UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

AMERICAN RED CROSS,
HEART OF AMERICA
BLOOD SERVICES REGION,

Respondent.

And

Case Nos. 33-CA-15821
33-CA-15896
33-CA-16144
33-CA-16204
33-CA-16207
33-CA-16229
33-CA-16246
33-CA-16247
33-CA-16248

AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES
(AFSCME), COUNCIL 31, AFL-CIO

Charging Union.

RESPONDENT'S REPLY BRIEF TO ANSWERING BRIEFS OF COUNSEL FOR THE ACTING GENERAL COUNSEL AND CHARGING PARTY

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Respondent, American Red Cross, Heart of America Blood Services Region, replies to the Answering Briefs of Counsel for the Acting General Counsel (hereinafter "General Counsel") and the Charging Union (hereinafter "Union").

I. CHANGES MADE BY RESPONDENT PRIOR TO THE UNION'S CERTIFICATION WERE NOT "AT ITS PERIL" AND DID NOT VIOLATE THE ACT.

Both the General Counsel and the Union ask the Board to apply the *Mike O'Connor* "at its peril" rule in a manner that ignores a principle and critical distinction applicable to the facts of this case, i.e., the absence of any objective evidence suggesting that the Union had attained majority status at the time of the alleged unilateral changes. As set forth in Respondent's Brief in Support of Exceptions, Respondent advocates for a closer examination and analysis of the *Mike O'Connor* cases and seeks reversal of the ALJ's decision finding that alleged unilateral changes made prior to the Union's certification and in the absence of any election tally or other indication of majority status violate the Act.

II. RESPONDENT'S CHANGES TO BENEFITS WERE A CONTINUATION OF THE DYNAMIC STATUS QUO AND DID NOT VIOLATE THE ACT.

General Counsel and the Union also support the ALJ's erroneous conclusion that Respondent's actions were changes to the status quo rather than a preservation of the status quo. In doing so General Counsel and the Union would have the Board ignore the undisputed evidence in the record establishing that the status quo with respect to benefits is the Respondent's participation in the ANRC National plans. The record establishes a past practice of change to the National plans, over which the Respondent has no control, with changes applied to the Respondent's employees just as those changes are applied to ANRC employees across the nation. The factual record further establishes that as a participating employer the Respondent does not exercise control over what happens with the plans and that each time the National plans

change those changes are applied to Respondent's employees. (Tr. 912, 914, 916-918, 922-923). It is pursuant to this past practice of change that changes were made in 2009, preserving the dynamic status quo as required by the Act.

III. NEITHER THE RECORD NOR THE LAW SUPPORTS THE ALJ'S RECOMMENDED REMEDY EXTENDING THE CERTIFICATION YEAR.

Even if the Board were to affirm the ALJ's decision finding violations of the Act, the Board should reject the ALJ's recommended remedy and order requiring Respondent to bargain in good faith and honor the Union's certification for an additional six-month period. The ALJ bases the recommendation upon the Board's decision in *Mar-Jac Poultry*, 136 NLRB 785 (1962). As Respondent has argued, given the record at hand, the ALJ's recommendation is plainly unsupported by *Mar-Jac* and its progeny. The principle articulated by these decisions is clear: *Mar-Jac* relief is inappropriate unless the evidence shows that the employer refused to recognize the union, engaged in overall bad faith bargaining or surface bargaining, or that the employer's conduct tainted negotiations during the certification period. Here, because the evidence falls well short of this required showing, the ALJ's recommended *Mar-Jac* extension is unwarranted.

