288  
                      7-CA-52544  
                      7-CA-52811  
                      7-CA-53018

Charging Party OPEIU,

and

LOCAL 580, INTERNATIONAL BROTHERHOOD  
OF TEAMSTERS

CASES           7-CA-52282  
                      7-CA-52308  
                      7-CA-52487

Charging Party IBT.

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**BRIEF OF OFFICE AND PROFESSIONAL EMPLOYEES LOCAL 459**  
**IN SUPPORT OF EXCEPTIONS TO THE DECISION AND ORDER**  
**OF THE ADMINISTRATIVE LAW JUDGE**

Submitted By:

Tinamarie Pappas  
Law Offices of Tinamarie Pappas  
Attorney for OPEIU Local 459  
4661 Pontiac Trail  
Ann Arbor, MI 48105  
(734) 994-6338  
pappaslawoffice@comcast.net

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## STATEMENT OF THE CASE

Following multiple charges and amended charges filed by Office and Professional Employees Local 459, AFL-CIO (“OPEIU”), and International Brotherhood of Teamsters Local 580 (“Teamsters”), the Regional Director for Region Seven of the National Labor Relations Board (“Board”) issued a Fourth Order Consolidating Cases, Fourth Consolidated Amended Complaint and Notice of Hearing (“Complaint”), alleging a multitude of unfair labor practices committed by Respondent American National Red Cross, Great Lakes Blood Services Region (“ANRC Region”), and Respondent American National Red Cross, Mid-Michigan Chapter (“ANRC Chapter”)[GC 1(dddd)]<sup>1</sup>. A trial was held in these matters on September 27-30, October 1, November 15-17, 30, and December 1-2, 2010, before Administrative Law Judge Jeffrey D. Wedekind. (“ALJ”).

On May 5, 2011, the ALJ issued his Decision and recommended Order (“ALJD”)<sup>2</sup> in which he found that ANRC Region and ANRC Chapter had violated the Act as to every allegation contained in the Complaint regarding the bargaining unit employees represented by OPEIU, with the exception of the following:

- The ALJ found that Respondent ANRC Chapter did not violate Section 8(a)(5) of the Act by unilaterally eliminating the defined benefit pension plan (retirement system) for all employees hired on or after July 1, 2009. (GC 1 (dddd), ¶¶ 28(c)(i), 30, 31, 37, 40). Rather, the ALJ concluded that the changes made by ANRC Chapter were a continuation of a “dynamic status quo” created by the parties’ contractual language and the past practice which had existed prior to July 1, 2009;
- The ALJ found that Respondents ANRC Region and ANRC Chapter did not engage in bad faith fixed mind bargaining in violation of Section 8(a)(5) over the

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<sup>1</sup> References to the trial transcript will be denoted “T\_\_\_”, and references to exhibits of General Counsel, Charging Party OPEIU Local 459, and Respondents will be denoted, respectively, as “GC\_\_\_\_\_”, “CPO\_\_\_\_\_”, and “R\_\_\_\_\_”.

<sup>2</sup> Upon the joint motion of General Counsel and OPEIU, the ALJ issued an Erratum on May 31, 2011, correcting certain inadvertent inaccuracies in his original Decision. Accordingly, “ALJD” shall refer to the ALJ’s original Decision and Order as amended by the May 31, 2011 Erratum.

issues of pension, 401(k) plan, and health insurance (GC 1 (dddd), ¶¶ 28(d), 30, 31, 37, 40). Rather, the ALJ found that the totality of circumstances did not support a finding of bad faith, but merely a conclusion that Respondents engaged in lawful hard bargaining, and;

- The ALJ found that Respondent ANRC Region did not violate Section 8(a)(5) of the Act in October 2009 by reducing the number of choices for local health insurance plans offered to employees. (GC 1 (dddd), ¶¶ 34(a), 37, 40). Rather, the ALJ concluded that General Counsel had not met his burden of proving that ANRC Region had effectuated such a change and that the record evidence supported a conclusion that no change had been implemented.

In addition, although the ALJ correctly found that both Respondents ANRC Region and ANRC Chapter had violated Section 8(a)(5) by implementing unilateral changes to health insurance coverage under the Benefits Advantage plan, to retiree health care benefits, and to 401(k) benefits, and that Respondent ANRC Region had additionally violated Section 8(a)(5) by unilaterally eliminating pension benefits for employees hired on or after July 1, 2009, the ALJ limited his Order of “make whole relief” with respect to such matters. He stated:

Respondents may litigate in compliance whether it would be unduly burdensome to restore the status quo ante with respect to the unilateral changes in health insurance coverage or other benefits. See *Comau, Inc.*, 356 NLRB No. 21, slip op. at 1, fn. 7 (2010). If the Unions choose to retain one or more of the unilaterally implemented changes, then make-whole relief for those changes is inapplicable. *Ibid.* (ALJD p. 44, fn. 60).

OPEIU takes exception to the ALJ’s dismissal of the above-described 8(a)(5) allegations. Both the record evidence and extant case law support a finding that ANRC Chapter’s unilateral elimination of the defined pension plan violated Section 8(a)(5) of the Act. Likewise both the record evidence and case law support a finding that both ANRC Region and ANRC Chapter engaged in bad faith fixed mind bargaining over pension, 401(k) benefits, and health insurance, in violation of Section 8(a)(5). Finally, the record evidence supports a finding that Respondent Region unilaterally eliminated choices among local health plans offered to employees in violation of Section 8(a)(5). Accordingly, as will be further discussed below, the ALJ erred as a

matter of fact and law by dismissing these allegations, and should, therefore, be reversed by the Board.

OPEIU further takes exception to the ALJ's limitation on the make whole remedy for Respondent ANRC Region and ANRC Chapter's unilateral changes to health insurance, pension, 401(k) and retiree health care benefits. As will be discussed below, the Board has recently reversed the Board decisions relied upon by the ALJ in limiting the make whole remedy, and has reinstated the previously followed traditional "make whole" standard. Accordingly, the ALJ's remedial limitation is erroneous as a matter of law, and should likewise, be reversed.

### **ISSUES PRESENTED**

**Exceptions 1-9.** Did the ALJ erroneously dismiss the Complaint allegations that Respondent ANRC Chapter violated Section 8(a)(5) of the Act by unilaterally eliminating the defined benefit pension plan for all employees hired on or after July 1, 2009?

**Exceptions 10-18.** Did the ALJ erroneously dismiss the Complaint allegations that Respondent ANRC Region violated Section 8(a)(5) of the Act by eliminating choices among local health insurance plans offered to employees in October 2009?

