

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

DAYCON PRODUCTS COMPANY, INC.

and

Case 5-CA-35043

DRIVERS, CHAUFFEURS, AND HELPERS LOCAL
UNION NO. 639 A/W INTERNATIONAL
BROTHERHOOD OF TEAMSTERS

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S OPPOSITION TO
RESPONDENT'S MOTION FOR RECONSIDERATION AND/OR
MOTION FOR CLARIFICATION**

On August 12, 2011, the National Labor Relations Board unanimously found that Respondent Daycon Products Company, Inc. (“Daycon” or “Respondent”) violated Sections 8(a)(5) and (1) of the National Labor Relations Act when it unilaterally reduced the contractual wage rate of eight bargaining unit employees. On September 9, 2011, Respondent filed a motion for reconsideration of this decision, or, in the alternative, a motion for clarification. There being no extraordinary circumstance warranting reconsideration or clarification, the Board should dismiss Respondent’s alternative motions promptly.

Respondent presents three arguments, each of which is easily rebutted. First, Respondent argues that the Board must reconsider its decision because the decision rests on issues which were not fully and fairly litigated before Judge Rosenstein. In essence, Respondent argues that it was denied due process because Judge Rosenstein precluded all parties from introducing extrinsic evidence regarding each parties’ motives and intents during bargaining that resulted in the parties’ 2007-2010 collective-bargaining agreement. Yet Respondent fails to mention the basis for Judge Rosenstein’s evidentiary ruling—that such evidence was not relevant, because the parties ultimately reached a collective-bargaining agreement—and the fact that Judge Rosenstein permitted Respondent to introduce evidence into the rejected exhibits file (Tr. 105) and to make offers of proof

(Tr. 118).¹ For one, Judge Rosenstein’s evidentiary ruling (essentially applying the parol evidence rule) was, at root, correct, and the Counsel for the Acting General Counsel did not file exceptions regarding this aspect of the case. Furthermore, Respondent had the opportunity to include documentary exhibits into the rejected exhibits file, as well as to make offers of proof on lines of inquiry that Judge Rosenstein foreclosed. For Respondent now to claim that it has been denied due process is simply disingenuous.

Turning to Respondent’s second argument, Respondent asserts that the Board must reconsider its decision because the decision includes material factual errors. Respondent maintains that the Charging Party Union did *not* rely upon a wage schedule it had received prior to negotiations for the parties’ 2007-2010 collective-bargaining agreement, and asserts that the agreement does not contain employees’ wages. Neither of Respondent’s points have any credibility. First, Respondent provided the Charging Party Union with a wage schedule, prior to the parties’ bargaining for the 2007-2010 collective-bargaining agreement, and that schedule “accurately stated the wages actually being paid to each unit employee, including the wages paid to the eight employees as a result of their prior mistaken raises.” Daycon Products Company, Inc., 357 NLRB No. 52, slip op. at 1 (August 12, 2011). That wage information unquestionably laid out the wage structure that the parties were operating within when they negotiated employees’ wages and ultimately reached agreement on the 2007-2010 collective-bargaining agreement. That agreement included an across-the-board raise of \$.55/hour in each year of the contract for most bargaining unit employees. Simply put, both Respondent and the Charging Party Union walked down a path in their negotiations for employees’ wages that began at the same starting point: the wage structure that Respondent provided to the

¹ On this evidentiary point, Respondent maintains that the Board erroneously ruled that its cross-exceptions on this evidentiary issue were lacking under the Board’s rules. However, the Board correctly concluded that Respondent’s cross-exceptions were insufficient. Rule 102.46(b)(1) states that “[i]f no supporting brief is filed the exceptions document shall also include the citation of authorities and argument in support of the exceptions.” Respondent failed to take the opportunity to file a brief in support of its exceptions, and Respondent also failed to provide any citation to authority or argument in support of its exceptions. Accordingly, Respondent’s cross-exceptions were unquestionably deficient under Rule 102.46(b)(1).

Charging Party Union at the outset of negotiations. Respondent's suggestion to the contrary is unsupported, misplaced, and flat wrong.

Yet Respondent's other assertion of a material factual error—that the parties' 2007-2010 collective-bargaining agreement does not contain employees' wages—is even more fantastic. Under Respondent's way of thinking, a collective-bargaining agreement apparently does not contain employees' wages unless it specifically spells out each and every employee's precise wage rate. Notably, Respondent fails to cite to any Board authority to support its point. Furthermore, Respondent's approach to when a contract sets forth employees' wages is needlessly narrow. The parties' 2007-2010 collective-bargaining agreement clearly set forth a minimum hourly wage rate (by job classification), a night-shift premium, and the raises that employees were entitled to in each year of the three-year contract. An employee could look at the 2007-2010 collective-bargaining agreement and calculate her wage rate under that contract. Respondent's suggestion to the contrary requires a suspension of common sense. Viewed in conjunction with Respondent's other claim of a material factual error, the Board should have little pause in recognizing that no such material error exists, no matter how Respondent twists the facts.

