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Daycon Products Company, Inc. and Drivers, Chauffeurs and Helpers Local Union No. 639 a/w International Brotherhood of Teamsters. Case 5–CA–35043

August 12, 2011

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS PEARCE
AND HAYES

On January 8, 2010, Administrative Law Judge Bruce D. Rosenstein issued the attached decision. The General Counsel filed exceptions, a supporting brief, and an answering brief. The Respondent filed cross-exceptions and an answering brief. The Charging Party filed exceptions, a supporting brief, an answering brief, and a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge’s rulings,¹ findings,² and conclusions only to the extent consistent with this Decision and Order.

We find, contrary to the judge, that the Respondent violated Section 8(a)(5) and (1) and Section 8(d) of the Act by unilaterally reducing the contractual wage rates of eight bargaining unit employees.

I. BACKGROUND

During the term of a 2004–2007 collective-bargaining agreement between the Respondent and the Union, eight employees were mistakenly given “catch-up” raises even though that agreement did not provide for such raises. At the onset of negotiations for a contract to succeed the 2004–2007 agreement, the Respondent provided the Union with a Wage Schedule that accurately stated the wages actually being paid each unit employee, including

¹ The Respondent’s cross-exceptions summarily challenge the judge’s rulings limiting questioning of the business agent for the Charging Party. The cross-exceptions lack supporting argument and do not meet the minimum requirements of Sec. 102.46(b) of the Board’s Rules and Regulations. Accordingly, they shall be disregarded. See *Holsum de Puerto Rico, Inc.*, 344 NLRB 694, 694 fn. 1 (2005), *enfd.* 456 F.3d 265 (1st Cir. 2006).

² The Charging Party has implicitly excepted to some of the judge’s credibility findings. The Board’s established policy is not to overrule an administrative law judge’s credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

the wages paid to the eight employees as a result of their prior mistaken raises. The parties relied on this information in negotiating the wage rates and increases for their 2007–2010 collective-bargaining agreement.

The wages set forth in the new agreement remained unchallenged and unaltered until early 2009, when Human Resources Director Jodie Kendall determined that the eight employees had been overpaid since their mistaken raises years earlier under the prior contract. Thereafter, Kendall and the Respondent’s attorney communicated with the Union’s representatives about how to correct what the Respondent perceived to be a clerical error resulting in the eight employees being paid more than they should under the current contract. The Union took the position that the employees were receiving their negotiated wage rates, and it opposed any proposals by the Respondent to reduce their wages and recoup the claimed overpayments. Failing to reach any agreement to its proposals, the Respondent unilaterally reduced the employees’ wages on May 22, 2009.

II. DISCUSSION

The judge concluded that the Respondent was privileged to act unilaterally. He found that the Respondent’s actions restored the “agreed upon wages” to conform to those previously negotiated by the parties and that, therefore, the Respondent did not engage in a midterm modification of the parties’ collective-bargaining agreement. The judge reasoned that the Respondent merely corrected overpayments to employees that were paid due to administrative errors and that such corrections required no collective bargaining. We disagree.

It is well established that an employer violates Section 8(a)(5) and (1) and Section 8(d) of the Act during the term of a collective-bargaining agreement by modifying any provision governing a mandatory bargaining subject without obtaining the union’s consent.³ The allegation of an unlawful midterm contract modification in this case involves the 2007–2010 collective-bargaining agreement, not its predecessor. We therefore need not pass here on the question whether the Respondent could lawfully have corrected its mistake at any point prior to execution of the 2007–2010 agreement.⁴ There was *no* mistake as to

³ See, e.g., *Wightman Center*, 301 NLRB 573, 575 (1991). In neither *Eagle Transport Corp.*, 338 NLRB 489, 493–494 (2002), nor *Foster Transformer Co.*, 212 NLRB 936, 936 & 939 (1974), on which the judge relied, was a collective-bargaining agreement in effect which set the wage rate that the employer unilaterally changed to correct an earlier mistake.

