

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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Drivers, Chauffeurs, and Helpers, Local Union No. 639,	:::	
a/w International Brotherhood of Teamsters,	:::	
	:::	Case No.: 5-CA-35043
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Charging Party,	:::	
	:::	
- and -	:::	
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	:::	
Daycon Products Company, Inc.,	:::	
	:::	
Respondent.	:::	
	x	

**DAYCON PRODUCTS COMPANY, INC.’s MOTION FOR RECONSIDERATION OF
THE DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD,
OR IN THE ALTERNATIVE MOTION FOR CLARIFICATION**

Pursuant to Section 102.48(d) of the Rules and Regulations of the National Labor Relations Board (the “Board”), Respondent Daycon Products Company, Inc., (“Respondent”) by its attorneys, Epstein Becker & Green, P.C., moves for reconsideration, or alternatively pursuant to Section 102.49 of the Board’s Rules and Regulations, clarification of the Board’s August 12, 2011 Decision and Order (“Decision”).

I. RELEVANT BACKGROUND¹

Over the course of several years, Respondent mistakenly gave eight employees raises not called for under the appropriate collective bargaining agreement. After several months of non-fruitful discussions with the Union, on May 22, 2009 the Respondent corrected the error

¹ Respondent’s Motion should not be construed as a concession that all issues not raised herein have been rightly decided, and Respondent reserves the right to seek review of the Decision by an appropriate federal court. However, Respondent does not contest the Board’s finding that the wage raises given the eight employees were erroneous, and that the employees were not entitled to the raises.

and conformed the eight employees' wages to the proper rates. At the same time, Respondent notified the Union that it intended to provide three separate bonuses to the effected employees that would correspond with the amounts their wages were reduced, and carry them through the term of the contract on January 31, 2010. (Transcript, p. 110-111) However, due to the ongoing dispute, only one such bonus was actually paid to the employees. (Resp. Exh. 4) The Union filed a ULP alleging that Respondent could not correct the error.

Ultimately, a hearing was held before Administrative Law Judge Bruce D. Rosenstein. Judge Rosenstein concluded that Respondent's action merely "restored the agreed upon wages to conform them to those previously negotiated by the parties," holding that "the correction of overpayments to employees that were incorrectly paid due to administrative errors requires no collective bargaining." The General Counsel appealed, and the Board reversed, finding that "while the 2007-2010 wage rates and subsequent raises for the eight employees in dispute may represent a perpetuation of an erroneous prior pay raise," Respondent could not correct the error during the term of the collective bargaining agreement. Respondent files this Motion for Reconsideration.

II. ISSUES FOR RECONSIDERATION

- (1) Whether Respondent was denied due process by the Board's grounding of its Decision on two issues on which the ALJ denied the opportunity to present relevant evidence.
- (2) Whether the Decision rests on material errors which require reconsideration.
- (3) Whether the Decision should be clarified as to the scope of its holding such that it recognizes the continuing validity of the holding of Foster Transformer that an employer may correct an administrative error rather than have it continue in perpetuity.

III. LEGAL ARGUMENT

A. Reconsideration is necessary because the Decision's core holdings rest on issues which were not fully and fairly litigated before the ALJ.

Due process requires that matters underlying violations of the Act be fully and fairly litigated. United Mine Workers, 308 NLRB 1155, 1158 (1992). Here, however, the ALJ precluded the parties from presenting evidence pertinent to the two main issues underlying the Board's finding. Accordingly, no violation can be found.

The Board's holding rests on twin material errors which were not fully and fairly litigated. The material errors are: first, the parties "relied on" information contained in a wage schedule "in negotiating the wage rates and increases for their 2007-2010 collective bargaining agreement."² Second, the erroneous wage rates were incorporated into the contract, and thus "represent the bargain struck in good faith by the parties."