**Exceptions 19-28.** Did the ALJ erroneously dismiss the Complaint allegations that Respondents ANRC Region and ANRC Chapter violated Section 8(a)(5) of the Act by engaging in bad faith, fixed mind bargaining over pension, 401(k) benefits, and health insurance?

**Exception 29.** Did the ALJ erroneously limit the make whole remedy for Respondents' unilateral changes to benefits including pension, 401(k), health insurance, and retiree health benefits, by providing that make whole relief was inapplicable in the event OPEIU chose to retain one or more of the unilaterally implemented benefit changes, and that

Respondents could litigate in compliance whether it would be unduly burdensome to restore the status quo ante?

### **GENERAL BACKGROUND FACTS**

OPEIU Local 459 has represented bargaining units of employees at Respondents ANRC Region and ANRC Chapter for many years (T-260-261). At all times relevant to the instant cases, the OPEIU bargaining units at the Region consisted of a lab, clerical and distribution unit (“LCD”), with about 70-75 employees, and a collections unit (“Collections”) with about 165 employees. The employees in the two Region bargaining units are primarily involved in the collection, distribution, and testing of blood products, recruitment and scheduling of donors (telerecruitment), and maintenance and clerical functions. (T-259). The Chapter bargaining unit consists of about 5 employees engaged in disaster relief services and food bank operations. (T-259). Lance Rhines has been the Local 459 service representative for all three bargaining units since 2001. (T-258).

Respondents and OPEIU have been party to a series of individual collective bargaining agreements (“CBA”) for all three bargaining units going back to at least 1998. (R 108-110, 115-119). The most recent CBAs between OPEIU and Respondent Region for the Collections and LCD Units, respectively, were four-year agreements effective March 31, 2004, with an original expiration date of March 30, 2008. (GC 3, 4). Because neither party gave notice to terminate, each of these CBAs rolled over by its respective terms for an additional year to March 30, 2009. (T-261). At midnight on March 30, 2009, the CBAs between OPEIU and the Region expired. (T-261-262, 282, GC 23, 24)(Region Answer ¶ 8).

The most recent CBA between OPEIU and the Chapter was a five-year agreement effective April 1, 2003 with an original expiration date of March 31, 2008, however again,

because neither party gave notice to terminate, the agreement rolled over until midnight March 31, 2009, on which date it also expired. (GC 2, T-261, 282)(Chapter Answer ¶ 9).

The parties began formal negotiations for the Region bargaining unit employees, both Collections and LCD, on February 24, 2009 (T-335-336, GC 39). As of the date of commencement of the trial in these matters, the parties had met in 2009 for bargaining over the Collections CBA on 2/24, 3/5, 3/6, 3/27, 3/30, 4/8, 4/27, 6/16, 8/5, 8/20, and in 2010 on 6/16, 7/12, and 8/31. (GC 39). During that same period, negotiations for the LCD Unit took place on 2/24, 3/13, 3/26, 3/29, 3/30, 4/10, 5/6, 8/5, 8/20, and 12/3/09, and 4/26/10. (GC 39). Negotiations for the Chapter began later and were less frequent, however the parties did meet formally on 5/22, 7/13, 8/27, 9/28 and 11/2/09, and on 7/15/10.<sup>3</sup> (GC 54). As of today, a successor CBA has not been agreed upon for any of the three OPEIU bargaining units.

As will be discussed in more detail below, it is undisputed that in early 2009 Respondents bypassed OPEIU and announced (and subsequently implemented unilaterally) significant reductions to primary economic benefits, including: (1) the suspension of the 401(k) savings plan match; (2) the elimination of participation in the defined benefit pension plan for all employees hired on or after July 1, 2009, and; (3) the elimination and/or significant reduction to health care benefits for future retirees. Significant unilateral changes to health insurance benefits and other terms of employment followed thereafter. The evidence adduced at trial established that Respondents took such unilateral actions in the absence of any meaningful bargaining whatsoever with OPEIU. As further found by the ALJ, Respondent ANRC Region engaged in a host of additional bad faith bargaining conduct, along with actions directed against employees in retaliation for their union support and activities.

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<sup>3</sup> As discussed below, and as found by the ALJ, the parties had tacitly agreed that the Chapter CBA would likely be patterned on the CBA agreed upon for the Region bargaining units, and thus essentially construed the Region negotiations to also serve as negotiations for the Chapter CBA.

**ARGUMENT IN SUPPORT OF EXCEPTIONS**

**Exceptions 1-9.**

**I. THE ALJ ERRONEOUSLY DISMISSED ALLEGATIONS THAT RESPONDENT ANRC CHAPTER VIOLATED SECTION 8(A)(5) BY UNILATERALLY ELIMINATING THE DEFINED BENEFIT PENSION PLAN (RETIREMENT SYSTEM) FOR ALL EMPLOYEES HIRED ON OR AFTER JULY 1, 2009.**

**C. Facts**

The most recent expired CBA between Respondent ANRC Chapter and OPEIU provides at Article 31, as follows:

**ARTICLE 31- RETIREMENT**

**Section 1.** The Employer shall continue to participate in the retirement program of the American National Red Cross on the same basis as the present or as it hereafter may be amended by the American National Red Cross. (GC 2).

On April 2, 2009, without having given any prior notice to OPEIU, Red Cross CEO Gail McGovern bypassed the Union, and issued a memo to all employees nationwide, via the American National Red Cross internal website (“Cross Net”), entitled “Cost Savings Steps Difficult but Essential”. (GC 7, 61). The memo, stated, *inter alia*, as follows:

- **Closing Pension Plan to New Employees on July 1-** In addition, effective July 1, we will be closing our pension plan to new employees. Employees who join Red Cross units currently participating in the Savings Plan 401(k) on or after July 1, 2009, will be offered an enhanced 401(k) program but will not be eligible to participate in the Retirement System. This change will not affect current employees. Current eligible employees will continue to benefit from the Retirement System and Savings Plan to the extent their unit participates in these programs. I also want to make clear that these changes will not affect Red Cross retirees currently receiving monthly pension payments from the Retirement System.

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I wish we did not have to go this route, but we have no choice. . .I wish I could guarantee that there won't be more cuts, but we are living in uncertain times. I can guarantee that I will do absolutely everything I can to avoid more large-scale layoffs. . .I truly hope these cuts will be sufficient.