⁴ If the Respondent had corrected its mistaken overpayment of wages while the 2004–2007 collective-bargaining agreement was still in effect, Member Hayes would have found, essentially for reasons stated by the judge, that the Respondent was privileged to act unilaterally.

the basis for computing wages and wage raises in that contract. It was the current wage actually earned by each employee in early 2007. The Respondent does not contend that it was mistaken as to these amounts. Consequently, once it entered into the contract, it was barred from unilaterally altering unit employees' wage rates contained therein.⁵

Moreover, to the extent that the Respondent's agreement could be characterized as mistaken due to the clerical error made during the prior contract term, there would still be no basis for permitting it to avoid the wage provisions of the successor contract. To the extent that the wage rates earned by the eight unit employees were inflated by this error, the Union was in no position to know of this mistake when it relied in good faith on the representations made in the Respondent's Wage Schedule. As stated in *North Hills Office Services*, 344 NLRB 523, 525 (2005), "[a] party to a contract cannot avoid it on the ground that he made a mistake where the other [party] has no notice of such mistake and acts in perfect good faith."

In sum, while the 2007–2010 wages rates and subsequent raises for the eight employees in dispute may represent a perpetuation of an erroneous prior pay raise, they nevertheless represent the bargain struck in good faith by the parties. The Respondent could not thereafter modify those wages during the contract term without the Union's consent. When it did so, it violated Section 8(a)(5) and (1) and Section 8(d) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we will order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, we will order the Respondent to restore the wages of the eight affected employees to the levels required by the parties' 2007–2010 collective-bargaining agreement and to make them whole for any loss of earnings and other benefits suffered as a result of its unlawful wage reduction, in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), *enfd.* 444 F.2d 502 (6th Cir. 1971), plus daily compound interest as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).⁶

ORDER

The National Labor Relations Board orders that the Respondent, Daycon Products Company, Inc., Upper

Marlboro, Maryland, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Unilaterally modifying the terms of a collective-bargaining agreement by reducing the wage rates of bargaining unit employees without first bargaining with the Union and reaching an agreement on any modification.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative actions necessary to effectuate the policies of the Act.

(a) Restore Gerald Jackson, Steven Walker, Alvin Phoenix, Hasmon Abraham, Derrall Bridges, Robert Redmond, Trevor Holder, and Lynette Burton to the wage rates they should have received under the 2007–2010 collective-bargaining agreement between the Union and the Respondent.

(b) Make the above-mentioned employees whole for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful reduction of their wages, in the manner set forth in the remedy section of this decision.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of compensation due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its Upper Marlboro, Maryland facility, copies of the attached notice marked "Appendix."⁷ Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during

⁵ See *Reppel Steel & Supply Co.*, 239 NLRB 358, 361–362 (1978).

⁶ We shall also provide for the electronic distribution of the notice in accord with *J. Picini Flooring*, 356 NLRB No. 9 (2010). For the reasons stated in his dissenting opinion in *J. Picini Flooring*, Member Hayes would not require electronic distribution of the notice.

⁷ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 22, 2009.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. August 12, 2011

Wilma B. Liebman,	Chairman
Mark Gaston Pearce,	Member
Brian E. Hayes,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD
 APPENDIX
 NOTICE TO EMPLOYEES
 POSTED BY ORDER OF THE
 NATIONAL LABOR RELATIONS BOARD
 An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO
 Form, join, or assist a union

Choose representatives to bargain with us on
 your behalf

Act together with other employees for your bene-
 fit and protection

Choose not to engage in any of these protected
 activities.

WE WILL NOT unilaterally reduce the wage rates of bargaining unit employees without first bargaining with the Union and reaching an agreement on any modification to the terms of the contract.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL restore Gerald Jackson, Steven Walker, Alvin Phoenix, Hasmon Abraham, Derrall Bridges, Robert Redmond, Trevor Holder, and Lynette Burton to the

wage rates they should have received under our 2007–2010 collective-bargaining agreement with the Union.

WE WILL make the above-mentioned employees whole for any loss of earnings and other benefits suffered as a result of our unlawful reduction of their wages.

DAYCON PRODUCTS CO.

Shelly C. Skinner, Esq. and *Paula S. Sawyer, Esq.*, for the General Counsel.

Mark M. Trapp, Esq. and *Paul Rosenberg, Esq.*, of Washington, DC, for the Respondent-Employer.

Eugene K. Ahn, Esq., of Washington, DC, for the Charging Party-Union.

