

No. 10-2474

**UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

ATLANTIS HEALTH CARE GROUP (P.R.), INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

**ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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JURISDICTIONAL STATEMENT

This case is before the Court on the petition of Atlantis Health Care Group (P.R.), Inc. (“the Company”) to review, and the cross-application of the National Labor Relations Board (“the Board”) to enforce, a Board order issued against the Company. The Board had subject matter jurisdiction over the unfair labor practice proceeding under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) (“the Act”), which authorizes the Board to prevent

unfair labor practices affecting commerce. The Board's Decision and Order issued on November 15, 2010, and is reported at 356 NLRB No. 26. (A 106-11.)¹

The Court has jurisdiction over this proceeding pursuant to Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)) because the unfair labor practice was committed in Puerto Rico. The Board's Order is final with respect to all parties. The Act places no time limits on the filing of review or enforcement proceedings. Therefore, the Company's petition that was filed on December 14, 2010, and the Board's cross-application that was filed on December 29, 2010, were both timely.

STATEMENT OF THE ISSUE

Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(5) and (1) of the Act by unilaterally reducing its employees' wages on March 9, 2009, without providing the Union with notice and an opportunity to bargain.

STATEMENT OF THE CASE

In this straightforward case, the Board's unfair labor practice finding is based on a stipulated record and settled principles of law. Acting on a charge filed by the Union General de Trabajadores de Puerto Rico ("the Union"), which is the

¹ "A" references are to the joint appendix. "Tr" references are to the transcript of the unfair labor practice hearing. "GCX" references are to the exhibits admitted at the hearing that were offered by the Board's General Counsel. "Br" references are to the Company's opening brief. When a semicolon is used, references preceding the semicolon are to the Board's findings and those after the semicolon are to the supporting evidence.

collective-bargaining representative of employees at three of the Company's health care centers, the Board's General Counsel issued a complaint alleging that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by unilaterally reducing its employees' wages on March 9, 2009, without providing the Union with notice and an opportunity to bargain.

After an abbreviated hearing at which the parties agreed to a stipulated record and no witnesses testified, the administrative law judge issued a decision finding that the Company had committed the alleged unfair labor practice. On review, the Board affirmed the judge's rulings, findings, and conclusions, and adopted his recommended order, as modified. Below are summaries of the stipulated facts and the Board's Conclusions and Order.

I. STATEMENT OF THE STIPULATED FACTS

A. Background; the Company's Operations, and the Parties' Collective-Bargaining Relationship

The Company operates 12 outpatient dialysis and related health centers at various locations in Puerto Rico. Since 2000, the Union has been the collective-bargaining representative of certain professional, technical, and other employees at three of those locations (Ponce, Aguadilla, and Fajardo). (A 107-08; A 18.) On November 1, 2002, the parties executed collective-bargaining agreements covering the employees' terms and conditions of employment. After the contracts expired on October 31, 2005, the parties agreed to a series of contract extensions. Most

recently, in January 2009, the parties agreed to extend the terms of the 2002 contracts on a day-to-day basis and began negotiating for successor collective-bargaining agreements. (A 108; A 18-19, 26-31.)

B. The Company's History of Paying Wage Increases Every February from 2003 to 2009; One Month After Paying Increases in February 2009, the Company Reduces Wage Rates Back to Pre-February Levels Without Bargaining With the Union

The wage provisions of the 2002 collective-bargaining agreements provided for annual increases of 45 cents per hour for professional employees, 40 cents per hour for technicians, and 30 cents per hour for other employees. (A 108; A 19, 23-25.) Under those provisions, the Company paid wage increases each February in the years 2003, 2004, and 2005. (A 108; A 19.) Under the terms of the parties' April 2006 extension agreement, the Company retroactively increased wages in February 2006 in the same amounts specified in the 2002 contracts. (A 108; A 19-20, 26-27.) Although the parties' later extension agreements all were silent regarding annual wage increases, the Company paid increases in February 2007, February 2008, and February 2009, all of which were identical to the annual wage increases specified in the 2002 contracts. (A 108; A 19-20, 28-31.)

On March 9, 2009, one month after paying the February 2009 increases, the Company reduced the employees' wage rates back to their pre-February levels. (A 108; A 19-20.) On March 26, Human Resources Director Hermongenes Torres-Morilla sent a letter announcing the wage reductions by e-mail to Union

Representative Maria Silva Cancel. (A 108; A 20, 32-33.) The letter was addressed to the employees and stated that “your salary was erroneously increased according to the expired collective-bargaining agreements,” and therefore would be reduced “to your previous hourly salary.” (A 108; A 20, 32.) This was the first time the Company informed the Union of the wage reductions. (A 108; A 20.)