General Counsel correctly notes that the record must support both the need for and the length of any *Mar-Jac* extension of the certification year and that in determining the appropriateness and length of any extension, the Board considers such factors as the nature of the violations, the number, extent and dates of the bargaining sessions, the impact of the violations on the bargaining process and the union's conduct in negotiations. (GC Br. 38) However, while the General Counsel and the Union both generally assert that unilateral changes allegedly made by Respondent put the Union at a disadvantage at the bargaining table, neither the General Counsel nor the Union has cited to evidence in the record supporting such a conclusion. Instead,

General Counsel resorts to inflated and admittedly colorful narratives of Respondent's alleged conduct which are completely divorced from the ALJ's factual findings and conclusions of law. Here, the appropriateness of *Mar-Jac* relief hinges not on the General Counsel's animated descriptions of Respondent's conduct but upon the actual record before the ALJ.

At the outset, General Counsel suggests the ALJ based the six month extension on a "specific finding" that the unfair labor practices undercut and undermined the Union's status as the statutory collective bargaining representative. (GC Br. 36). It is true that the ALJ recited in the remedy section of his decision that the changes had such an effect. ALJD 12:41-43. However, the ALJ's conclusory statement is neither explained in his decision nor supported by any citation to evidence in the record. The ALJ, like the General Counsel and the Union, based his recommended remedy on mere speculation as to any effect the changes had on the Union's status or its effectiveness at the bargaining table.

Even a few examples of General Counsel's attempt to stretch the "facts" to fit within the constructs of *Mar-Jac* suffice to show that extension of the certification year is not warranted. For instance, in discussing the nature of the alleged violations and impact at the bargaining table, General Counsel blames Respondent for the delay between the representation election and the Union's certification,[1] ignoring the fact that the three plus year delay between the election and the ballot count and certification resulted from waiting for a decision from the Board rather than any delay tactics on the part of Respondent. (*See* Jt. Exh. 1) In another misguided attempt to bolster the argument that the Union has somehow been disadvantaged at the bargaining table, General Counsel goes even further by suggesting Respondent acted in a discriminatory manner by "ending its unilateral wage freeze for all employees, except unit employees", and thereby

[1] *See* GC Br. 38 ("These unilateral changes could not but erode the Union's standing in the eyes of employees, this against the backdrop of a three and a half-year delay as the representation proceedings were pending, as Respondent pushed the discredited and rejected argument that team leaders were statutory supervisors.")

disadvantaging the Union at the bargaining table, with the Union "having been set back by the wage freeze and subsequent withholding of the wage increase allowed to others". (GC Br. 38) General Counsel cites *United Aircraft Corp.*, 199 NLRB 658, 662 (1972), which fails to support the General Counsel's position for a number of reasons, including that there was a specific finding in that case of a violation of Section 8(a)(1) and (3).[2] Not only is there not such a finding in the instant case, but there was also never any allegation of alleged discriminatory conduct at issue.[3] General Counsel further asserts that the Union's "attention and energies were diverted away from actual negotiations to forge a contract." (GC Br. 38) General Counsel's only citations to the record in support of this overreaching assertion actually undercut the General Counsel's position. General Counsel's own witness admitted that the concern raised at the bargaining table by the Union (bargaining unit work performed by non-bargaining unit employees) was immediately investigated with Respondent communicating back to the Union at the very next bargaining session.[4] These facts do not create the picture the General Counsel paints of a Union "hobbled, forced on its back heels, haplessly protesting unilateral changes it was powerless to do anything about". (GC Br. 38)

Most significantly, although the General Counsel pays lip service to the fact that the ALJ found that Respondent did not engage in surface or overall bad faith bargaining and dismissed those allegations, General Counsel nevertheless attempts to resurrect the issue to support the

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[2] It is also noteworthy that extension of the certification year was not a remedy ordered, or even discussed, by the administrative law judge or the Board.

