No.12-1022

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD

Petitioner

and

DRIVERS, CHAUFFEURS AND HELPERS LOCAL UNION NO. 639

Intervenor

v.

DAYCON PRODUCTS COMPANY, INC.

Respondent

ON APPLICATION FOR ENFORCEMENT
OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE
NATIONAL LABOR RELATIONS BOARD

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JURISDICTIONAL STATEMENT

This case is before the Court on the application of the National Labor

Relations Board to enforce a Board Order issued on August 12, 2011 and reported

at 357 NLRB No. 52. (A. 77-82.)[1] The Board found that Daycon Products Company, Inc. unlawfully reduced the contractual wage rates of eight employees represented by the Drivers, Chauffeurs & Helpers Local Union No. 639. (*Id.*) The Board's Order is final with respect to all parties under Section 10(e) of the National Labor Relations Act, as amended.[2]

The Board had jurisdiction over the proceedings below pursuant to Section 10(a) of the Act,[3] which empowers the Board to prevent unfair labor practices. The Board's application for enforcement, filed on December 30, 2011, was timely; the Act places no time limitations on such filings. This Court has jurisdiction over the application for enforcement pursuant to Section 10(e) because the unfair labor practice occurred in Upper Marlboro, Maryland.[4]

STATEMENT OF THE ISSUE

A party to a collective-bargaining agreement commits an unfair labor practice if, during the effective period of that agreement, it modifies a term contained in the agreement without the other party's consent. Here, Daycon

[1] "A." references are to the joint appendix. "Add." references are to the addendum at the back of this brief. References before a semicolon are to the Board's findings; those following are to the supporting evidence.

[2] 29 U.S.C. § 160(e).

[3] *Id.* § 160(a).

[4] *Id.* § 160(e).

admits that it reduced the wage rates of eight employees during the term of a collective-bargaining agreement. Did the Board correctly determine the wage rates were "contained in" the agreement and that Daycon therefore violated the Act?

STATEMENT OF THE CASE

Acting on charges filed by the Union, the Board's Acting General Counsel issued a complaint alleging, among other things, that Daycon violated Section 8(a)(5) and (1) and Section 8(d) of the Act by unilaterally reducing the contractual wage rates of eight union-represented employees. (A. 1-7.) Following a hearing, an administrative law judge rejected the Acting General Counsel's allegations and recommended dismissing the complaint. (A. 81-82.)

The Acting General Counsel filed exceptions. Daycon filed limited cross-exceptions, which the Board disregarded because they failed to meet the minimum requirements of the Board's regulations for such filings. (Add. 1-2.) On August 12, 2011, the Board reversed the judge and issued a decision finding that Daycon violated the Act as alleged in the complaint. (A. 77.) On September 9, 2011, Daycon filed a motion for reconsideration. The Board denied the motion on December 12, 2011, finding that Daycon failed to present "extraordinary circumstances" warranting reconsideration under the Board's Rules and Regulations. (A. 83-85.) Facts supporting the Board's findings are set forth below, followed by a summary of the Board's Conclusions and Order.

STATEMENT OF FACTS

I. The Board's Findings of Fact

A. The 2007-2010 Collective-Bargaining Agreement

Daycon manufactures and distributes janitorial, maintenance, and hardware supplies. (A. 80.) Its headquarters are located in Upper Marlboro, Maryland. (*Id.*) Jodie Kendall is Daycon's human resources director. (A. 80; 56.)

The Union has represented Daycon's drivers, warehouse employees, and repairmen since about 1973. Doug Webber is the Union's business agent and is responsible for policing the Union's agreements with Daycon and negotiating new contracts. (A. 80; 11-12.)

In January 2007, the parties were preparing to bargain for a new contract to succeed the one expiring on January 31. On January 4, 2007, Webber sent a letter to Daycon requesting a "list of the hourly wage rate paid to each employee." (A. 124; 14.) In response, Daycon provided Webber with a document labeled "Seniority List." (A. 127-28; 16.) The list set out each unit member's name, job title, date of hire, and hourly wage rate. (A. 127-28; 16.)

The parties reached agreement, and the resulting collective-bargaining agreement was effective from March 3, 2007 through January 31, 2010. (A. 80; 129-63, 17.) That agreement stated that "each employee shall receive [an annual

55¢] increase to his/her rate of pay." (A. 141.) Pursuant to the contract, employees received pay increases in 2007 and 2008.

B. Over the Union's Objection, Daycon Reduced the Wages of Eight Unit Employees in the Middle of the Contract's Term

In early 2009, following an unrelated payroll inquiry, Human Resources Director Kendall conducted an audit of unit employee wages. She determined that, several years before, eight employees had been given wage increases they were not entitled to under the contract in place at that time, which was effective from January 16, 2004 through January 31, 2007. (A. 80; 57.) Kendall reported her discovery to Daycon President John Poole, and they ultimately decided to reduce the wages of the eight employees. (A. 80; 59, 65.)