Before the ALJ, the Union and General Counsel ("GC") took the position that the wage rates were not erroneous, and much of the testimony before the ALJ was geared towards establishing and/or debating the fact of the error.³ (Transcript, p. 186)(GC asserting that "we never admitted that the employees' wage rates were inflated.") Throughout the hearing, each time the parties attempted to present evidence on the wage proposals during negotiations, or the meaning and intent of the wage article in the collective bargaining agreement, the ALJ prevented the introduction of such evidence. Indeed, so focused was the ALJ on limiting the testimony to what he considered to be relevant issues, that Respondent was denied the opportunity to present evidence directly relevant to the Decision ultimately issued by the Board. As no evidence was

² The Decision also asserts that "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." This is dealt with in Sec. III(B)(ii), *infra*.

³ As the erroneous nature of the raises has now been expressly decided against the GC and the Union, there is no longer any doubt that the raises were administrative errors.

presented on the central issues on which the Decision rests, Respondent has been denied fundamental due process. See Lamar Central Outdoor, 343 NLRB 261, 265 (2004).

Unfortunately, as a result the Decision is supported solely by the Board's adverse resolution of issues the parties were precluded from fully exploring during the hearing. For example, at the hearing the ALJ cut off Respondent's attempt to question the Union business agent as to his reliance on the wage schedule during the negotiations for the 2007-2010 collective bargaining agreement, (Transcript, p. 100-101) The ALJ had earlier stopped the GC from similar questioning. (Transcript, p. 47)(cutting off questioning about bargaining over wages) Respondent also attempted to question the business agent regarding the wage proposals and his supposed reliance on them in formulating the Union bargaining position, and yet again was prevented from doing so. (Transcript, p. 104-105) Respondent tried to elicit testimony to establish that the Union was well aware of the contractual wage rates of employees, but the ALJ again stopped this line of pertinent questioning. (Transcript, p. 118) As a result of the ALJ restricting the testimony, as candidly observed by the GC in her brief to the ALJ "No evidence concerning the parties' positions and intent during contract negotiations was permitted at the administrative law hearing." (GC Brief to ALJ, p. 10 fn. 5)

Nevertheless, in order to meet precisely this set of circumstances, Respondent filed cross-exceptions raising the ALJ's limitations on testimony and evidence. As asserted by Respondent, questioning of the business agent "would have shown that the wage proposals were the same as in prior negotiations, rather than specifically tailored based on the wage scale document." (Cross-exception No. 1)⁴ Respondent further asserted that its only contractual

⁴ Respondent noted that the business agent "testified that he used these wage rates to come up with his proposals for the new contract, and I'd like to establish that these proposals across the board were the same proposals that had been proposed in a prior contract negotiation." (Transcript, p. 104-105) Moments

obligation was to pay the “minimums in the collective bargaining agreement,” and that questioning would have revealed that “the union was well aware of the various wage rates in place throughout the administration of the contracts.” (Cross-exceptions 2 and 3) Each of the cross-exceptions are central to whether the Union “relied on” the wage schedule or had notice of the correct wages, and by extension the administrative error in which eight employees were paid above the contractual minimums. Each cross-exception concisely presents Respondent’s (now relevant) objection to the denial of the opportunity to present evidence which would have undermined the very basis for the Decision.

In a footnote, the Board ruled that 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.” (Decision at fn. 1) However, the cross-exceptions do comply with Sec. 102.46(b), as they cite to the pages of the record, set forth specifically the questions to which exception is taken, and concisely state the grounds for the exception. See Sec. 102.46(b). The language of 102.46 stating that “if no supporting brief is filed the exceptions document shall also include the citation of authorities and argument in support of the exceptions” is designed merely to ensure compliance with a 50-page limit for briefs, and cannot be construed as a procedural or over-technical requirement on which the cross-exceptions may be disregarded.