After receiving the letter on March 27, Representative Cancel called Director Torres-Morillo and stated that the wage reductions were “illegal.” On March 30, Torres-Morillo sent the letter directly to the affected employees. (A 108; A 20, 22, 32.) On May 12, the Company and Union met for the first time to discuss the March 9 wage reductions. At that meeting, no resolution was reached and the Union stated that it intended to file an unfair labor practice charge. (A 108; A 20, Tr 20-21.) On August 20, the Union filed a charge alleging that the March 9 wage reductions were unlawful because the Company failed to give the Union notice and an opportunity to bargain over the reductions. (A 108; GCX 1.)

As of March 2, 2010, the date of the hearing, the Company was still paying its employees the same hourly wages that they received prior to February 2009, and the parties were still negotiating successor collective-bargaining agreements. (A 108; A 20.) In negotiations, the Company had proposed a wage increase of 45 cents per hour (retroactive to March 9, 2009) in exchange for the Union’s agreement to reduce certain fringe benefits. (A 108; A 20.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On November 15, 2010, the Board (Chairman Liebman, and Members Pearce and Hayes) issued its decision finding, in agreement with the administrative law judge, that the Company violated Section 8(a)(5) and (1) of the Act by unilaterally reducing the wages of its employees on March 9, 2009, without providing the Union with notice and an opportunity to bargain. (A 106.) The Board's Order requires the Company to cease and desist from engaging in the unfair labor practice found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights guaranteed them by Section 7 of the Act (29 U.S.C. § 157). (A 106, 110.)

Affirmatively, the Order requires the Company to restore the employees' wages to the levels that existed prior to the March 9, 2009 wage reductions, and to make the employees whole for any resulting loss of earnings and other benefits. (A 106, 110.) The Order also requires the Company to notify and, on request, bargain with the Union before implementing any reduction in hourly wage rates, or making any other changes that would affect the employees' wages, hours, and other terms and conditions of employment. Finally, the Order requires the Company to post and electronically distribute a remedial notice to all affected employees. (A 106, 110.)

STANDARD OF REVIEW

The Court has explained that it “will enforce a Board order if the Board correctly applied the law and if substantial evidence on the record supports the Board’s factual findings.” *Union Builders, Inc. v. NLRB*, 68 F.3d 520, 522 (1st Cir. 1995). *See C.E.K. Indus. Mech. Contractors, Inc. v. NLRB*, 921 F.2d 350, 355 (1st Cir. 1990) (under Section 10(e) of the Act (29 U.S.C. § 160(e)), the Board’s factual findings are “conclusive” if supported by substantial evidence). Moreover, the Court accords “considerable deference” to the Board’s decisions, because the Board is the entity “primarily responsible for developing and applying a coherent national labor policy” (*Yesterday’s Children, Inc. v. NLRB*, 115 F.3d 36, 44 (1st Cir. 1997)), and bears “the primary responsibility for determining the scope of an employer’s statutory duty to bargain.” *Pan Am. Grain Co. v. NLRB*, 558 F.3d 22, 26 (1st Cir. 2009). *Accord NLRB v. Auciello Iron Works, Inc.*, 980 F.2d 804, 808 (1st Cir. 1992) (the Court “reviews the NLRB’s orders with considerable deference”).

SUMMARY OF ARGUMENT

Substantial evidence supports the Board's finding that the Company violated Section 8(a)(5) and (1) of the Act by unilaterally reducing its employees' wages on March 9, 2009, without providing the Union with notice and an opportunity to bargain. In this straightforward case, the Board's unfair labor practice finding is based on a stipulated record and settled principles of law. Here, the Company admits, as it must given the facts to which it stipulated, that it reduced its employees' wage rates on March 9, and that it did so without affording the Union an opportunity to bargain over the wage reductions. The Company, however, seeks to avoid liability for its unfair labor practice conduct by asserting a number of defenses, all of which the Board previously rejected, and all of which are meritless and otherwise contrary to settled law.

The Company's contention, for instance, that its liability should be excused because it acted in good faith by rescinding the February wage increases that it "mistakenly" implemented is contrary to a well established body of law that holds that an employer's good faith is irrelevant to the Board's finding of an unlawfully implemented unilateral change. Similarly, the Company's various arguments that that the Board somehow erred by ordering the Company to rescind the March wage reductions because contract negotiations were still underway are also contrary to settled principles of law.