From March to May 2009, Kendall communicated and met with Union Business Agent Webber several times to discuss the results of her audit and Daycon's decision to reduce the wages of the employees. (A. 80; 24-25, 63-64.) Each time, Webber objected that Daycon could not change the wages of employees during the term of a collective-bargaining agreement. (A. 80; 27.) In addition, Webber sent a letter to Daycon reiterating that objection. (A. 80; 34, 201.) Webber reminded Daycon of the wage information Daycon had provided to the Union during negotiations in January 2007, and stated "there was no mistake about the wage rates when we negotiated the 2007 contract." (A. 80-81; 34, 201.) Webber pointed out that the starting point for negotiations had been the actual

wages employees had been earning at that time, as set out in the "Seniority List" Daycon gave the Union. (*Id.*) Webber further noted that the Union "would have bargained for a bigger increase" if it had known about the payroll errors. (*Id.*)

Despite the Union's objections, Daycon reduced the wages of the eight employees on May 3, 2009. (A. 81; 66, 203-04.) The employees saw the reduction on their May 22 paychecks. (A. 81; 66.) Five of the affected employees were given a one-time bonus to help alleviate the impact of their wage reduction. (A. 81 n.7; 65-66.)

II. The Board's Conclusions and Order

On August 12, 2011, based on the above facts, the Board (then-Chairman Liebman and Members Pearce and Hayes) issued a Decision and Order. The Board found, contrary to the administrative law judge, that Daycon violated Section 8(a)(5) and (1) and Section 8(d) of the Act[5] by unilaterally reducing the contractual wage rates of eight bargaining-unit employees. (A. 77.)

The Board's Order requires Daycon to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act.[6] Affirmatively, the Order requires Daycon to restore the

[5] 29 U.S.C. §§ 158(a)(5) and (1), 158(d).

[6] *Id.* § 157.

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. (A. 78.) The Order also requires Daycon to post a notice to employees. (*Id.*)

SUMMARY OF ARGUMENT

Because Daycon admits that it reduced employee wage rates, the primary issue this Court needs to decide is whether those wage rates are terms "contained in" the collective-bargaining agreement. If so, then the Board correctly determined that Daycon violated the Act, which makes it an unfair labor practice for a party to modify a term contained in a collective-bargaining agreement without obtaining the other party's consent.

The parties' agreement states that "each employee shall receive" an annual 55¢ "increase to his/her rate of pay." This clear language constitutes a formula by which wages were to be computed. The formula required Daycon to take the "rate of pay" each employee was receiving when the contract was signed and add 55¢ each year. Yet Daycon ended its use of that formula and reduced the wages of eight employees, without the Union's consent.

Daycon launches a barrage of misguided attacks on the Board's conclusions. It claims it was permitted to modify the wage rates due to clerical errors its payroll

department had committed in years past. But Daycon's reasons for modifying the contract are irrelevant. What Daycon needed was the Union's consent.

Daycon further suggests that the Board should defer to arbitration decisions when it interprets contract language, and it claims an arbitrator would have ruled in its favor. But the Board is empowered to interpret collective-bargaining agreements when doing so is necessary to determine whether an unfair labor practice occurred, and it need not defer to arbitration decisions. Moreover, arbitrators generally apply the principle the Board applied here: that unilateral mistake does not relieve a party of its contractual obligations.

Finally, Daycon contends that the administrative law judge who heard the case wrongly excluded certain evidence, denying it due process. This Court has no jurisdiction to consider this argument due to Daycon's failure to raise it at the proper time and in compliance with the Board's rules. In any event, to overturn the Board's evidentiary rulings, a party must show abuse of discretion and prejudice. Daycon has shown neither. Accordingly, the Court should enforce the Board's Order in full.

STANDARD OF REVIEW

The Board's factual findings are conclusive if supported by substantial evidence on the record as a whole.[7] In this case, the Board reversed the administrative law judge's legal conclusions, but it accepted his findings of fact and credibility determinations with regard to the witnesses who testified at the unfair labor practice hearing. (D&O 1 & nn.1-2.) Contrary to Daycon's claim (Br. 9), it is well settled that "the substantial evidence standard is not modified in any way when the Board and its [judge] disagree."[8]

The Board has "considerable authority" to interpret the Act, and its legal determinations are entitled to deference from the courts as long as they are "rational and consistent with the Act."[9] This is particularly true here because, as

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[7] *Evergreen Am. Corp. v. NLRB*, 531 F.3d 321, 326 (4th Cir. 2008).