[3] There was also no allegation that Respondent violated Section 8(a)(5). Respondent proposed to bargain a wage increase with the Union during its ongoing negotiations as part of an economic package. (Tr. 1062-1063; R. Exh. 89)

[4] The record establishes that the Union first alerted Respondent to its concern in a letter dated April 7, 2011. (GC-28) The issue was then raised at the bargaining session on April 10, 2011, at which time Respondent's bargaining team stated they were unaware of any such assignments being made but agreed to look into the issue and check with the supervisor to determine if indeed such assignments were being made. ((Tr. 722; R-14) At the very next bargaining session on April 25, 2011, Respondent advised the Union that such assignments had ceased and would not be made in the future. (Tr. 749-750; R-21)

ALJ's *Mar-Jac* remedy. General Counsel asserts that Respondent is inaccurate in arguing there was no refusal to bargain warranting an extension of the certification year. Contending that Respondent "fritter[ed] away some four months of the certification year after the Union's certification on October 7, 2010, General Counsel ignores the agreement reached between the Union and the Respondent that extended the certification year until January 7, 2012. (Jt. Exh. 1) General Counsel also ignores that the ALJ found no violation of the Act with respect to the number, extent or length of bargaining sessions. ALJD 13-16. Instead, General Counsel trumps up the only allegations that were sustained with regard to bargaining (refusal to provide information and bargain regarding discipline and discharge of employees) as an "unlawful bargaining stance ... not lost on employees who testified to employee demoralization at seeing the Respondent succeed in flouting its bargaining obligation." (GC Br. 39) Again, the record fails miserably in terms of providing any support for General Counsel's inflated assertion of "demoralization" based on Respondent' bargaining stance. General Counsel presented absolutely no admissible or probative evidence[5] to support a finding that bargaining unit members lost interest in the Union and/or that the negotiations were somehow tainted by any conduct on the part of Respondent.

The Board decisions cited by the General Counsel only reinforce the conclusion that *Mar-Jac* relief is unwarranted. For example, in *Cortland Transit, Inc.*, 324 NLRB 372 (1997), the Board rejected the General Counsel's motion for reconsideration regarding a *Mar-Jac* extension, concluding that such relief was unsupported by the record, where there was no evidence that the employer "had failed or refused to recognize the Union or to meet and bargain with the Union in good faith following its certification." *Id.* Similarly, in *American Medical Response*, 346 NLRB 1004, 1005 (2006), the Board reduced the length of a *Mar-Jac* extension

[5] *See, e.g.* Tr. at 504-505, 530-531.

and underscored the rule that such relief is only warranted if supported by specific record evidence. In *Northwest Graphics, Inc.*, 342 NLRB 1288, 1290 (2004), the Board affirmed a 12-month extension only after noting that "little real bargaining occurred" in the first six months immediately after certification and the employer engaged in unfair labor practices in the following six months. Finally, in *Covanta Energy Corp.*, 356 NLRB No. 98 (2011), the Board imposed a *Mar-Jac* extension only after concluding that the employer had engaged in "highly coercive conduct" toward employees which was specifically directed to disrupt the bargaining process. *Id.* at 25.

These cases present facts that are clearly distinguishable and a far cry from the case at hand, where there is no record or finding that Respondent engaged in bad faith bargaining during negotiations or even that "little bargaining occurred" following the Union's certification, let alone any allegation or finding of coercive conduct. Critically, based upon the record, the ALJ specifically determined that Respondent did not engage in the myriad of individual allegations specific to bargaining (the allegations concerning limiting the dates available for bargaining, limiting the frequency of bargaining sessions, refusing to meet and confer at appropriate time, cancelling agreed upon bargaining dates, limiting the length of bargaining sessions, refusing to explain proposals and delay in providing proposals were each dismissed), and, further, the ALJ determined that Respondent did not engage in surface or overall bad faith bargaining. Accordingly, because the record is insufficient to support an extension of the certification year under *Mar-Jac* and its progeny, the Board should grant Respondent's exception and decline to adopt the ALJ's recommended *Mar-Jac* extension.

CONCLUSION

For all of the foregoing reasons and for the reasons set forth in Respondent's Brief in Support of Exceptions to Decision and Order of the Administrative Law Judge, Respondent requests that the Board grant Respondent's Exceptions to the ALJ's Decision and Order and that the Board reverse the judge's rulings, finding and conclusions relating to said Exceptions.

Dated: January 31, 2012.

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