DECISION

STATEMENT OF THE CASE

BRUCE D. ROSENSTEIN, Administrative Law Judge. This case was tried before me on November 9 and 10, 2009,¹ in Washington, DC, pursuant to a Complaint and Notice of Hearing (the complaint) issued on August 31, by the Regional Director for Region 5 of the National Labor Relations Board (the Board). The complaint, based upon a charge filed on June 4, by Drivers, Chauffeurs and Helpers Local Union No. 639 a/w International Brotherhood of Teamsters (the Charging Party or Union), alleges that Daycon Products Company, Inc. (the Respondent or Employer), has engaged in certain violations of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). The Respondent filed a timely answer to the complaint denying that it had committed any violations of the Act.

Issues

The complaint alleges that the Respondent violated Section 8(a)(1) of the Act by threatening employees that if the Union did not accept the Company's settlement of the wage dispute on the Company's terms, the Company would seek repayment from employees of the past overpayments. The complaint further alleges that the Respondent violated Section 8(a)(1) and (5) of the Act by implementing its decision to reduce the wages of certain employees without first bargaining with the Union to a good-faith impasse and without the Union's consent, and by-passing the Union and dealing directly with its employees in the Unit by discussing the reduced wage rate with them.

On the entire record,² including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Charging Party and the Respondent, I make the following

¹ All dates are in 2009 unless otherwise indicated.

² After the opening of the hearing on November 9, the undersigned approved a Consent Order (informal board settlement agreement with the posting of a notice) that fully remedies the allegations in paragraph 7 of the complaint (alleged threat to employees) and paragraph 9 of the complaint (bypass of the Union) over the objections of the General Counsel and the Charging Party (TR7–14 and ALJ Exh.1). Accordingly, this decision will only address the allegations alleged in paragraph 8 of the complaint that involves the reduction of wages for certain employees.

Findings of Fact

I. JURISDICTION

The Respondent is a corporation engaged in the manufacture and distribution of janitorial, maintenance, and hardware supplies, with its principal office and place of business located in Upper Marlboro, Maryland. Respondent in conducting its business operations derived gross revenues in excess of \$500,000 and sold and shipped from its Upper Marlboro, Maryland facility goods valued in excess of \$50,000 directly to points outside the State of Maryland. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

At all material times, the Union has been the designated exclusive collective-bargaining representative of the Unit. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which is effective by its terms from March 3, 2007 to January 31, 2010.³

At all material times, John Poole held the position of Respondent's President and Jodie Kendall serves as the Human Resources Director. Douglas Webber holds the position of Business Agent for the Union while Eugene Brown serves as the Union Steward. Webber is the principal point of contact for the Union and acted as its chief negotiator in the negotiations for the current collective-bargaining agreement.

B. The 8(a)(1) and (5) Allegations

The General Counsel alleges in paragraph 8 of the complaint that in or around March 2009, the Respondent orally notified the Union of its decision to reduce the wages of certain employees. On or about April 17, by letter, the Respondent again notified the Union of its decision to reduce the wages of certain employees and on or about May 22, the Respondent implemented its decision to reduce the wages of certain employees without first bargaining with the Union to a good-faith impasse and without the Union's consent.

Facts

In January 2009, employee Erin Baker contacted Union Steward Brown to complain about being underpaid by a dollar. Brown brought the matter to the attention of Kendall who after looking into the matter, and determining that Baker had not been underpaid because he did not have all of his driver certifications, decided to review the wage rate history of all bargaining unit employees to discern if there were any other wage issues in dispute. Kendall, between January and early February 2009, conducted an exhaustive review of the entire bargaining unit wage history and uncovered information that showed that eight bargaining unit employees had been overpaid since 2004

³ Prior collective-bargaining agreements between the parties were in effect from January 16, 2004 to January 31, 2007 (GC Exh. 3) and from January 1, 2001 to December 31, 2003 (GC Exh. 7).

based on the contractual wage rates that had been negotiated by the parties. Kendall attributed this factor to an inadvertent clerical error when the eight employees had mistakenly been given Union catch-up raises during the period of the then existing 2004–2007 collective-bargaining agreement even though that agreement did not provide for such raises. Kendall estimated that the total overpayments for the eight employees amounted to approximately \$80,000.⁴

On February 2, Kendall met with Poole to discuss her findings and to seek his input on how the Employer should proceed. They met on at least four or five occasions between February and May 2009 to review the analysis that Kendall had prepared and to address the anticipated impact on the eight employees if repayments were sought (R. Exh.10).