Finally, Respondent's third argument in support of its motion is that the Board's decision requires clarification.² Despite Respondent's apparent reading of "clues,"³ there is nothing ambiguous in the Board's decision and order, nor should there be any confusion warranting any

² Respondent makes another argument related to this third argument: that the Board's decision is incompatible with controlling precedent. Yet Respondent's argument on this point fails to meet the minimum standards for a motion under Rule 102.48. Respondent points to nothing extraordinary at all—the Board simply disagreed with Respondent's incorrect view of what it was legally permitted to do unilaterally regarding employees' terms and conditions of employment. Rather than departing from extant Board law, the Board distinguished Foster Transformer Co., 212 NLRB 936 (1974) on grounds which Respondent does not find palatable. Yet Respondent is hardly the first nor the last employer to find unpalatable the Board's analysis of caselaw where the Board finds that the employer has violated the National Labor Relations Act.

³ Respondent claims that the Board limited its decision "to the term of the contract in which the error was supposedly embodied." As with its claims about the "material errors" in the decision, this is another example of Respondent's tortured straining of the Board's decision in order to suit its own purpose. The Board did *not* limit its decision as Respondent contends. The Board was faced with a basic question: could Respondent unilaterally modify a term of employment embodied in a collective-bargaining agreement during the term of that agreement. The hornbook labor law answer is "no." All the Board did was make clear that it was *not* passing on a question it *was not presented with*: whether Respondent could have lawfully corrected a payroll error that existed before the parties agreed on their 2007-2010 collective-bargaining agreement.

clarification from the Board. Evidently, Respondent believes it is only required to restore the affected employees' wages up to the point when the parties' 2007-2010 collective-bargaining agreement expired. Yet this belief is inconsistent with the unambiguous terms of the Board's decision and order, which place no time limit on Respondent's obligation to restore the affected employees' wages to the levels required in the 2007-2010 collective-bargaining agreement. The Board's decision and order follows traditional Board remedies and requires Respondent to undo its unlawful reduction in employees' wages and correspondingly to make those employees whole for their lost wages and benefits. Yet Respondent seeks a clarification—that it was privileged to unilaterally reduce employees' wages after the expiration of its collective-bargaining agreement—that is extra-judicial (in that it goes beyond the facts of the case at hand) and contrary to well-established Board law that Respondent is quite familiar with.⁴ Of course, if Respondent chooses to only provide a remedy consistent with what it thinks is required in the Board's order, Respondent acts at its own peril.⁵

⁴ As Respondent is well-aware, an employer violates Sections 8(a)(5) and (1) of the Act when it unilaterally changes employees' terms and conditions of employment, embodied in an expired collective-bargaining agreement, without first either giving the union the appropriate notice and opportunity to bargain, or bargaining and reaching a good-faith impasse with the union. See Daycon Products Company, Inc., 2011 WL 3228193 (Feb. 15, 2011)(currently pending on Respondent's exceptions to the Board).

⁵ Respondent clearly seeks to apply a remedy up to the conclusion of the parties' 2007-2010 collective-bargaining agreement, claiming that to require otherwise would force it to live with an error in perpetuity. Respondent's claim regarding this "error" demonstrates that Respondent still cannot come to grips with the Board's clear factual findings, including the Board's determination that there was no error as to what employees' wages were at the time Respondent unilaterally modified those wages. The Board found that there was a clerical error that had occurred during the term of the parties' 2004-2007 collective-bargaining agreement that resulted in some employees erroneously getting wage raises. Yet the parties subsequently bargained for a new collective-bargaining agreement, conducting those negotiations with the employees' *actual* wages as their financial framework, not what the employees' wages *should have been*. Once the parties reached agreement, there was no longer any mistake or error regarding employees' wages.

CONCLUSION

For the foregoing reasons, the Counsel for the Acting General requests that the Board deny Respondent's motion for reconsideration, and/or motion for clarification.

Dated at Baltimore, Maryland, this 16th day of September 2011.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed this Counsel for the Acting General Counsel's Opposition to Respondent's Motion for Reconsideration And/Or Motion for Clarification on September 16, 2011, and, on that same day, copies were electronically served on the following individuals by electronic mail:

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