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY UNILATERALLY REDUCING ITS EMPLOYEES’ WAGES ON MARCH 9, 2009, WITHOUT PROVIDING THE UNION WITH NOTICE AND AN OPPORTUNITY TO BARGAIN

A. An Employer Violates the Act by Unilaterally Changing Its Employees’ Wages Without Providing Their Collective-Bargaining Representative with Notice and an Opportunity To Bargain

Section 8(a)(5) of the Act (29 U.S.C. § 158(a)(5)) makes it an unfair labor practice for an employer to refuse to bargain collectively with the representative of its employees. Section 8(d) of the Act (29 U.S.C. § 158(d)) defines collective bargaining, in relevant part, as “the mutual obligation of the employer and the representative of the employees to meet . . . and confer in good faith with respect to wages, hours, and other terms and conditions of employment.”

An employer fails to meet its duty to bargain in good faith and violates Section 8(a)(5) and (1) of the Act when, without having negotiated to impasse, it makes unilateral changes in those mandatory subjects of collective bargaining.²

Litton Fin. Printing Div. v. NLRB, 501 U.S. 190, 198 (1991); *NLRB v. Katz*, 369 U.S. 736, 743 (1962). *Accord Pan Am. Grain Co. v. NLRB*, 558 F.3d 22, 26 (1st

² Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise” of their statutory rights. A violation of Section 8(a)(5) of the Act therefore results in a “derivative” violation of Section 8(a)(1). *See Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983); *Regal Cinemas, Inc. v. NLRB*, 317 F.3d 300, 309 n.5 (D.C. Cir. 2003).

Cir. 2009); *NLRB v. Beverly Enters.-Mass.*, 174 F.3d 13, 24-25 (1st Cir. 1999).

That general prohibition against unilateral changes to mandatory subjects of bargaining squarely applies “where, as here, an existing agreement has expired and negotiations for a new one have yet to be completed.” *Litton*, 501 U.S. at 198.

As the Supreme Court has explained, “[u]nilateral action by an employer without prior discussion with the union . . . must of necessity obstruct bargaining, contrary to the congressional policy.” *Katz*, 369 U.S. at 747. *See Litton*, 501 U.S. at 198 (bargaining would be frustrated “if, during negotiations, an employer [were] free to alter the very terms and conditions” under negotiation). Moreover, as one court has explained, an employer’s unilateral change “detracts from the legitimacy of the collective-bargaining process by impairing the union’s ability to function effectively, and by giving the impression to members that a union is powerless.” *Carpenter Sprinkler Corp. v. NLRB*, 605 F.2d 60, 64-65 (2d Cir. 1979).

Accordingly, it has long been settled that an employer’s unilateral change to wages, which is a mandatory subject of bargaining, violates Section 8(a)(5) of the Act (*Katz*, 369 U.S. at 745-47), and that such prohibited changes include an employer’s unilateral reduction of wages during contract negotiations. *See, e.g., Beverly Enters.-Mass.*, 174 F.3d at 19-20, 24-26 (employer’s unilateral reduction of the rate of its historically granted annual increases from 4 percent to 3 percent was unlawful); *Metrocare Home Servs., Inc.*, 332 NLRB 1570, 1574-76 (2000)

(employer's unilateral reduction of wages during contract negotiations and absent impasse was unlawful); *Quik Park Garage Corp.*, 315 NLRB 111, 111-12 (1994) (same).

Moreover, an employer's unilateral wage reduction is unlawful under Section 8(a)(5) of the Act even where the employer reduced wages based on a claimed mistake or misunderstanding. *See, e.g., Sturdevant Sheet Metal & Roofing Co. v. NLRB*, 636 F.2d 271, 275 (10th Cir. 1980) (employer's unilateral wage reduction was unlawful despite the fact that it was a mistake "apparently based on a less than careful reading" of a union letter) (internal quotation marks omitted); *JPH Mgmt., Inc.*, 337 NLRB 72, 73 (2001) (employer violated Section 8(a)(5) by unilaterally rescinding a wage increase it had mistakenly implemented). This is because, as the Supreme Court has held, an employer's unilateral change violates Section 8(a)(5) even in the absence of a showing of bad faith. *See Katz*, 369 U.S. at 738-39, 742-43 (reversing the court of appeals' holding that "subjective bad faith" must be shown). *Accord NLRB v. Hosp. San Rafael, Inc.*, 42 F.3d 45, 52-53 (1st Cir. 1994) ("Good faith is not generally a defense to such [failure to bargain] charges."); *Sturdevant Sheet Metal & Roofing Co.*, 636 F.2d at 275 ("In situations involving a unilateral change . . . good or bad faith is not a relevant consideration.").