Kendall, on March 5, during a telephone conversation with Webber informed him of the overpayments for the eight employees and promised to get back with him once the Respondent determined how to proceed.

On April 14, Kendall had a meeting with Webber and Brown wherein she explained the methodology regarding the calculations and offered to show the union representatives step by step on how she arrived at the overpayment figures. According to Kendall, Webber declined the opportunity to review the analysis. Webber, however, denies that this occurred.⁵

By letter dated April 16, Kendall informed the Union that the Respondent has recently reviewed the collective-bargaining agreement and has confirmed that eight bargaining unit employees (named in the letter) have received above the minimum agreed to hourly wage due to a clerical error. Unfortunately, this means that the employees were paid above other employees of greater seniority. In order to bring each of the employees to the correct wage rate, the Respondent will permit the employees to divide the total overpayment amount over the next six (6) months, starting with the check paid on May 8, ending on October 9 (GC Exh. 8).⁶

On April 17, Respondent's Attorney Jay Krupin and Kendall met with Webber and Brown to discuss the April 16 letter. During the course of the meeting, Webber informed both Krupin and Kendall that the reduction of any employee's wages was a violation of their current collective-bargaining agreement.

By letter dated April 23 from Webber to Krupin, the Union informed the Employer that it would not entertain any agreement to reduce the negotiated wage rates for bargaining unit members. The letter further states that the Union would do

⁴ The eight employees and their overpayment amounts were Gerald Jackson (\$5,119.15), Steven Walker (\$5,890.47), Alvin Phoenix (\$224.34), Hasmon Abraham (\$9,809.96), Derrall Bridges (\$12,333.97), Robert Redmond (\$7,493.22), Trevor Holder (\$18,729.58), and Lynette Burton (\$22,760.11).

⁵ I am convinced that Kendall did offer Webber the opportunity to review her calculations during the meeting based on my evaluation of the testimony from both individuals. Kendall was far more precise with her recollection of events and her notes taken on that date confirm her testimony (R. Exh. 3).

⁶ Individual letters were also sent to the eight employees impacted with a breakdown of the correct pay, current pay, and the difference between them.

everything possible under the law to challenge any action that the company takes to reduce the agreed upon wage rates or to recover the supposedly erroneous payments and would consider it a breach of our agreement and an unfair labor practice under the National Labor Relations Act (GC Exh. 9).

On April 25, the Union held a meeting with bargaining unit members to inform them of the ongoing issue regarding the anticipated reduction of wages for eight bargaining unit employees and to discuss the taking of a strike vote (GC Exh. 10).

By letter dated May 1, from Krupin to Webber, the Respondent acknowledged receipt of the Union's April 23 letter. In pertinent part the letter states that the Employer is neither attempting to deduct money from the bargaining unit's wages, nor is it seeking to renegotiate the wage rates set forth in the current collective-bargaining agreement between the parties. Rather, the Respondent wants to correct an obvious clerical error made by its payroll department. This error, which unfortunately went unnoticed by either party for an extended period of time, has translated into bargaining unit members receiving in excess of \$82,000 over and above what they should have been paid according to our agreement. The letter additionally states that in the spirit of good faith and cooperation, the Employer has determined not to recoup the money that has already been paid. However, as discussed in our April 22 meeting, it is both unjust and contrary to the seniority principles memorialized in our agreement to continue paying a few individuals more than their senior counterparts. Furthermore, it would be fiscally irresponsible to not correct the problem prospectively. In order to lessen the impact on the impacted employees, the Employer will provide as it deems appropriate a bonus payment in accordance with our agreement (GC Exh. 11).⁷

By fax dated May 20, Kendall sent Webber a breakdown of the corrected and current pay in addition to the bonus payments that bargaining unit employees would receive (GC Exh. 12). Upon receipt of this breakdown, Webber telephoned Kendall and informed her that the Union never agreed to a bonus or a roll back of wages and would do anything legal to enforce the terms of our collective-bargaining agreement.⁸

Effective May 22, eight bargaining unit employees had their wages reduced.