By email dated April 15, 2009, ANRC Region's Human Resources Supervisor Tim Smelser forwarded the April 2 memo to Rhines stating that "The American Red Cross intends to honor its existing agreements. Where the agreements permit us to make the changes referred to by Ms. McGovern, we will do so." (GC 61). Rhines responded via emails on April 15 and 17 asking, "Can you be more specific as to what cuts you think you have the latitude to make per the contracts with Local 459, and which ones you intend to make and when?" (GC 61, 62). On April 23, Smelser, via email to Rhines, stated: "The following benefits changes will occur: Discontinue the 401(k) match beginning May 1, 2009. Close the pension plan to new participants beginning July 1, 2009." (GC 62). Rhines responded stating: "Obviously, we do not agree. But, having said that, what is National ARC replacing their pension with for non-union employees starting July 1?" (GC 62). Smelser responded that he was "not sure at this time" and that "[he] will advise." (GC 62). He never did.

It is undisputed that effective July 1, 2009 the retirement system (pension plan) was eliminated for any employee hired on or after that date. (GC 7, R-66 T-1340-1341)(ALJD p. 21, lines 28-29.)

#### **D. Legal Argument**

In contrast to his findings with regard to the Chapter, the ALJ correctly concluded that ANRC Region violated Section 8(a)(5) by unilaterally eliminating the defined benefit pension plan (retirement system) effective July 1, 2009 for all employees hired on or after that date.<sup>4</sup>

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<sup>4</sup> The relevant provisions of the expired ANRC Region CBA with regard to retirement benefits provide:

Article 31. RETIREMENT

Section 1. Employees covered under the contract will receive the same retirement benefits, savings plan, including the American Red Cross Savings Plan (a 401-k plan) and 403(b) plan as other employees at the Great Lakes Region. The American Red Cross has the right to amend the Retirement System, Savings Plan and 403(b) plans in its discretion. The provisions of these plans are fully set forth in separate summary plan descriptions.<sup>4</sup>

In that regard, the ALJ correctly concluded that ANRC Region had bypassed OPEIU and announced the change to employees as a “fait accompli”, and that OPEIU, therefore, had not waived its right to bargain over the change by making a demand for bargaining separate and apart from main table negotiations.<sup>5</sup> (ALJD p. 21, p. 22, lines 26-29).

The ALJ further correctly found with respect to the ANRC Region’s changes, that the contractual language did not constitute a clear and unmistakable waiver of the right to bargain over the elimination of the defined benefit pension plan, and further, that “there [was] no evidence that the parties intended the reservation-of-discretion language to survive the expiration of the contract.” (ALJD p. 20, lines 28-30). Lastly, the ALJ correctly concluded that neither the contractual language nor “prior changes” made to the pension plan (retirement system) during the terms of successive CBAs, “established a status quo permitting the post contract unilateral changes”. (ALJD p. 26, lines 25-36). In doing so, the ALJ explicitly rejected ANRC Region’s argument that the “reservation-of-rights” language defined the “status quo” following contract expiration to the same extent as it defined the “status quo” privileging the Region to amend the pension plan during the term of the contract. (ALJD p. 26, lines 9-27).

With respect to ANRC Chapter, however, the ALJ reached a different conclusion. Preliminarily, however, the ALJ correctly found that, like with the Region, the elimination of the pension plan by the Chapter had been announced as a fait accompli, and, accordingly, that OPEIU had not waived its right to bargain over the changes (ALJD p. 22, lines 26-29). He

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<sup>5</sup> The ALJ concluded it was unnecessary to address OPEIU’s alternative argument that no request was necessary because a union is not required to demand bargaining over individual proposed changes when the parties are engaged in bargaining for an overall contract. See e.g. *Pleasantview Nursing Home*, 351 F.3d 747, 757 (6<sup>th</sup> Cir. 2003)(During negotiations, “a party need not respond to every [announced change] with a forceful rejection and insistence on further bargaining; further bargaining is assumed and a waiver of the issue will not be presumed unless it is clear and unmistakable”). ALJD p. 22, fn. 36. In so concluding, the ALJ noted that “it [was] undisputed that the changes here were not proposed at the bargaining table prior to implementation. Indeed. . .there was no “proposal” to make the changes at all; rather, they were announced as a fait accompli. ALJD p. 22, fn. 36.

further correctly concluded that like the Region, since the changes were implemented by the Chapter post-contract expiration, the contractual language did not “require” implementation of the national pension plan changes to the OPEIU bargaining unit employees. (ALJD p. 23, lines 22-29).

In contrast to his ultimate conclusion that the Region’s changes were unlawfully implemented, however, the ALJ concluded that the Chapter had lawfully implemented the July 1, 2009 pension plan elimination because such changes “continued the status quo as defined by the provisions of the expired contract and/or the Respondent’s past practice of unilateral changes.” (ALJD p. 23, lines 38-41, p. 24, lines 17-45, p. 25, lines 1-16).

In reaching this conclusion with regard to ANRC Chapter’s elimination of the defined benefit pension plan, the ALJ found that the status quo with respect to the Chapter’s pension plan benefit was “dynamic” rather than “static”. In so finding, the ALJ relied upon the following:

- The expired contractual language provided that the Chapter “shall continue to participate in the retirement program of the [ANRC] on the same basis as the present or as it hereafter may be amended by the [ANRC].
- The “status quo” “was established by the provisions of the expired [Chapter] contract, and it was dynamic rather than static”.
- That such contractual language “contemplate[s] that the status quo between [the Chapter and OPEIU] includes, not just the current ANRC retirement program, but any amendments to the program or future [pension] plans offered to other employees by the ANRC.
- There is no evidence that the [Chapter] has any control over whether the ANRC amends the national program or offers different national plans.
- There is no evidence that the [Chapter] has not adopted or applied past changes in the pension. . . plans made by the ANRC.

- The record indicates that the ANRC made numerous changes to the pension . . . plan over the years.<sup>6</sup>

(ALJD pp. 24-25). As will be discussed below, the ALJ’s conclusion with regard to the legality of ANRC Chapter’s July 1, 2009 elimination of the defined benefit pension plan cannot withstand legal scrutiny, and must be reversed. The ALJ’s finding of a “dynamic status quo” based upon expired contractual language and changes which were universally implemented during the terms of CBAs containing certain “reservation of rights” language runs afoul of well-established legal precedent.

First of all, under well-settled Board law, provisions such as that contained in Article 31 of the expired ANRC Chapter CBA which allow an employer to exercise unilateral action with regard to a term or condition of employment, expire with the expiration of the CBAs, and, therefore, cannot be relied upon post-expiration to justify changes unilaterally implemented in the absence of bargaining. For example, in *Ironton Publications, Inc.*, 321 NLRB 1048 (1996), the Board held:

It is well settled that the waiver of a union’s right to bargain does not outlive the contract that contains it, absent some evidence of the parties’ intentions to the contrary. Citing, *Buck Creek Coal*, 310 NLRB 1240, fn. 1 (1993); *Control Services*, 303 NLRB 481, 484 (1991), enfd. 961 F.2d 1568 (3d Cir. 1992).