[8] *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951) (internal quotation marks omitted); *accord NLRB v. Galicks, Inc.*, __ F.3d __, 2012 WL 678142, at *4 (6th Cir. 2012) ("The Courts of Appeal[s] exercise the same level of utmost care in reviewing the record in all cases, regardless of whether the Board and the ALJ reached opposite inferences and conclusions."); *Andino v. NLRB*, 619 F.2d 147, 151 (1st Cir. 1980) ("The standard is not modified when the Board and its administrative law judge disagree."); *see also Vance v. NLRB*, 71 F.3d 486, 489-90 (4th Cir. 1995) (applying substantial evidence standard in case where Board reversed ALJ); *NLRB v. Am. Nat'l Can Co.*, 924 F.2d 518, 524 (4th Cir. 1991) (same).

[9] *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 42 (1987); *see also Holly Farms Corp. v. NLRB*, 517 U.S. 392, 399 (1996) ("Courts . . . must respect the judgment of the agency empowered to apply the law to varying fact patterns,

the Supreme Court has recognized, "Congress made a conscious decision" to delegate to the Board "the primary responsibility of marking out the scope of the statutory language and of the statutory duty to bargain."[10]

The Board's contract interpretation is not entitled to deference.[11] However, this Court is "'mindful of the Board's considerable experience in interpreting collective bargaining agreements.'"[12]

ARGUMENT

The Board Correctly Determined That Daycon Modified a Term of Employment Contained in the Collective-Bargaining Agreement, and Therefore Violated the Act, By Reducing the Wage Rates of Eight Employees Without the Union's Consent

A. A Party to a Collective-Bargaining Agreement Violates the Act By Modifying a Contract Term Without the Other Party's Consent

Employers and unions commit unfair labor practices when they "refuse to bargain collectively" with each other.[13] Section 8(d) defines collective bargaining as "the performance of the mutual obligation of the employer and the

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even if the issue with nearly equal reason might be resolved one way rather than another.") (quotations and citations omitted).

[10] *Ford Motor Co. v. NLRB*, 441 U.S. 488, 496 (1979).

[11] *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 203 (1991).

[12] *Bonnell/Tredegar Indus., Inc. v. NLRB*, 46 F.3d 339, 343 (4th Cir. 1995) (quoting *Jones Dairy Farm v. NLRB*, 909 F.2d 1021, 1028 (7th Cir. 1990)).

[13] *Id.* § 158(a)(5), 158(b)(3).

representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment."[14]

During the term of a contract, however, the scope of the duty to bargain is limited. Section 8(d) provides that "where there is in effect a collective-bargaining contract . . . [the Act] shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period."[15] The Board has long held, with court approval, that these provisions make it an unfair labor practice for a party to a collective-bargaining agreement to modify a term of employment contained in that agreement without obtaining the other party's consent.[16] Each party, moreover, has every right to withhold consent.[17]

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[14] *Id.* § 158(d).

[15] *Id.*

[16] *Bonnell*, 46 F.3d at 342; *Commc'n Workers*, 280 NLRB 78, 82 (1986), *enforced*, 818 F.2d 29 (4th Cir. 1987) (table). A Section 8(a)(5) violation results in a "derivative violation" of Section 8(a)(1). *See Allied Chem. & Alkali Workers of Am. v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 163 n.6 (1971).

[17] *Bonnell*, 46 F.3d at 342-43; *Milwaukee Spring Div. of Illinois Coil Spring Co.*, 268 NLRB 601, 602 (1984) (stating that when contract is in effect, one party must obtain other party's consent before modifying terms), *enforced sub nom. United Auto Workers v. NLRB*, 765 F.2d 175 (D.C. Cir. 1985).

For example, in *Bonnell/Tredegar Industries, Inc. v. NLRB*, this Court agreed with the Board that a formula for determining a Christmas bonus was a term of employment contained in the parties' collective-bargaining agreement, even where it was not explicitly set forth in the contract.[18] The employer therefore violated the Act by ending its use of that formula without the union's consent.[19]

B. The Parties' Collective-Bargaining Agreement Contains a Formula Requiring the Payment of Certain Wages

Daycon admits (Br. 5) that it reduced the wage rates of eight employees in the middle of the contract without the Union's consent. The threshold issue, then, is whether employee wage rates were terms of employment "contained in" the collective-bargaining agreement.[20] The Board correctly determined (A. 77-78) that they were.

Prior to negotiations, the Union requested a list of current employee wages, and Daycon provided a list that named each employee and set out that employee's

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[18] *Bonnell*, 46 F.3d at 341-42.

[19] *Id.* at 344-45; *see also Commc'n Workers*, 280 NLRB at 82 (union modified term of contract, which required sharing of arbitration transcript costs, by refusing to pay its share); *NLRB v. Sys. Council T-6, IBEW*, 599 F.2d 5, 7-9 (1st Cir. 1979) (union modified term of contract, which permitted management to assign unit employees to act as temporary supervisors, by enacting rule prohibiting employees from accepting such assignments).