This is especially so where, as here, the cross-exceptions only became relevant as a result of the Board’s reversal of the ALJ. The procedural requirement to advance argument and authorities cannot be applied to cross-exceptions which would remain moot had the Board simply affirmed the ALJ. Simply stated, at the time it cross-exceptioned, Respondent agreed with the ALJ’s substantive ruling, and its cross-exceptions were not directed towards reversing any

earlier, Respondent was foreclosed from getting a response to his question to the business agent regarding the wage schedule. (Transcript, p. 100)(“You’re saying that you relied on it, right?”)

part of the ALJ's opinion. Rather, the cross-exceptions were prepared and filed solely to protect against the risk that the Board might overrule the ALJ and find that the evidentiary issue had not been preserved, which is precisely what has now occurred. Surely a victorious Respondent cannot be required to divine all possible outcomes on appeal and tailor exceptions to the hypothetical future ruling, as well as file lengthy briefs in support of such cross-exceptions. (Although here, Respondent did take the extraordinary step of preserving the evidentiary arguments for exactly this scenario.)

Clearly, only when the Board reversed the ALJ and grounded its Decision on the very items to which Respondent had filed clear and succinct cross-exceptions did the cross-exceptions become relevant. To disregard the cross-exceptions is to add insult to injury; first in grounding the Decision in the issues over which no evidence was allowed, and second ignoring Respondent's objections by pretending they fail to meet the technical requirements. It simply cannot be maintained that the cross-exceptions do not alert a reasonable adjudicator of the nature and reasons for the objection. See e.g. Rome Electrical Systems, 356 NLRB No. 38 (2010)(finding exceptions "although conclusory" "sufficiently particularized to comply with Rule 102.46(b)."). Because the cross-exceptions are adequately particularized and directly relevant to the issues underlying the Decision, they cannot be disregarded. Id.

For the foregoing reasons, the Decision cannot stand. Alternatively, the Board's rules allow it to take "evidence which the Board believes should have been taken at the hearing" in a further proceeding. Sec. 102.48(d)(1). Given that the Decision rests squarely and solely on two issues upon which even the GC admits no evidence was permitted at the hearing, this is the minimal step that should be taken to comport with the requirements of due process.

B. Reconsideration is necessary because the Decision's factual background includes material errors, which if corrected, would nullify the core foundation upon which the ruling rests.

As noted above, the Decision is based on the Board's flawed determination that the erroneous wage rates were relied upon by the parties, and embodied in the 2007-2010 contract. While the ALJ precluded nearly all evidence on these issues, such evidence as appears in the record wholly undermines the Board's findings.

i. The Union did not "rely on" the wage schedule in formulating its proposals or in negotiations

The evidence shows the wage increases agreed upon in the 2007-2010 agreement were the same as in the prior contract. Specifically, the 2007 agreement provided employees a \$0.55 per hour across the board wage increase in each year of the contract. (GC Ex. 6, p. 13) This equated to a three percent (3%) annual wage increase.⁵ Under the 2004 Agreement, employees also received a three percent (3%) annual raise. (GC Ex. 3, p. 13)

In addition, the business agent admitted that his initial proposal after receiving the wage schedule was based on classification, rather than individual wage rates. (Transcript, p. 103-104). Discussing this very topic (the rationale for the Union's proposal) the business agent testified that the wage raises were based on classification, rather than on the individual rates earned by an employee. He testified:

[The raises] are cents-on-the-dollar raises **for the various classifications**, commercial driver's license, drivers and non-CDL drivers, repair, warehouse, chemical, utility, and part-time warehouse, across-the-board increases of 55 cents for each year **for all classifications** except utility and part-time, which was 35 cents across the board.

(Transcript, p. 48, lines 15-20)(emphasis added)

⁵ When the 2007-2010 agreement was entered into, the average wage rate within the bargaining unit was \$17.68 per hour.

Clearly, both the Union and Respondent understood that both the proposals and the contract referred to wage rates by classification, and not by individual. Otherwise there would be no rational basis for the agreed upon raises being exactly the same as in the prior contract – as it is axiomatic that individuals earn different rates based on their seniority. Thus, the contract’s reference to “his/her rate of pay” is a reference to his/her corresponding classification rate, not the individual rate. This is also clear from the language immediately below that sentence, which lays out the wage raises *by classification*. (GC Exh. 6, p. 13).