See also, *Kingsbury, Inc.*, 355 NLRB No. 195 (9/29/10); *Long Island Head Start Child Development Services*, 345 NLRB 973 (2005), vacated on other grounds, 460 F.3d 254 (2<sup>nd</sup> Cir. 2006); *Blue Circle Cement Co.*, 319 NLRB 954, 954(1995). The language contained in Article 31 of the Chapter CBA that employee participation in the [ANRC] retirement program shall be “on the same basis as present or as it hereafter may be amended by the [ANRC]” is exactly the

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<sup>6</sup> The ALJ noted that most of the changes were minor, technical or housekeeping amendments, and that only the changes implemented in 2005, during the term of the then existing CBAs were “significant”. ALJD p. 24, lines 33-45.

type of waiver of bargaining rights addressed in the above cases, and, which, according to such precedent, does not survive contract expiration.

Here, however, the ALJ apparently concluded that even though such reservation of rights to alter terms of employment would normally expire simultaneous with the CBA, the parties' use of the words "shall continue" in Article 31, demonstrated an intent that the reservation of rights language survive contract expiration. There is, however, no record evidence supporting such a conclusion.

More specifically, the record is devoid of evidence that the words "shall continue" were not intended by the parties to refer to a continuation of the employees' participation in the ANRC retirement plan (whether the same or as changed by ANRC) solely during the five (5) year term of the CBA. There is nothing in the record justifying the ALJ's conclusion that the words "shall continue" were more likely intended to refer to changes made post-expiration, than they were to refer to changes made during the contract's effective dates. As the Board stated in the above-cited cases, such management rights clauses do not survive contract expiration absent "evidence of the parties' intentions to the contrary". Because the contractual language here could just as reasonably and logically be interpreted to refer to changes made during the term of the CBA, as it could to changes made post-expiration, there was no "evidence" that the parties' did not intend that the right of Respondent to unilaterally implement changes to the retirement system would expire simultaneous with the CBA.<sup>7</sup>

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<sup>7</sup> Moreover, the ALJ's inference that the Chapter had no authority to modify the ANRC national retirement system, and that all employees participated in the same ANRC retirement system, is in direct conflict with record testimony in which it was revealed that both non-bargaining unit employees, as well as employees in the IBT bargaining unit enjoyed terms under the retirement system which were different from those of the OPEIU bargaining unit employees. (T-671, 675). Even if the ALJ's assumptions were accurate, the Board has held that the practical difficulties encountered by an employer in negotiating about a pension plan with the representative of a portion of his employees, where all company employees, both union and non-union, are covered by a company-wide benefits plan, do not eliminate the employer's duty to bargain over changes affecting the bargaining unit. *Winn-Dixie Texas, Inc. d/b/a Foodway*, 234 NLRB 72, 77 (1978), citing *Tide Water Associated Oil Co.*, 85 NLRB 1096, 1097 (1949).

Next, the ALJ's conclusion that the past changes to the retirement system created a past practice and "dynamic status quo" which privileged ANRC Chapter to make post-expiration changes, is likewise flawed as a matter of law. In that regard, it is undisputed that all "past" changes to the retirement system (whether of a ministerial, technical, housekeeping, or substantive nature) occurred during periods in which a CBA was in effect. The record is devoid of one iota of evidence that even a single change to the pension plan (retirement system) was implemented during a contractual hiatus.

Therefore, since all changes were effectuated during the terms of the then existing CBAs, any "dynamic status quo" which existed as of July 1, 2009 was created solely as result of changes implemented pursuant to the now expired "reservation of rights" clause in Article 31. The Board has unequivocally rejected the argument that changes made under these factual circumstances pursuant to such "reservation of rights" clauses create a "past practice" upon which an employer may rely to effectuate post-contract unilateral changes.

In a recent case virtually identical to the instant factual situation, the Board adopted the rationale of dissenting Member Liebman in its earlier *Courier-Journal*, 342 NLRB 1093 (2004) decision, and found no "past practice" had been established where all prior changes had been effected during periods when CBAs were in effect which authorized such unilateral action by the employer.<sup>8</sup> Specifically in *E.I DuPont de Nemours and Company*, 355 NLRB No. 177, slip op. at 1 (8/27/10), the Board distinguished *Courier-Journal* and held:

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<sup>8</sup> In *Courier-Journal*, 342 NLRB 1093 (2004), the case Respondents here, and apparently the ALJ, have relied upon, the Board found that where the employer had for 10 years treated union-represented employees the same as non-union employees, and had implemented the same changes for health care costs for union employees as non-union employees, without objection from the union, a past practice had been established sufficient to relieve the employer of the duty to bargain over the changes at issue. *Id.* at 1094. Board Member Liebman dissented in vehement opposition to the majority's conclusion, based upon the long-standing case law cited above, holding that discretionary "management rights" or "waiver" clauses expire with the CBA and, therefore, Liebman argued, prior changes made pursuant to such clauses cannot be relied upon in any respect to support a past practice argument.

The Respondent relied upon the *Courier-Journal* cases, 342 NLRB 1093 (2004) and 342 NLRB 1148 (2004). In those cases, the Board found that the employer's unilateral changes to employees' health care premiums during a hiatus between contracts were lawful because the employer demonstrated a past practice of making such changes both when the contract was in effect and during hiatus periods. As the judge explained, however, the Respondent's asserted practice in the instant case was limited to changes made at times when the parties' contract and management-rights provision, which authorized the changes, were in effect. As a result, the judge properly found that the *Courier-Journal* cases were inapposite. Here, because Respondent's prior changes do not establish a past practice of changes implemented during a hiatus, the unilateral changes at issue violated the Act.

Likewise, ANRC Chapter did not establish a past practice of making such changes sufficient to relieve it of the duty to bargain over the elimination of the defined benefit pension plan. Here, as in *E.I DuPont de Nemours*, there is no evidence of any changes being implemented during periods of contractual hiatus, indeed there is no evidence of any hiatus whatsoever between CBAs going back to at least the year 2000. Therefore, unlike the facts upon which the Board based its anomalous decision in *Courier-Journal*, the facts here do not support an argument that Respondent ANRC Chapter was privileged to make such changes in accordance with an established past practice.<sup>9</sup> Accordingly, the ALJ's finding that ANRC lawfully effected such changes is in conflict with extant Board precedent.