[20] 29 U.S.C. § 158(d) (stating no party is required "to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period").

hourly wage. (A. 127-28.) Consequently, both parties knew exactly how much each employee was earning as they negotiated over increases to those wages.

There is no dispute that wages are a term of employment,[21] and Daycon and the Union entered into a collective-bargaining agreement that stated "each employee shall receive" an annual 55¢ "increase to his/her rate of pay" during the contract term. (A. 141.) The Board correctly found (A. 78) that this language constituted an agreement on the "basis for computing wages." The formula required Daycon to take each employee's "rate of pay," that is, "the current wage actually earned by each employee in early 2007" (A. 78), and add 55¢ each year. Indeed, Daycon admits (Br. 24) that the formula in the contract required it to increase each employee's "*then-existing* wage rate" each year by 55¢. As Daycon puts it, "[t]his principle is so plain it cannot be disputed." (Br. 24.)

Despite its admission that the contract required it to add wage increases to each employee's "then-existing" wage rate, Daycon still claims (Br. 23) that the contract does not "contain" the wage rates it is required to pay employees. This is incorrect. As just shown, the contract sets out a specific formula – to which both parties agreed – requiring Daycon to pay certain wages to each employee during each year of the contract. Accordingly, there was no need for the contract to list each individual employee's wage rate, as Daycon now seems to believe was

[21] *See Bonnell*, 46 F.3d at 343 n.3.

required to preclude it from modifying any wages. Daycon's argument would permit it to modify any wages – a term of employment – with impunity, despite the parties' clear agreement on wages.

C. By Ending Its Use of the Wage Formula Contained in the Contract and Modifying Employee Wage Rates, Daycon Violated the Act

Daycon admits (Br. 5) that it reduced employee wage rates in May 2009. It ended its use of the wage formula the parties had agreed to and set out in their contract. It stopped paying eight employees their "then-existing" (2007) wage rates plus the stated yearly increase. Instead, Daycon reduced (in some cases drastically) their contractual wage rates. By doing so, Daycon violated the Act.

A specific example makes this clear. As negotiations began in early 2007, both parties knew that employee L. Burton earned $16.67 per hour. (A. 127.) Under the formula contained in the collective-bargaining agreement, Daycon was required to increase this amount by 55¢ each year of the contract. (A. 141.) Accordingly, Burton was supposed to earn $17.22 after the contract was signed; $17.77 after the first year; and $18.32 after the second year and through the contract's expiration. These are the terms of her employment, agreed to by Daycon and the Union and set out in the contract.

But due to Daycon's unlawful reduction of her wages, Burton actually earned $16.05 in 2010 at the end of the contract term. This is 62¢ less than she

was earning at the beginning of the contract and $2.27 less than the parties' agreement required. By ending its use of the contract's formula and unilaterally modifying the wage rates of Burton and seven other employees, Daycon violated the Act.[22]

Daycon argues (Br. 19-32) that it had a "sound arguable basis" for its reduction of employee wages. Yet the contract provides *no* basis for reducing those wages. Neither before the Board, nor in the 13 pages it devotes to this argument before the Court, has Daycon identified the contract language that allegedly authorized its modification of employee wages. Instead, Daycon claims that "simple logic" requires that the contract "must" permit it to modify the wage rates (Br. 24), and that the contract should be "implicitly read as" giving it permission to modify wage rates (Br. 26). Where Daycon's position is based on its own "logic," not any contractual language, the Board rejected Daycon's strained argument without comment, as it is permitted to do.[23]

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[22] *Bonnell*, 46 F.3d at 341-42 (employer violated the Act by ending use of bonus formula contained in contract without union's consent); *Republic Die & Tool Co.*, 343 NLRB 683, 686 (2004) (employer violated the Act by modifying contractual wage rates without union's consent); *Wightman Ctr.*, 301 NLRB 573, 575 (1991) (same).

[23] *See LeMoyne-Owen College v. NLRB*, 357 F.3d 55, 60 (D.C. Cir. 2004) (Board is not required to distinguish every allegedly contrary case); *see also NLRB v. Schill Steel Prod., Inc.*, 340 F.2d 568, 574 (5th Cir. 1965) ("The Board is not required to issue an elaborate opinion on every case that comes before it for review."); *NLRB v. United Aircraft Corp.*, 324 F.2d 128, 130 (2d Cir. 1963)

And Daycon's hyperbolic claim (Br. 7, 9) that the Board's Order prevents it from ever adjusting wage rates is mistaken. The Board's Order requires only that Daycon refrain from making modifications to agreed-on wage rates during the term of the contract. Once a collective-bargaining agreement expires, wages and other terms of employment remain in place only until the parties bargain for a new contract or bargain to a good faith impasse. Once a valid impasse is reached, an employer is free to implement its last best offer, even absent union agreement.[24]

D. Daycon's Remaining Arguments Have No Merit

1. Daycon's reasons for modifying wage rates are irrelevant

Daycon contends (Br. 10-14) that it was privileged to modify the contractual wage rates to correct mistakes made in years past by the payroll department. But Daycon's reasons for modifying wage rates are irrelevant.[25] As the Board noted (A. 77), settled law requires the other party's *consent* before terms in a collective-

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("[T]he Board is not required to consider and make findings on every contention raised in defense or every aspect of the problem presented.").