Thus, the only evidence of record contradicts the Decision’s proclamation that the Union “relied” upon data it received to negotiate any individualized wage increases memorialized in the 2007 agreement, and instead establishes that wages were proposed by classification and the raises agreed upon were the same as in prior negotiations.

ii. The wages were not “set forth in the agreement”

Moreover, the evidence plainly contradicts the Decision’s statement that “wages were set forth in the agreement.” The 2007-2010 contract merely provided for a \$0.55 cent base wage increase to an individual’s rate of pay, but was premised on their classification. (GC Ex. 6, p. 13) Importantly, no individuals’ rates of pay were included anywhere in the contract. As such, no wages were “set forth in the new agreement.” In stark contrast, the only amounts set forth were the raises, and as described *supra* those were to be applied to the corresponding classification rate of each individual employee. There simply was no evidence to indicate that

the erroneous wage rates were “set forth” in the contract. As such, the Decision must be reconsidered.⁶

C. The Decision is incompatible with controlling precedent.

As there is insufficient record evidence on which to conclude that the mistaken wage rates were relied upon by the Union or incorporated into the contract, the issue turns on whether Respondent could correct the error. It is well settled that an employer may unilaterally correct an administrative error resulting in employees being paid more than what is required under a collective bargaining agreement. Dierks Forests, Inc., 148 NLRB 923, 925-926 (1964) (holding a unilateral reduction in wages to correct an administrative error did not violate the Act). See also Foster Transformer Co., 212 NLRB 936 (1974). In the Foster Transformer case, an employee was erroneously paid above the proper pay rate for nearly four years. When the error was discovered, without bargaining with the union, the employer corrected the employee’s wage rate. In affirming the ALJ’s decision that the company was permitted to reduce the wage rate to its correct level, the Board stated:

Whatever Respondent’s intent 3 years earlier, it was not bound to continue in effect a plainly inequitable rate structure. **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.**

Foster Transformer Co., 212 NLRB at 936 (emphasis added).

⁶ In fact, the Board ignored direct testimony that the Respondent historically paid only the minimums under the contracts, and that raises were not applied beyond what was contractually required. The following exchange occurred at the hearing:

Q. Because the only thing that the Employer has to do under this contract is to pay the contractually called for minimums correct?

A. Correct.

(Transcript, p. 95)

Interpreting the contract to mean that the raises were based off correct amounts – not those inflated by error – is certainly a reasonable (and equitable) interpretation. As the issue thus comes down to one of contract interpretation, and Respondent had a sound arguable basis for its interpretation, there cannot be a violation at hand. See Bath Iron Works Corp., 345 NLRB 499, 502 (2005)(“Where an employer has a sound arguable basis for its interpretation of a contract and is not motivated by union animus or ... acting in bad faith, the Board ordinarily will not find a violation.”).

The lack of a collective bargaining agreement in Foster should be of no consequence, as the mistake here was not embodied in an agreement, and Foster rested upon the basic equitable doctrine that a party cannot be bound to an error in perpetuity. Id. See also Newcor, Bay City Division, of Newcor Inc., 2010 WL 3285338 (NLRB Div. of Judges, July 21, 2010) (employees as a matter of principle are entitled solely to the benefits of the restored contract); and Eagle Transport Corp., 338 NLRB 489, 490 (2002). The same principles must apply here.

The Decision properly recognizes that Respondent mistakenly gave “catch up raises” which employees were not entitled to receive. Forcing Respondent to bargain about correcting this error is irreconcilable with the basic equitable doctrine that Foster upheld. As such, for the reasons set forth herein, Respondent respectfully urges the Board to reconsider the Decision. See Excel Corp., 313 NLRB 588, 589 (1993) (granting motion for reconsideration due to majority’s ill-considered departure from Board precedent); AM Property Holding Corp., 352 NLRB 279, 280 (2008) (granting motion for reconsideration where the Board failed to properly apply its precedent).