Even assuming, *arguendo*, that the changes had been implemented during the term of the Chapter CBA (as opposed to post-termination), the ALJ incorrectly concluded that by the foregoing contractual language OPEIU had conceded ANRC Chapter's right to effectuate the total and complete elimination of the defined benefit pension plan (retirement system) for employees hired on or after July 1, 2009. None of the past changes, even assuming the ALJ

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<sup>9</sup> Moreover, the record evidence revealed only one set of past substantive changes by ANRC to the pension plan, which were effectuated in 2005, and the unrebutted testimony of OPEIU Service Representative Lance Rhines was that such changes, far from being unilaterally implemented, were discussed and negotiated prior to implementation by he and then Human Resource Director Bill Wittington. (T-481-482, 585-586, CPO 4). A single substantive change over the course of the instant bargaining relationship is wholly insufficient to establish a past practice of acquiescence or acceptance by the union of such changes, or of a "dynamic status quo".

appropriately relied upon them, included the complete elimination of a retirement benefit, and the relevant language of Article 31 does not specifically reserve to ANRC the right to either “eliminate” or terminate the retirement system, it states merely that ANRC retains the right to “amend” the retirement system.

The Board has consistently required that in order for a waiver to be found, the waiver must be “clear and unmistakable”. This guiding and steadfast principal was recently reconfirmed by the Board in *Provena St. Joseph Medical Center*, 350 NLRB 808, 811 (2007), in which it stated:

The clear and unmistakable waiver standard . . . requires bargaining partners to unequivocally and specifically express their mutual intention to permit unilateral employer action with respect to a particular employment term, notwithstanding the statutory duty to bargain that would otherwise apply.

See also, *Kingsbury, Inc.*, 355 NLRB No. 195, slip op. at 5, fn. 6 (9/29/10)(“Proof of a contractual waiver is an affirmative defense “which must meet a high standard” and it is the Respondent’s burden to show that a contractual waiver is “explicitly stated, clear and unmistakable”)(citations omitted); *Verizon N., Inc.*, 352 NLRB 1022 (2008)(finding no clear and unmistakable waiver allowing employer’s unilateral changes to use of paid vacation and leave to preserve FMLA leave).

It is insufficient that contractual language could reasonably be interpreted to cover certain conduct. *Provena*, 350 NLRB at 812, 822, fn. 19. Further, the Board has held that language allowing an employer to “amend” a benefit plan did not allow the employer to unilaterally eliminate or substitute the plan or any of its features. *Loral Defense Systems-Akron*, 320 NLRB 755, 755-756 (1996), enf., 200 F.3d 434 (6<sup>th</sup> Cir. 1999); *Paul Mueller Co.*, 332 NLRB 312, 319 (2000)(Board enforced ALJ’s decision that changes implemented were not encompassed within phrase “major benefit changes”).

Here, the change implemented on July 1, 2009 indisputably eliminated the defined benefit retirement system for all employees hired on or after that date. The contractual language, however, contains no provision allowing ANRC to terminate or eliminate the retirement system either for some or all employees, therefore it cannot be concluded that the contractual language constituted a clear and unmistakable waiver of OPEIU's right to bargain over the complete elimination of pension benefits for any current or future employees. The contractual language here gave only limited authority to Respondent to "amend" the retirement system, and ANRC Chapter's elimination of the benefit clearly exceeded that authority.<sup>10</sup>

Furthermore, there was no record evidence that retirement system benefits had been eliminated in the past so as to create a "past practice" or "dynamic status quo" of such changes. The one past example of a substantive change to the retirement system did not consist of the elimination of the defined benefit pension plan, but only of the modification of certain benefits within that plan (i.e. the early retirement penalty, change to calculation for years of benefit service, and annual 1% increase to retirement benefits). ALJD p. 24, lines 36-40).

The ALJ's conclusion that ANRC Chapter was merely continuing the "status quo" by its July 1, 2009 elimination of the defined pension plan for all employees hired on or after that date is not supported by either the record evidence or extant Board law. Accordingly, OPEIU's exceptions to the ALJ's dismissal of the 8(a)(5) allegation related such changes should be

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<sup>10</sup> Nor does the language of the retirement system plan document constitute a waiver of OPEIU's right to bargain over the elimination of the defined benefit pension plan for employees hired on or after July 1, 2009, because neither the plan document nor any of its terms or provisions are specifically incorporated into the CBA. *Georgia Power Co.*, 325 NLRB 420, 420-421 (1998), enfd. 176 F. 3d 494 (11<sup>th</sup> Cir. 1999).(employer's unilateral changes to benefits for future retirees unlawful where CBA contained no provision regarding those benefits and benefit plan language giving the employer the right to amend or terminate benefits was not incorporated into the CBA); *Amoco Chemical*, 328 NLRB 1220, 1222, 1229-1230 (1999), enfd. 217 F.3d 869 (D.C. Cir. 2000) (unilateral changes unlawful where CBA did not incorporate reservation of right to modify or terminate which were set forth in plan document); Cf. *Mary Thompson Hospital*, 296 NLRB 1245, 1246-1247 (1989), enfd. 942 F.2d 741 (7<sup>th</sup> Cir. 1991)(CBA specifically incorporated plan document, which included reservation of right to employer to "modify, suspend, or terminate" plan)

granted, the ALJ's decision should be reversed, and the Respondent ANRC Chapter should be found to have violated Section 8(a)(5) of the Act.

**Exceptions 10-18.**

**II. THE ALJ ERRONEOUSLY DISMISSED ALLEGATIONS THAT RESPONDENT ANRC REGION VIOLATED SECTION 8(A)(5) BY ITS OCTOBER 2009 UNILATERAL ELIMINATION OF CHOICES AMONG LOCAL HEALTH CARE PLANS.**

The ALJ concluded that General Counsel had failed to prove by a preponderance of the evidence that ANRC Region had unilaterally reduced the choices given to employees for local health insurance options in October 2009. (ALJD p. 27, lines 8-9). The ALJ's finding is not supported by the record evidence for the following reasons:

First, although ANRC Region denied in its Answer that it had unilaterally changed the local health insurance options offered to employees, there was no evidence received at the hearing to rebut the testimony of GC witnesses McGwin and Hemstreet that the choices for selection of local plans for 2010 were not the same as those for 2009.