B. The Board Reasonably Found that the Company Unlawfully Reduced Its Employees' Wage Rates on March 9, 2009

The Company admits (Br 6-7) that it reduced its employees' wage rates on March 9, 2009, while the parties' collective-bargaining negotiations were in progress, and that it did so without affording the Union an opportunity to bargain over the wage reductions. Indeed, these key factual matters were settled by the stipulated record and formed the basis of the Board's unfair labor practice finding. (*See* A 109.) Moreover, as the Board emphasized (A 109), the stipulated facts demonstrate that the Union was "presented with a fait accompli with no opportunity to bargain concerning the wage reductions" which "significantly and materially impacted every unit employee."

The Company also does not contest (Br 15-16, 18) the settled principle that an employer violates Section 8(a)(5) and (1) of the Act by unilaterally changing its employees' wages without providing their representative with notice and an opportunity to bargain. Rather, the Company seeks to avoid liability for its unfair labor practice conduct by raising to the Court a number of defenses that the Board rejected. Therefore, if the Court finds that the Board reasonably rejected the Company's defensive arguments, the Board is entitled to enforcement of its Order. As we now show, the Company's contentions are contrary to settled law and otherwise meritless.

The Company argues (Br 7, 9-10, 12, 14-15, 17-20) that it mistakenly increased wages in February 2009 because its Director of Human Resources misread the January 2009 extension agreement. This mistake, it contends, prompted the Director to rescind the wage increases in March 2009 as a good-faith attempt to comply with the Act. The Board reasonably rejected (A 109) this argument, explaining that the fact that the Director “concluded he had erroneously and mistakenly implemented the February 2009 wage increases does not justify the Company’s unilaterally rescinding the increases without notifying the Union and bargaining with the Union over the rescissions.” *See NLRB v. Katz*, 369 U.S. 736, 743 (1962), and cases cited at pp. 10-11.

Indeed, without needing to pass on whether the increases were, in fact, a mistake, the Board explained (A 109) that “[t]he Company may well be able to correct the ‘erroneously’ implemented wage increases; however, it was obligated to notify and bargain with the Union when it decided to rescind the wage increases.” Accordingly, even after an employer has mistakenly, and without an ill motive, implemented a wage increase, it may not lawfully rescind the increase without bargaining with the employees’ representative. *See JPH Mgmt., Inc.*, 337 NLRB 72, 73 (2001),³ and cases cited at pp. ___-__.

³ In attempting to distinguish the case, the Company misstates the facts of *JPH Mgmt., Inc.*, 337 NLRB 72. It claims (Br 11-12, 16-17) that, unlike here where the parties were still bargaining, in *JPH* the parties had reached a tentative agreement

In the alternative, the Company contends (Br 12, 19) that, even if the wage reductions were unlawful, its conduct was based on a good-faith mistake, that it was under a duty to immediately correct its unilateral action, and thus should not be found in violation of the Act. However, it is well established that “[g]ood faith violations of the Act are nonetheless violations.” *Int’l Ladies’ Garment Workers’ Union v. NLRB*, 366 U.S. 731, 744 (1961). Indeed, if that were not the case, the federal labor law would be exempted from “the venerable axiom that ignorance of the law is no excuse.” *United States v. Gagnon*, 621 F.3d 30, 33 (1st Cir. 2010) (citation and internal quotation marks omitted). In any event, the Company’s legal duty, if it wished to rescind the February wage increases, was to offer the Union an opportunity to bargain over that proposal. *See Posadas de Puerto Rico Assocs., Inc. v. NLRB*, 243 F.3d 87, 92-93 (1st Cir. 2001) (stating that once an employer has provided its employees with a benefit, “it [is] not free to eliminate that benefit unilaterally without offering the Union the opportunity to bargain concerning the change”).

Moreover, the Company cites (Br 18-19) cases that do not further its argument that it should be relieved of liability based on its “good faith.” Indeed,

and were no longer bargaining. To the contrary, in *JPH*, after the employer unilaterally reduced wages, the parties continued bargaining over wages and the terms of a final agreement and the employer ultimately agreed to retroactively reinstate the increases. *See id.* at 72-73. In any event, an employer’s duty to bargain is not limited to the period of contract negotiations.