[24] *See Grinnell Fire Protection Sys. Co. v. NLRB*, 236 F.3d 187, 1096 (4th Cir. 2000) (after a contract expires, "the Act prohibits an employer from unilaterally instituting changes regarding wages, hours, and other terms and conditions of employment before reaching a good faith impasse in bargaining").

[25] *St. Barnabas Med. Ctr*., 341 NLRB 1325, 1329 (2004) (rejecting employer's urgent need to staff cardiothoracic unit as defense to increasing contractual wage rates without union's consent); *Oak-Cliff Golman Baking Co.*, 207 NLRB 1063, 1064 (1973) (rejecting financial distress as defense to reduction of contractual wages, stating "these considerations are irrelevant"), *enforced*, 505 F.2d 1302 (5th Cir. 1974) (table).

bargaining agreement may be modified,[26] not merely a good reason. Applying this principle, the Board has found contract modifications to be unlawful regardless of the justifications given for them.[27] Having pure motives is no defense.

In any event, as the Board stated (A. 77-78), there was no mistake about the basis for computing wages and wage raises in the 2007-2010 contract.[28] As shown above on pages 12-13, both parties were aware of the wages being earned by employees during negotiations, and the parties agreed to increase those wage rates by 55¢ each year.[29] Mistakes or clerical errors made by Daycon's payroll department in years past do not permit Daycon to rewrite the parties' clear agreement on employee wages. As the Board rightly noted (A. 78), "[a] party to a

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[26] *Bonnell*, 46 F.3d at 344 (stating contract terms "cannot be modified under § 8(d) of the Act without the parties' mutual consent"); *Commc'n Workers*, 280 NLRB 78, 82 (1986) (same), *enforced*, 818 F.2d 29 (4th Cir. 1987) (table); *Milwaukee Spring Div. of Illinois Coil Spring Co.*, 268 NLRB 601, 602 (1984) (stating that when contract is in effect, one party must obtain other party's consent before modifying terms), *enforced sub nom. United Auto Workers v. NLRB*, 765 F.2d 175 (D.C. Cir. 1985).

[27] *E.g.*, *St. Barnabas*, 341 NLRB at 1329 (finding violation where employer increased contract wage rates due to difficulty recruiting staff); *Wightman Ctr.*, 301 NLRB 573, 575 (1991) (stating "economic necessity is no excuse or defense" to a contract modification allegation).

[28] *See* RESTATEMENT (SECOND) OF CONTRACTS § 151 (2011) ("A mistake is a belief that is not in accord with the facts.").

[29] *See Reppel Steel & Supply Co., Inc.*, 239 NLRB 358, 361 (1978) (finding wage proposal was not a mistake but rather an unambiguous offer, which was accepted by the union and therefore formed a binding contract).

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."[30] The Union here was in no position to know about payroll errors committed years ago, "nor was it in a position to even have suspected" that such errors existed.[31] Accordingly, this Court should reject Daycon's request (Br. 19 n.15) to rewrite the agreement "to allow for the correction of errors."[32]

Contrary to Daycon's claim (Br. 11), the Board did not in any way suggest that an employer can never correct a payroll error if a contract is in place. The Board ruled only that where the mistaken figures are incorporated into the terms of employment contained in the contract, an employer may not change those terms without the union's consent. The Board expressly declined to pass on whether

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[30] *North Hills Office Serv.*, 344 NLRB 523, 525 (2005); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 153 (2011) (contract not voidable due to one party's mistake unless "the other party had reason to know of the mistake or his fault caused the mistake"); *Brock v. Entre Computer Ctrs., Inc.*, 933 F.2d 1253, 1260-61 (4th Cir. 1991) (rejecting defense of mistake in absence of proof that both parties to contract held the mistaken view).

[31] *Reppel*, 239 NLRB at 362; *see also ConocoPhillips v. United States*, 501 F.3d 1374, 1379-80 (Fed. Cir. 2007) (rejecting theory of mutual or unilateral mistake where contract was clear about price calculations, despite plaintiff's claim that "they did not appreciate" that contract price did not accurately reflect market price).