D. Assuming *arguendo* this Motion for Reconsideration is denied, clarification is necessary.

Since the correction was applied solely on a prospective basis, the impacted employees were enriched for as much as five years. Yet, in preliminary discussions with the Region regarding its compliance demand, it became apparent that the Region intends to assert that Respondent must pay back wages from the date of violation until the present, and that it cannot correct the error until the Union first agrees. While disagreeing with its conclusions, Respondent reads the Board’s opinion as merely finding that Respondent could not correct the

error during the term of the agreement, nothing more. Respondent respectfully suggests that addressing the differing interpretations of the Decision now would benefit all parties.

The Decision found that Respondent unilaterally modified the terms of a contract. In numerous places, the Decision indicates that its holding is limited to the term of the contract in which the error was supposedly embodied. To be sure, the Board nowhere disputes the well-established principle that an employer can unilaterally correct a mistaken wage rate, nor did it overrule the Foster Transformer case which holds exactly that.⁷ Instead, the Board relied upon the absence of a collective bargaining agreement to distinguish Foster Transformer, and used carefully phrased language to limit its holding to the term of the contract.

For instance, the Board notes at the beginning of its Decision that “We find, contrary to the judge, that the Respondent violated ... the Act by unilaterally reducing the **contractual** wage rates of eight bargaining unit employees.” Daycon Products Company, Inc., 357 NLRB No. 52, at slip. op. 1 (2011)(emphasis added). The Decision also notes that “**once it entered into the contract**, [Respondent] was barred from unilaterally altering the unit employees’ wage rates contained therein.” Id. at 2 (emphasis added). Finally, the Board held that (as under its view, the erroneous wages were incorporated into the contract): “The Respondent could not thereafter modify those wages **during the contract term** without the Union’s consent.” Id. (emphasis added).

Thus, under a proper reading of the Decision, three principles become readily apparent: (1) the wage raises were erroneous (the very first sentence of the Decision’s Background section acknowledges as much), (2) because the errors were embodied in a contract, Respondent was not free to unilaterally correct them, and (3) once the contract ended, it no

⁷ The Decision notes that Member Hayes would have dismissed the Complaint if the error was corrected during the 2004-2007 agreement.

longer mandated the continuation of the error, and Respondent was free to unilaterally correct the mistake. Accordingly, the Board should clarify that its holding is limited in scope to the following distinct circumstances where: 1) an administrative error is embodied in a subsequent collective bargaining agreement; and 2) a party unilaterally corrects the mistake during the term of that agreement without the other party's consent.

Under the Region's expansive reading, the Decision would prohibit a party from ever correcting an error in contract administration, and would assume the *sub silentio* overruling of Foster Transformer. However, Foster Transformer is still good law, and as noted therein: "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." Foster Transformer, 212 NLRB 936, 936 (1974). Clearly, once the supposed contractual obligation to maintain the error ceased, Respondent was free to act to correct the error, even without the Union's consent.

To assert otherwise is ludicrous, since under such a policy beneficiaries of a mistake (whether it be the employer or employees) would be allowed to perpetuate any error *ad infinitum*, and the eight employees here would reap an ongoing windfall based on an error about which there is no longer any doubt. Such a policy would conflict with the promotion of labor peace and stability underlying the Act, and incentivize parties to act in bad faith. Accordingly, assuming *arguendo* this Motion for Reconsideration is denied, the Decision should be clarified to specify that once the contract expired, Respondent was privileged to act unilaterally to correct the erroneous wage rates of its employees, and no back pay based on such erroneous wages is due or owing beyond the expiration of the agreement.

CERTIFICATE OF SERVICE

I hereby certify that on the date shown below, copies of the foregoing Motion for Reconsideration were electronically filed and served by email upon the following:

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