Next, General Counsel subpoenaed healthcare enrollment packets sent to employees, and enrollment documents showing the plan choices available for plan years 2009 and 2010. ANRC Region failed to produce the subpoenaed documents, initially claiming they did not exist. Later in the trial, however, Respondent witness Smelser acknowledged that he did not know whether such documents existed or not, and that, if they did exist, they would be maintained by the Region's third party benefits administrator, who was clearly an agent of Respondent for purposes of employees' 2009 health insurance enrollment. (T-1988-1990).

Despite Smelser's testimony, the ALJ erroneously failed to acknowledge the agency status of Respondent's plan administrator, and, thereby, likewise erroneously concluded that "the lack of documentary evidence cannot be blamed on the Region's failure to produce the

information in response to General Counsel's subpoena". (ALJD p. 27, lines 42-44.) In addition, the ALJ essentially credited Respondent's assertion that it could not obtain the subpoenaed documents from Hewitt, its third party administrator, an assertion which was directed contradicted when Respondent attempted to introduce into evidence a document generated by the same plan administrator (Hewitt) allegedly showing zip code changes made to certain plan coverages, and which thus unequivocally demonstrated that it could, in fact, obtain information in the possession of its benefits administrator. (Rejected R 135).

The ALJ further erroneously characterized McGwin's testimony as having "admitted" that she changed residence locations and, therefore, likewise changed her local health plan selection. (ALJD p. 27, lines 30-32.) Contrary to the ALJ's finding, however, McGwin actually testified that she did not either change her residence or use a different address, from at least 2008 forward, consequently, the 2009 "change" in options could not have been due to any change in McGwin's residential address. (T-242-243). The ALJ then relied upon his erroneous characterization of McGwin's testimony to conclude that "consistent with the Region's position (and the names of the plans themselves), there is some connection between geographical location and the available local options". (ALJD p. 27, lines 32-36).

Rather than hold Respondent accountable for its failure to produce subpoenaed documents by drawing the appropriate adverse inference, the ALJ instead blamed the lack of documentary evidence on General Counsel, stating that "no documentary evidence was presented to substantiate" McGwin's testimony that in 2009 she was not afforded the opportunity to select from the three local plan options offered to her in 2008, and that "the only documentary evidence introduced was McGwin's October 2009 open-enrollment worksheet showing that she was offered only the West-Michigan local plan for 2010 (GC 18)." (ALJD p. 27, lines 26-30).

Obviously, as was made clear at the trial, the reason for the lack of documentary evidence from the General Counsel, was that Respondent failed to produce the subpoenaed documents. It is inconceivable that neither Respondent nor its agents, the plan administrator and insurance provider, maintained records showing the plan options available to employees during the October-November 2009 enrollment process. ANRC Region failed to call a single witness to substantiate its claims that it could not obtain the subpoenaed records from its third party administrator and agent. Likewise, no one from Hewitt was called to testify that the documents no longer existed. The ALJ erred in blaming the lack of documentary evidence on General Counsel when such evidence was properly subpoenaed from Respondent, and not produced.

Contrary to the ALJ's conclusion, the Region's failure to produce the subpoenaed documents justified an adverse inference that such evidence would have further substantiated the testimony of GC's witnesses and the complaint allegation of a unilateral change to local health insurance options.

In *University Medical Center*, 335 NLRB 1318, 1335 (2001), the Board affirmed the ALJ's determination that such an adverse inference was warranted. [Citing *J. Huizinga Cartage Co., Inc.*, 298 NLRB 965, 970 (1990); *NLRB v. Shelby Memorial Hospital Association*, 1 F.3d 550, 553 (7<sup>th</sup> Cir. 1993) ("The failure of an employer to produce relevant evidence particularly within its control allows the Board to draw an adverse inference that such evidence would not be favorable to it.")] See also, *Oasis Mechanical, Inc.*, 346 NLRB 1011, 1018 (2006); *Clear Channel Outdoor, Inc.*, 346 NLRB 696, 702 (1996).

Respondent offered no evidence that it notified the Union of the proposed change and afforded the Union an opportunity to bargain over it. To the contrary, the evidence established that the Region gave the Union assurances as late as October 23, 2009, that there would be no

change to the local plans offered to employees, and then changed those offerings without any notice whatsoever to the Union (GC 55). Respondent has never asserted that the parties had reached an impasse, either in negotiations overall, or as to this specific issue. Moreover, since such changes were effectuated after the CBA had expired, ANRC Region could not rely upon the contractual waiver provision allowing it to substitute comparable plans. *Ironton Publications, Inc.*, 321 NLRB at 1048. In any event, Respondent offered no evidence that it had, in fact, substituted a comparable plan for the plans not offered to employees during the 2009 open enrollment.

Accordingly, the evidence adduced at trial supported a finding, as alleged in the Complaint, that Respondent ANRC Region violated Section 8(a)(5) of the Act by eliminating certain local health insurance plans options. The ALJ's findings to the contrary and his dismissal of the allegation were erroneous. Accordingly, the Board should grant OPEIU's exceptions, reverse the ALJ's findings and conclusions, and find that ANRC Region violated Section 8(a)(5).

**Exceptions 19-28.**

**III. THE ALJ ERRONEOUSLY DISMISSED ALLEGATIONS THAT RESPONDENT ANRC REGION AND ANRC CHAPTER VIOLATED SECTION 8(A)(5) BY ENGAGING IN BAD FAITH, FIXED MIND BARGAINING OVER PENSION, 401(K) BENEFITS, AND HEALTH INSURANCE.**

The ALJ found that General Counsel had failed to prove by a preponderance of the evidence that Respondents ANRC Region and ANRC Chapter had, since February 2009, "bargained with a fixed mind and with no intention of reaching an agreement" over 401(k), participation in the retirement system (pension plan), and health insurance benefits. (ALJD p. 31, lines 25-30). The ALJ's finding is not supported by either the record evidence or extent Board precedent.