[32] *Rohan v. Networks Presentations LLC*, 375 F.3d 266, 281 (4th Cir. 2004) (recognizing that "it is improper for the court to rewrite the terms of a contract for the parties where the terms of the contract are clear and unambiguous."); *Employing Lithographers of Greater Miami v. NLRB*, 301 F.2d 20, 28 (5th Cir. 1962) ("It is a familiar rule that courts will not rewrite contracts.").

Daycon could have lawfully corrected the payroll errors at any time before it executed the 2007-2010 contract, since that issue is not presented in this case. (A. 77.) But by including then-existing wage rates as an element of the contract's wage formula, the parties effectively rolled those wages into a term of the new agreement. And the Act prohibits a party from modifying a term contained in a collective-bargaining agreement.

The cases cited[33] by Daycon purportedly giving it the right to correct mistakes (Br. 10-13) are inapposite. As the Board pointed out (A. 77 n.3), the parties in those cases had not signed a contract codifying terms that the employer later changed. Here, the violation is that Daycon modified terms in a collective-bargaining agreement, which necessarily requires that such an agreement be in effect. And Daycon has cited no authority showing that an employer's mistake during a prior contract term excuses a mid-term modification during a subsequent contract signed by both parties. Daycon's claim (Br. 12-14) that the existence of a contract is irrelevant must be rejected where the wages in the new contract were premised on employees' actual wages at the time of execution.

[33] *Eagle Transport Corp.*, 338 NLRB 489, 493-94 (2002); *Foster Transformer Co.*, 212 NLRB 936, 936 (1974); *Dierks Forests, Inc.*, 148 NLRB 923, 926 (1964).

2. The Board is free to interpret collective-bargaining agreements to resolve unfair labor practice allegations and need not defer to arbitration decisions

Daycon next claims (Br. 15-29) that, even if the existence of a contract were relevant, arbitrators are the primary source of contract interpretation, and an arbitrator would have permitted it to change wage rates. But the cited arbitration decisions do not control the outcome of this case, and the Board does not owe deference to them. Furthermore, there is no certainty that Daycon would have prevailed in arbitration.

The Board is empowered to interpret collective-bargaining agreements when doing so is necessary to determine whether an unfair labor practice has occurred.[34] Here, the Board was called upon to decide whether Daycon violated the Act by modifying a term contained in the parties' collective-bargaining agreement, which necessarily required the Board to interpret that agreement.[35]

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[34] *NLRB v. C&C Plywood Corp.*, 385 U.S. 421, 429 (1967); *NLRB v. Int'l Bhd. of Elec. Workers, Local 11*, 772 F.2d 571, 575 (9th Cir. 1985) ("It is well within the NLRB's authority to interpret collective bargaining agreements in order to determine whether or not unfair labor practices have been committed."); *see Bonnell/Tredegar Indus., Inc. v. NLRB*, 46 F.3d 339, 344 (4th Cir. 1995) (agreeing with Board's interpretation of "the plain meaning of the parties' contractual agreement").

[35] *See NLRB v. L.B. Priester & Son, Inc.*, 669 F.2d 355, 363 (5th Cir. 1982) ("To determine whether [employer] had unilaterally changed the negotiated wage scale, the Board had to interpret the collective bargaining agreement.").

Contrary to Daycon's claims (Br. 15-16), while the Board recognizes arbitrators' expertise in resolving contract disputes, the Board does not have a history of giving precedential effect to unrelated arbitration decisions when it is called upon to interpret contracts. In fact, by long-standing policy, the Board gives preclusive effect to arbitration decisions involving the same parties and legal dispute only in narrow circumstances.[36] Here, none of the cited decisions involved Daycon and the Union. The Board's policy is not to defer to arbitration decisions involving different parties,[37] and that policy is entitled to deference from this Court.[38]

In any event, even viewing those decisions for their persuasive authority, Daycon's contention that it certainly would have prevailed under "the black letter

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[36] *See, e.g., Ciba-Geigy Pharm. Div. v. NLRB*, 722 F.2d 1120, 1128 (3d Cir. 1983).

[37] *In re Kroger Co.*, 334 NLRB 847, 849 (2001) ("[T]he Board does not defer [to an arbitrator's decision] where a party to the unfair labor practice proceedings was not a party to the arbitration proceedings."); *accord Spielberg Mfg. Co.*, 112 NLRB 1080, 1081 (1955) ("[T]he Board is not bound, as a matter of law, by an arbitration award."); *see also Horner v. Schuck*, 843 F.2d 1368, 1377-78 (Fed. Cir. 1988) (stating MSPB not required to defer to unrelated arbitration decisions involving different parties); *see also SEC v. Conaway*, 697 F. Supp. 2d 733, 743-45 (E.D. Mich. 2010) (rejecting idea that SEC was bound by prior unrelated arbitration decision).