NLRB v. Signal Oil & Gas Co., 303 F.2d 785 (5th Cir. 1962), lends support to the contrary, holding that good faith is no defense to an employer's unlawful support of one rival union over another. *Id.* at 787-88 (adopting the reasoning of *Int'l Ladies' Garment Workers' Union v. NLRB*, 366 U.S. 731, 739 (1961)).⁴ Further, the Company relies (Br 19) on two cases that are legally distinct because they involve the very different issue under Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) of whether, during a union organizing campaign, an employer's changes to its employees' wages are illegally motivated by antiunion sentiment or made in good faith. *See J.J. Newberry Co. v. NLRB*, 442 F.2d 897, 900 (2d Cir. 1971); *NLRB v. Dorn's Transp. Co.*, 405 F.2d 706, 714-15 (2d Cir. 1969). The Court has previously distinguished such Section 8(a)(3) cases, which involve an inquiry into an employer's motive, from Section 8(a)(5) cases such as this one that involve the employer's violation of its duty to bargain over changes to terms and conditions of employment. *See Visiting Nurse Servs., Inc. v. NLRB*, 177 F.3d 52, 62 (1st Cir. 1999).

Also mistaken is the Company's contention (Br 10-13, 21-23) that the Board "did not take into account" (Br 12) that a Board order requiring the Company to

⁴ In the portion of *Signal Oil & Gas Co.* that the Company cites (Br 18), the court paraphrased language from *Int'l Ladies' Garment Workers' Union v. NLRB*, 366 U.S. 731, 744 (1961), in which the Supreme Court explained that a Board "remedial" order is not an unlawful "penalty." *See Signal Oil & Gas Co.*, 303 F.3d at 787-88 (citing *Int'l Ladies' Garment Workers' Union*, 366 U.S. at 740).

rescind the unlawful wage reductions might have “interfered with” (Br 21) the parties’ ongoing contract negotiations. Here, the Board fully recognized that the parties were engaged in contract negotiations, which, as shown, is a time when it is highly imperative that an employer’s unilateral changes be prohibited. *See Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991), and cases cited at p. 10. Accordingly, the Board acted well within its broad remedial authority by imposing its usual remedy for addressing an employer’s unilateral action—that is, a return to the economic status quo. *See Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 898-99 (1984) (the Board has “the primary responsibility and broad discretion” to devise remedies for unfair labor practices, “subject only to limited judicial review”); *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 263 (1969) (under Section 10(c) of the Act (29 U.S.C. § 160(c)), the Board has the authority to order “affirmative relief” that restores, as far as practicable, the economic status quo that would have obtained but for an employer’s unfair labor practice).

Insofar as the Company attempts to argue (Br 21-23) that it was punitive for the Board to order rescission of the unlawful wage reductions while leaving intact the Company’s “mistaken” February wage increases, a similar argument was squarely rejected by this Court in *Visiting Nurse Services*, 177 F.3d 52. There, the employer made several unilateral changes during the contract negotiations, including two wage increases. *Id.* at 55. After the union filed an unfair labor

practice charge alleging that most of the unilateral changes—but not the two wage increases—were unlawful, the Board ordered rescission of the unlawful changes but left the wage increases intact. *Id.* at 56-57. The employer then argued, as the Company does here (Br 21-23), that the Board’s order improperly interfered with the collective-bargaining process and was therefore punitive. *Id.* at 61. In rejecting that contention, and enforcing the Board’s order, the Court acknowledged the Board’s justification that “there was never an unfair labor practice charge filed about the wage increases and so there is no occasion to take action on them.” *Id.* at 62. The same may be said here. Accordingly, the Company has failed to present the Court with any basis for disturbing the Board’s finding, and its Order is therefore entitled to enforcement.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment denying the petition for review and enforcing the Board's Order in full.

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: Respondent :

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 4,016 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2000.

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Dated at Washington, DC
this 22nd day of July 2011

UNITED STATES COURT OF APPEALS FOR
THE FIRST CIRCUIT

ATLANTIS HEALTH CARE GROUP(P.R.), Inc. :
: Petitioner :
: Case No. 10-2474
v. :
: Board Case No.
NATIONAL LABOR RELATIONS BOARD : 24-CA-11300
: Respondent :

CERTIFICATE OF SERVICE

I hereby certify that on July 22, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system.

I certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not by serving a true and correct copy at the addresses listed below:

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Dated at Washington, DC
this 22nd day of July 2011