Initially, the ALJ correctly noted in his analysis that “in distinguishing between . . . whether an employer has engaged in lawful hard bargaining or unlawful surface bargaining—the totality of the employer’s conduct is examined, including its conduct both at and away from the bargaining table and the proposals themselves.” ALJD p. 31, lines 41-44, citing *Regency Service Carts*, 345 NLRB 671 (2005); *Liquor Industry Bargaining Group*, 333 NLRB 1219, 1220-1222 (2001), *enfd.* 50 Fed. Appx. 44 (D.C. Cir. 2002)(unpub). In examining the “totality of the circumstances”, the ALJ further correctly noted that:

- Respondents proposed “me too” language with respect to all three benefits, “and that this language reserved to the Respondents unlimited discretion to make whatever changes they wanted whenever they wanted.” (ALJD p. 32, lines 2-5).
- The “me too” health insurance proposal “even contained language expressly removing the subject from the grievance/arbitration procedure”, while at the same time, retaining the prohibition on OPEIU’s right to strike. Citing *Regency Service* and *Liquor Industry*, *supra*, for the premise that “broad management rights proposals accompanied by no-grievance and no-strike proposals evidenced bad faith”. (ALJD p. 32, lines 6-9, and fn. 51).
- Respondents “never wavered from their “me too” proposals, notwithstanding that OPEIU . . . made several counter-proposals, including dropping the local health insurance plans”. (ALJD p. 32, lines 9-12).
- “[T]he Region and/or the Chapter contemporaneously engaged in unlawful conduct by making unilateral changes in the very same benefits and failing to timely provide requested information. . . [and] the Region admittedly engaged in unlawful, fixed-mind bargaining with OPEIU in 2010 regarding the transfer of telerecruiter work.” (ALJD p. 32, lines 12-16).

The ALJ then went on, however, to find that the totality of the circumstances did not warrant a conclusion that ANRC Region and Chapter had engaged in bad faith, fixed mind bargaining. The ALJ based his finding in that regard on the following:

- “The ‘me-too’ language was nothing new; the retirement provisions of the expired contracts contained similar language. Although the ‘me-too’ health insurance proposal contained additional language removing the subject from the grievance/arbitration procedure, such language was not included in the ‘me-too’ 401(k) and pension proposal.” (ALJD p. 32, lines 18-22).

- “Peterson [Respondent’s bargaining agent] provided a reasonable explanation to the Unions why the ANRC and the Respondents wanted the ‘me-too’ language: to achieve greater commonality and consistency of administration and experience and lower costs.” (ALJD p. 33, lines 1-3).
- “Several other regions and chapters had successfully negotiated similar ‘me-too’ health-insurance and retirement provisions with other local unions around the country.” (ALJD p. 33, lines 13-15).
- “[I]t was . . . reasonable for the Respondents to believe that it was ‘fair and proper’ to stand firm on their position, and/or that they had ‘sufficient bargaining strength to force’ the Unions to agree”. (ALJD p. 33, lines 18-20).
- “The similar or related unfair labor practices found in this proceeding [were] insufficient to establish that the Respondents. . . were attempting to avoid reaching any new agreements.” (ALJD p. 33, lines 25-27).
- “[I]t is doubtful that the fundamental differences between the parties, especially over the ‘me-too’ health insurance proposal, would have been any less fundamental in the absence of the 8(a)(5) violations.”

As will be discussed below, the reasons relied upon by the ALJ to justify the dismissal of this allegation, whether taken individually or as a whole, are insufficient to support a conclusion that Respondents did not bargain in bad faith, given the totality of the circumstances in this case. Indeed, in direct contradiction to his findings on these allegations, the ALJ, earlier in his decision, characterized ANRC Region and Chapter’s conduct in announcing their unilateral changes to retiree health insurance, health insurance, 401(k) and pension, as objective evidence that Respondents had no intention of bargaining with OPEIU or of changing their minds concerning the implemented changes. ALJD p. 15, lines 43-44 (with respect to changes to retiree health benefits), p. 30, lines 7-8 (with respect to health insurance changes) (“[T]he record indicates that Respondents did not bargain over the [health insurance] changes in a meaningful way or with good faith.”)

Here, Respondents not only bypassed the Union, and announced their pre-determined intentions and decisions on these very same issues directly to employees, but they also maintained that they had no authority to change the decisions which had already been made, and never once varied from their bargaining proposals seeking to divest the Union of any and all right or ability to negotiate over present and future changes to these most critical of employment terms and conditions. It is difficult to fathom how good faith bargaining could possibly occur over issues on which Respondents had completely undermined OPEIU's bargaining authority by announcing widespread and significant changes directly to employees as a "fait accompli", and clearly telegraphing to employees that the decisions were final and would not be changed even though the parties were engaged in overall contract negotiations.

In the absence of widespread unlawful unilateral changes, bypassing of the Union, and other significant unlawful conduct, including the refusal to provide relevant requested information, the other factors relied upon by the ALJ might have been sufficient to find that a party's merely intractable insistence on a particular proposal or position is not tantamount to bad faith, "fixed mind" bargaining.

However, whereas here, an employer has engaged in such additional unlawful conduct directly impacting the negotiation process itself, those factors do not, and cannot, erase the most fundamental of bad faith bargaining conduct, to wit: (1) Bypassing the employees' collective bargaining representative and directly announcing changes as a fait accompli to employees, and; (2) Unlawfully implementing the announced unilateral changes while the parties were supposed to be negotiating over these exact same subjects. See, e.g., *NLRB v. Fitzgerald Mills Corp.*, 313 F.2d 260, 267 (2<sup>nd</sup> Cir. 1963)(Bad faith bargaining established by employer's unlawful unilateral changes made during bargaining, and intransigence in bargaining proposals); *Visiting Nurses*

*Servs. v. NLRB*, 177 F.3d 52, 58(1<sup>st</sup> Cir. 1999)(“An employer’s unilateral change in conditions of employment under negotiation is. . .a violation of § 8(a)(5), for it is a circumvention of the duty to negotiate which frustrates the objectives of § 8(a)(5) much as does a flat refusal [to bargain]”)(citations omitted).

Although merely proposing a “me-too” waiver clause which would have allowed Respondents to unilaterally implement such changes is not unlawful, here Respondents had already implemented the changes they sought, without either bargaining over them or reaching a valid impasse on any single proposal, let alone in overall negotiations. Thereafter, they refused to bargain over these same conditions of employment, and instead held intractably to their proposals seeking a complete waiver of the Union’s bargaining rights.

Accordingly, although seeking the waiver clauses as part of their bargaining proposal may not have been *per se* unlawful standing alone, the fact that Respondents bypassed OPEIU and went directly to employees with their announced changes, then implemented the desired changes without bargaining with the Union, while at the same time insisting on OPEIU’s agreement to contractual waivers of its right to bargain over future changes, strongly supports the conclusion that Respondents engaged in bad faith bargaining.

Here, Respondents were merely carrying through at the bargaining table that which they had already accomplished away from the bargaining table: The unilateral implementation of significant changes to major terms of employment without either giving notice to OPEIU, or affording OPEIU an opportunity to bargain. Meaningful negotiations could not occur under these circumstances and Respondents’ conduct in creating these circumstances amounts to bad faith, fixed mind bargaining.

