

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

**KERRY, INC.**

**Respondent**

**and**

**Cases 7-CA-52965**

**7-CA-53192**

**LOCAL 70, BAKERY, CONFECTIONARY,  
TOBACCO WORKERS & GRAIN MILLERS**

**INTERNATIONAL UNION, AFL-CIO**

**Charging Union**

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S  
ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS AND  
BRIEF IN SUPPORT OF RESPONDENT'S EXCEPTIONS TO THE  
ADMINISTRATIVE LAW JUDGE'S DECISION AND ORDER**

On September 27, 2011, Administrative Law Judge (ALJ) Keltner W. Locke issued a Decision (and Order) in the above-captioned matter. On November 22, 2011, Respondent filed Exceptions to the Administrative Law Judge's Decision and Order and a Brief in Support of its Exceptions to the Administrative Law Judge's Decision and Order.

Counsel for the Acting General Counsel Joseph Canfield hereby files this Answering Brief to Respondent's Exceptions and Brief in Support of Exceptions to the Administrative Law Judge's Decision and Order (Respondent's Brief).

In essence, Respondent excepted to the Administrative Law Judge's Decision (ALJD) as follows:<sup>1</sup>

1. To the finding that Respondent violated Section 8(a)(1) and (5) of the Act by failing to negotiate a change in the application and payment of shift differential pay that was governed by the collective bargaining agreement;
2. To the finding that Respondent violated Section 8(d) of the Act by changing the application and payment of shift premium payments.

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<sup>1</sup> Respondent also excepted to specific findings related to the shift differential issue which relate to evidence relied on by the ALJ in reaching the conclusion that Respondent violated Sections 8(a)(5) and 8(d) of the Act.

The Consolidated Amended Complaint at paragraph 10(b)(iv) alleges that on about August 22, 2010, Respondent changed the application and payment of shift premiums to bargaining unit employees. The Consolidated Amended Complaint, at paragraph 12 alleges that Respondent engaged in the conduct described in paragraph 10 without affording the Charging Union a meaningful opportunity to bargain with the Charging Union with respect to the conduct and the effects of this conduct on the Unit. Paragraph 14 of the Consolidated Amended Complaint alleges that Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective bargaining agent of its employees in violation of Section 8(a)(1) and (5) of the Act. (GC Ex. 1(o)) At the trial, the ALJ granted Counsel for the Acting General Counsel's motion to also allege the conduct in paragraphs 10 and 12 as a violation of Section 8(d) of the Act.

Respondent's Answer to Consolidated Amended Complaint paragraph 10(b)(iv) admits the allegation "with regard to some, but not all Unit employees." Respondent denied the allegations in paragraph 12 of the Consolidated Amended Complaint relating to paragraph 10(b)(iv) and denied the allegations in paragraph 14.

The collective bargaining agreement currently in effect between the parties at paragraph 6.9 states:

Employees on the second shift will receive a shift premium of \$.10 per hour.  
Employees on the third shift will receive a shift premium of \$.15 per hour. (GC Ex. 2)

Prior to August 22, 2010, unit employees worked three shifts, from 7:00 a.m. to 3:00 p.m., 3:00 p.m. to 11:00 p.m., and 11:00 p.m. to 7:00 a.m. (Tr. 133) Pursuant to the collective bargaining agreement, prior to August 22, 2010, first shift employees did not receive a shift differential, but second shift employees received a shift differential of 10 cents per hour and employees on the third shift received a shift differential of 15 cents per hour. (Tr. 152, 170)

On about August 22, 2010, Respondent changed its work schedule from a three shift operation to a two shift operation. All employees worked the new shift schedule and except for one six-hour day, the employees then worked 7:00 a.m. to 7:00 p.m. and 7:00 p.m. to 7:00 a.m.. Respondent's Brief states that upon changing the shift schedule, Respondent paid all of the employees working the 7:00 a.m. to 7:00 p.m. shift a 10 cent shift premium, and those working the 7:00 p.m. to 7: a.m. shift a 15 cent shift premium, including employees who had previously not received a shift premium. (Respondent's Brief p. 4)