[38] *NLRB v. Am. Nat'l Can Co.*, 924 F.2d 518, 522 (4th Cir. 1991) (stating Board has discretion in deciding how much weight to give to arbitration decisions); *Mobil Exploration & Producing U.S., Inc. v. NLRB*, 200 F.3d 230, 243-44 (5th Cir. 2002) (same); *NLRB v. Yellow Freight Sys., Inc.*, 930 F.2d 316, 322 (3d Cir. 1991) (same).

principles applied by arbitrators" (Br. 15) is wrong. There are arbitration decisions finding breaches of contract where parties attempted to correct mistakes or errors.[39] While an arbitrator may relieve a party of its contractual obligations due to *mutual* mistake, "unilateral mistake is not sufficient."[40] And, here, an arbitrator would be prohibited from rewriting the contract due to the parties' agreement that an arbitrator "shall have no authority to add to, subtract from, or in any manner or way alter, amend or modify the terms of the agreement." (A. 158.)

3. Substantial evidence supports the Board's finding that the Union "relied" on the wage information provided to it by Daycon and expected it to be accurate

The Board found (A. 78) that, even "to the extent that [Daycon'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" because the Union was in no position to know of the mistake and instead "relied in good faith" on wage information it received

[39] *See Raley's Supermarkets*, 124 Lab. Arb. Rep. (BNA) 829, 832 (2007) (Staudohar, Arb.) (finding employer's clerical error not sufficient to relieve it of complying with plain language of contractual wage provision); *Cleo Wrap*, 90 Lab. Arb. Rep. (BNA) 768, 769 (1988) (Welch, Arb.) (union's mistake about contract language irrelevant where contract was clear and parties both read and signed it); *Jafco, Inc.*, 82 Lab. Arb. Rep. (BNA) 283, 285-86 (1984) (Armstrong, Arb.) (employer breached contract by unilaterally ending past practice of time-and-a-half pay for Sunday work, which became term of employment, even if such payments were result of mistake).

[40] ELKOURI & ELKOURI, HOW ARBITRATION WORKS 572 (5th ed. 1997).

from Daycon. Although Daycon challenges (Br. 31-32) the finding of reliance, the record more than meets the substantial evidence standard of review.

As noted, before bargaining for the contract began, the Union asked Daycon how much each employee was earning. The Union indicated that its request was "pertaining to the bargaining of a new Collective Bargaining Agreement" (A. 124), and Daycon provided the information for each individual employee by name, (A. 127-28).

At the hearing, Union Business Agent Webber testified that the Union used the wage information "to come up with our proposals for the successor contract, for a starting point of wages. . . . we needed a square footing and a starting point for future negotiations and proposals." (A. 16.) Webber "had to have starting real wages, real dollars to know where we were going in the future." (A. 54.) Webber further testified on cross-examination that he had no basis for questioning the accuracy of the information provided to him by Daycon. (A. 46.) The fact that the parties ultimately agreed to wage increases similar to those contained in a previous contract (Br. 32) does nothing to rebut the Board's finding, which is fully supported by the record evidence.

Daycon also points out (Br. 32) that the pay increase "each employee" was entitled to receive "to his/her rate of pay" under the contract depended on that employee's job title (A. 141). All the employees at issue here were entitled to 55¢

annual increases. But this in no way calls into question the Union's reliance on the accurate information it received from Daycon about then-current wage rates. As Webber said in a letter to Daycon, the starting point for negotiations had been the actual wages employees were earning at that time, as set out in the "Seniority List" Daycon gave to the Union. (A. 201.) Webber said the Union "would have bargained for a bigger increase" if it had been aware of the payroll errors. (*Id.*) The Board's finding that the Union relied on the information it received from Daycon is well-supported.

Daycon further claims – wrongly – that the main issue before the judge was whether there even was a payroll mistake, and that the Board's decision, which discusses the Union's reliance on the wage information it received during negotiations, therefore rests on a legal theory different from that put forward by the Acting General Counsel at the hearing. (Br. 33 & n.25.) The violation found by the Board was no different than the Acting General Counsel's complaint allegation or trial theory. The theory was not complex: he alleged that Daycon modified wage rates contained in the contract. The Board's discussion of the Union's reliance on the wage information Daycon provided during negotiations (A. 78) responded to Daycon's defense that it was privileged to make the modification due to its payroll mistake. The Union's reliance was not a necessary element of the unlawful modification violation or underlying theory. Moreover, nothing in the

Board's decision suggests that the Acting General Counsel was contesting the existence of an error, or that whether an error occurred was the primary issue before it.