The ALJ's dismissal of the 8(a)(5) allegations of fixed mind bad faith bargaining with respect to 401(k), pension, and health insurance benefits by ANRC Region and ANRC Chapter is erroneous. The Board should, therefore, grant OPEIU's exceptions, reverse the ALJ, and find Respondents to have violated Section 8(a)(5) of the Act.

**Exception 29.**

**IV. THE ALJ ERRONEOUSLY LIMITED THE MAKE WHOLE REMEDY FOR RESPONDENT ANRC CHAPTER AND ANRC REGION'S UNILATERAL CHANGES TO PENSION, 401(K), HEALTH INSURANCE, AND RETIREE HEALTH BENEFITS.**

The ALJ properly concluded that Respondent ANRC Region violated Section 8(a)(5) by unilaterally implementing changes to its defined benefit pension plan, 401(k) plan, Benefits Advantage Health Insurance plans, and retiree health insurance plans. However, in reliance upon Board decisions commencing with *Brooklyn Hospital*, 344 NLRB 404 (2005), and including the case cited by the ALJ, *Comau, Inc.*, 356 NLRB No. 21 (2010), the ALJ limited the make whole remedy as follows:

Respondents may litigate in compliance whether it would be unduly burdensome to restore the status quo ante with respect to the unilateral changes in health insurance coverage or other benefits. See *Comau, Inc.*, 356 NLRB No. 21, slip op. at 1, fn. 7 (2010). If the Unions choose to retain one or more of the unilaterally implemented changes, then make-whole relief for those changes is inapplicable. *Ibid.* (ALJD p. 44, fn. 60).<sup>11</sup>

Most recently, in the case of *Goya Foods of Florida*, 356 NLRB No. 184 (June 22, 2011), the Board re-examined the propriety of its prior limitation on the remedial make whole relief in situations where the involved union elects to retain one or more of the unilaterally implemented plans rather than require the employer to reinstate the status quo ante. The Board in *Goya* determined that the remedial relief required in the 40 years of cases pre-dating *Brooklyn Hospital*

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<sup>11</sup> In *Brooklyn Hospital*, and its progeny, the Board limited the make whole remedy to only those situations in which the union demands rescission of the unilaterally implemented changes and a return to the status quo. In cases in which the union decided to accept the implemented plan or policy changes, the Board ruled that make whole relief was not warranted.

more accurately reflected Board policies and would more effectively serve the purposes of the Act.

In so determining, the Board explicitly reversed the limitation on make whole relief set forth in *Brooklyn Hospital*<sup>12</sup>. *Id.*, slip op. at 4. In explanation of its decision, the Board stated:

After careful consideration, we have concluded that *Brooklyn Hospital's* limitation on make-whole relief is unjustified. The purposes of the Act would be best served by returning to prior precedent, under which employees who have suffered losses due to a unilateral change in terms or conditions of employment shall be made whole, even if their exclusive bargaining representative decides not to demand restoration of the status quo. The policy to which we return today is preferable because it fully compensates employees for economic losses cause by respondent unfair labor practices. (citation omitted)

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To condition a remedy for [economic] losses on a judgment made by the Union long after the losses were incurred would undermine the Act's policies by leaving the victims of the unfair labor practices uncompensated for their losses, and, by doing so, benefitting the wrongdoing respondent. Furthermore, awarding noncontingent make-whole relief in this context serves the Act's purposes by maintaining the long-standing financial disincentive against the commission of unlawful unilateral changes. (citations omitted).

*Id.*, slip op. at 3-4.

Neither did the Board in *Goya* sanction the escape mechanism afforded here by the ALJ that a respondent who was found to have violated the Act by unlawfully implementing unilateral changes, could subsequently litigate in a compliance proceeding whether restoration of the status quo was "unduly burdensome". Like the limitation on make whole relief, the opportunity for a respondent to escape its obligation to effectuate the long-standing remedy of returning to the status quo, would undermine the Act's purposes and policies by leaving victims of the unfair labor practices subject to respondent's unilaterally implemented plans along with whatever increased economic burden accompanied such implementation.

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<sup>12</sup> This limitation was adopted by the Board in *Comau, Inc.*, the case cited by the ALJ here.

The ALJ's limitations on the remedial relief ordered for Respondents' unilateral changes to pension, 401(k), health insurance, and retiree health benefits, is in direct conflict with current Board law as decided in *Goya Foods*, and, therefore, must be reversed.<sup>13</sup>

### CONCLUSION

For all of the foregoing reasons, Charging Party OPEIU requests that the Board grant the Exceptions to the ALJ's Decision and proposed Order, reverse the ALJ's partial dismissal of the Complaint as it relates to OPEIU, find that Respondent ANRC Chapter and ANRC Region violated Section 8(a)(5) of the Act as set forth above, and order the remedial relief appropriate under current law.

Respectfully submitted this 30<sup>th</sup> day of June 2011.

s/ Tinamarie Pappas  
Tinamarie Pappas  
Law Offices of Tinamarie Pappas  
Attorney for OPEIU Local 459  
4661 Pontiac Trail  
Ann Arbor, MI 48105  
(734) 994-6338  
pappaslawoffice@comcast.net

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<sup>13</sup> Should the Board grant OPEIU's exceptions to the ALJ's dismissal of the unilateral changes by Respondent ANRC Chapter to the pension plan, and by Respondent ANRC Region to the local health insurance plan options, OPEIU maintains the same "make whole" remedy and status quo restoration would be appropriate as to these benefit plans as well under the *Goya Foods* decision.

**CERTIFICATE OF SERVICE**

TINAMARIE PAPPAS states that on June 30, 2011, she e-filed OPEIU Local 459's Brief in Support of Exceptions to the Decision and Order of the Administrative Law Judge, through the Board's e-filing system, and served all counsel of record via electronic transmission, at the email addresses set forth below:

Dynn Nick, Esq.  
[dynn.nick@nrb.gov](mailto:dynn.nick@nrb.gov)

Robert Drzyzga, Esq.  
[robert.drzyzga@nrb.gov](mailto:robert.drzyzga@nrb.gov)

Wayne A. Rudell, Esq.  
[waynearudellplc@yahoo.com](mailto:waynearudellplc@yahoo.com)

Michael J. Westcott, Esq.  
[mwescott@axley.com](mailto:mwescott@axley.com)

Fred W. Batten, Esq.  
[fbatten@clarkhill.com](mailto:fbatten@clarkhill.com)

The above statements are true and correct to the best of my information, knowledge and belief.

s/ Tinamarie Pappas \_\_\_\_\_.