As observed by Respondent in its Brief, the ALJ concluded that following the schedule change, Respondent failed to pay shift premiums to some employees as required

by the collective bargaining agreement. According to Respondent, in reaching this conclusion, the ALJ relied, in part, on Respondent's Answer to the Consolidated Complaint which issued in this matter. (Respondent's Brief p. 3) For the first time, apparently as an afterthought, Respondent now attempts to explain its Answer to mean that upon effecting the shift changes, all employees received the shift premium, including those who prior to the change worked the first shift and thus did not previously receive a shift premium. Respondent asserts that since no employee were harmed by the manner in which shift premiums were applied after the shift changes, its unilaterally applying a 10 cent premium to employees working the 7:00 a.m. to 7:00 p.m. shift and a 15 cent premium to those working the 7:00 p.m. to 7:00 a.m. shift did not violate the Act. (Respondent's Brief p. 5)

The language of Respondent's Answer to Complaint paragraph 10 (b)(iv) is clear. A fair reading of that language leads to the inevitable conclusion that after the schedule change some employees were paid a shift premium, but some were not, The ALJ read the Answer to mean that, and so did Counsel for the Acting General Counsel. Director of Human Resources Tasha Milburn, as reflected in Respondent's Brief, presented only general testimony that after the schedule change all employees received the shift premium. However, although it had ample opportunity to do so, Respondent never previously asserted that its Answer merely intended to admit that after the schedule change there were no employees who did not receive a shift premium, as it now claims in its Brief. Thus, given the plain meaning of Respondent's language in its Answer, the ALJ correctly interpreted Respondent's Answer to paragraph 10(b)(iv) to be an admission to the Complaint allegations that some employees were not paid a shift premium.

Counsel for the Acting General Counsel contends that Respondent should be held to the plain meaning of its Answer to the Consolidated Complaint and findings of the ALJ. Counsel for the Acting General Counsel presented its evidence at trial based upon the representations in Respondent's Answer to the Complaint allegations. Allowing Respondent to escape the consequences of the plain meaning of its Answer would prejudice Counsel for the Acting General Counsel and, presumably, the Charging Union as well.

In asserting that the only change is that all employees received a shift premium following the schedule change, Respondent relied on attacking the testimony of employee Bernard Kowalski, who testified that following the change he did not believe that he was receiving a shift differential. (Respondent's Brief p. 3) Respondent then argued that Kowalski did indeed receive a shift differential following the change, but the differential was not reflected in his paycheck. (Respondent's Brief p. 4) However, in addition to Kowalski, employees Emras Rodriguez-Torres and Nicki Miller also testified that they did not receive a shift premium following the schedule change. (Tr. 149, 161) Thus, Respondent's selective argument in its Brief fails to demonstrate that there were no employees who did not receive the shift differential following the schedule change on

August 22, 2110. Because it is unclear how many employees were affected by Respondent's unilateral action, it is urged this matter be left to the compliance stage of this proceeding.

Additionally, the ALJ specifically found that Respondent failed to bargain in good faith in violation of Sections 8(a)(5) and 8(d) of the Act by failing to adhere to the contractual provisions pertaining to the application and payment of shift premiums. (ALJD p. 51, L 27-33) While Respondent filed Exceptions relating to this finding, it did not specifically address this issue in Respondent's Brief, and presents no arguments or legal precedent to support this Exception.

Finally, assuming *arguendo* Respondent's contention that it did not fail to give shift premiums to certain employees, but merely applied shift premiums to employees who formerly worked the first shift, Respondent's conduct in unilaterally applying the shift differentials to all employees working under the new two shift operation was technically in violation of Section 8(a)(5) of the Act even if, as Respondent now contends, its conduct was a benefit to employees rather than a detriment. *NLRB v. Katz*, 369 U.S. 736 (1962); *Costal Cargo Co.*, 353 NLRB 819 (2009).

### CONCLUSION

Based on the foregoing, Counsel for the Acting General Counsel respectfully requests that the Board reject Respondent's Exceptions to the ALJ's findings that Respondent violated Section 8(a)(1) and (5) of the Act by failing to negotiate a change in the application and payment of shift differential pay that was governed by the collective bargaining agreement and that Respondent violated Section 8(d) of the Act by changing the application and payment of shift premium payments, and affirm the ALJD.

Dated at Detroit, Michigan this 6<sup>th</sup> day of December, 2011.

  
Joseph Canfield

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**CERTIFICATE OF SERVICE**

I certify that on the 6<sup>th</sup> day of December, 2011, I electronically transmitted Counsel for the Acting General Counsel's Answering Brief To Respondent's Exceptions And Brief In Support Of Respondent's Exceptions To The Administrative Law Judge's Decision And Order to the following parties of record:

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