Discussion

The General Counsel argues that an employer acts in derogation of its bargaining obligation under Section 8(d) of the Act and violates Section 8(a)(5), when without consent of the union, it modifies terms and conditions of employment contained in a contract between the employer and the union, or otherwise

⁷ Bonus payment checks minus appropriate taxes were provided to and cashed by five of the eight employees on May 22 (R. Exh. 4(a) through 4(e)). As it concerns the other three employees, no bonus payments were provided due to the Employer's determination that their overpayments were not excessive and the repayment would not be an undue burden for those employees.

⁸ The record confirms that Webber protested the reduction of the eight employee's wage rates and argued that it was a patent violation of the parties' collective-bargaining agreement, however, it is noted that the Union did not orally or in writing request to negotiate the reduction of wages.

repudiates obligations under the contract before the terms of the contract has run its course even though the employer offers to bargain with the union on the subject and the union has refused. *C and S Industries Inc.*, 158 NLRB 454, 456-458 (1966). As stated in *Oak Cliff-Golman Baking Co.*, 202 NLRB 614, 616 (1973):

The Respondent's unilateral change in wages which is a basic term or condition of employment manifestly constitutes a "modification" within the meaning of Section 8(d). Such action by the Respondent clearly being in derogation of its statutory obligation under Section 8(d) was therefore violative of Section 8(a)(5) of the Act.

Thus, the General Counsel and the Charging Party argue that reducing the wages of the eight employees' on or about May 22 without bargaining to a good faith impasse and without the Union's consent, amounts to a clear repudiation of the parties' wage provisions set forth in their current collective-bargaining agreement, and therefore violates Section 8(a)(1) and (5) of the Act.

The Respondent contends that the wage reductions were merely administrative adjustments which were made when it discovered that eight employees were being paid wages at a higher rate than that to which they were entitled under their respective classifications. *Dierks Forests, Inc.*, 148 NLRB 923 (1964). In this regard, the employees were inadvertently given catch-up raises during a period of time that the 2004-2007 collective-bargaining agreement did not provide for such raises. As a result, the eight employees wage rates became inflated and resulted in higher wages than those of employees with greater seniority.

The Respondent further argues that union animus was not the reason for initiating the wage survey but rather was undertaken due to an inquiry of a bargaining unit employee claiming that he was being underpaid. Moreover, the Respondent asserts that it did everything possible to alleviate the economic onus on the bargaining unit by not recouping the overpayments from prior years and paying bonuses to five of the eight employees who were impacted the greatest by correcting the past overpayments.

In agreement with the Respondent, I conclude that their actions restored the agreed upon wages to conform them to those previously negotiated by the parties. Therefore, I find that the Respondent did not engage in a mid-term modification of the parties' collective-bargaining agreement. This principle is also recognized by the General Counsel and the Charging Party, who cited the Board's holding in *Eagle Transport Corp.*, 338 NLRB 489, 490 (2002), for the proposition that an Employer's administrative error in a paycheck may be corrected without violating the Act. As in that case, the error in the subject case was corrected shortly after it was discovered.⁹

The Board held in *Foster Transformer Company*, 212 NLRB 936 (1974), on facts similar to the subject case, that since the

⁹ The Charging Party's reliance on *Lexus of Concord, Inc.*, 330 NLRB 1409 (2000) and *Clark United Corp.*, 319 NLRB 328, 329 (1995) cited in their post-hearing brief are misplaced. Those cases present significantly different issues than those in the subject case.

Respondent merely adjusted the wage rates of employees nothing in our law requires the perpetuation of such inequities merely because a respondent may have at some time in the distant past embarked upon a mistaken course. In our view, Respondent was clearly entitled to take the action it did in line with its uncontradicted policy of paying the applicable rate for the work performed and to correct an unwarranted departure from this policy.¹⁰

In summary, contrary to the General Counsel, I find that the correction of overpayments to employees that were incorrectly paid due to administrative errors requires no collective bargaining.

Accordingly, the General Counsel did not conclusively establish the allegations alleged in paragraph 8 of the complaint, and therefore, I find that the Respondent did not violate Section 8(a)(1) and (5) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

¹⁰ As in *Foster Transformer Company*, the Employer in the subject case did not change the existing negotiated wage rates in the parties' collective-bargaining agreement.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent did not violate Section 8(a)(1) and (5) of the Act when it reduced the wages of eight bargaining unit employees who previously received overpayments in their wages due to an administrative error.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹¹

ORDER

The complaint is dismissed.

Dated, Washington, D.C. January 8, 2010

¹¹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.