4. This Court lacks jurisdiction to consider Daycon's untimely challenge to the judge's evidentiary rulings; the judge did not abuse his discretion or prejudice Daycon

Finally, Daycon claims (Br. 33-36) that it was denied due process, and that the Board's findings were not fully and fairly litigated, because the judge prohibited it from presenting "evidence on the wage proposals during negotiations, or the meaning and intent of the wage article in the collective bargaining agreement." This Court does not have jurisdiction to entertain these arguments because Daycon did not properly raise them before the Board.[41]

Section 10(e) of the Act states, in part, that "[n]o objection that has not been urged before the Board . . . shall be considered by the court."[42] Application of Section 10(e) is "mandatory, not discretionary."[43] A "court of appeals has no power, *sua sponte*, to find objectionable a portion of an NLRB order, if no

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[41] *See Int'l Ladies' Garment Workers Union v. Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975) (refusing to consider objection that Board denied employer procedural due process because employer failed to raise that issue before the Board).

[42] 29 U.S.C. § 160(e).

[43] *Oldwick Materials, Inc. v. NLRB*, 732 F.2d 339, 341 (3d Cir. 1984) (citing *NLRB v. Ochoa Fertilizer Corp.*, 368 U.S. 318, 322 (1961)); *see also NLRB v. HQM of Bayside, LLC*, 518 F.3d 256, 262 (4th Cir. 2008).

objection was raised before the Board and the failure to object was not excused by any 'extraordinary circumstances.'"[44]

Moreover, to preserve their rights on appeal, litigants must raise their objections at the proper time and in compliance with the Board's rules.[45] As the Supreme Court has recognized, "courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection *made at the time appropriate under its practice*."[46] The Board's Rules and Regulations state that "[n]o matter not included in exceptions or cross-exceptions may thereafter be urged before the Board, or in any further proceeding."[47] Parties that do file exceptions are required to "concisely state the grounds for the exceptions" and include "citation of authorities and argument in

[44] *Oldwick*, 732 F.2d at 342 (citing *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665 (1982), and *NLRB v. United Mineworkers*, 355 U.S. 453, 463-64 (1958)).

[45] *E.g.*, *Spectrum Health-Kent Cmty. Campus v. NLRB*, 647 F.3d 341, 349 (D.C. Cir. 2011) ("[T]o preserve objections for appeal a party must raise them in the time and manner that the Board's regulations require.").

[46] *United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952) (emphasis added); *see also State of S.C. v. Dep't of Labor*, 795 F.2d 375, 378 (4th Cir. 1986).

[47] 29 C.F.R. § 102.46(g).

support of the exceptions."[48] Any exceptions that fail to comply with these requirements are waived, and the Board may disregard them.[49]

Before the Board, Daycon did not except at all to any ruling by the judge excluding evidence about the meaning and intent of the wage provision of the contract. (Add. 1-2.) Daycon did include one sentence on the judge's exclusion of evidence regarding proposals made during negotiations:

> The ALJ erred in limiting questioning of the business agent for the [Union] regarding the wage negotiations on the current and prior bargaining agreement, as such questioning would have shown that the wage proposals were the same as in prior negotiations, rather than specifically tailored based on the wage scale document (Tr. at p. 104-05).

(Add. 2.) But the exceptions contained no further explanation or "citation of authorities and argument in support of the exceptions," as the Board's rules require, and Daycon failed to file an accompanying brief.

Such cursory treatment, devoid of argument or citation to legal authority, falls short of preserving an issue for review under the Board's regulations.[50] And

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[48] *Id.* § 102.46(b)(1).

[49] *Id*. § 102.46(b)(2); *Elizabethtown Gas Co. v. NLRB*, 212 F.3d 257, 265 (4th Cir. 2000) ("passing reference" not sufficient to preserve objection; allegation of error must be grounded in an appropriately specific objection).

[50] *HQM of Bayside*, 518 F.3d at 262 (refusing to review issue where, before Board, exceptions did not raise it and brief did not contain any argument on it); *Elizabethtown*, 212 F.3d at 265 (same); *NLRB v. Daniel Constr. Co.*, 731 F.2d 191, 198 (4th Cir. 1984) (refusing to consider issue mentioned only generally in exceptions, "a lapse compounded by [party's] failure to brief or argue" the issue to

Daycon cites no authority for its claim (Br. 35 n.28) that these regulations are intended "merely to ensure compliance with a 50-page limit for briefs." Here, Daycon failed to present *any* argument. The Board has consistently held in such circumstances that it will not do the party's job by "determin[ing] what if any problems, errors, or irregularities are presented by the judge's decision."[51] Because the Board acted within its discretion in disregarding Daycon's deficient exceptions[52] (A. 77 n.1), Daycon is wrong when it claims the Board had notice of their contents (Br. 36).

Daycon contends (Br. 36 n.29) that, as a "victorious" party before the judge, it cannot be required to comply with the Board's requirement that it "concisely state the grounds for the exceptions" and "include the citation of authorities and argument in support of the exceptions."[53] But this Court and others have rejected any claim that a party is relieved of its obligation to file proper exceptions with the

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the Board); *Holsum de Puerto Rico, Inc.*, 344 NLRB 694, 694 n.1 (2005) (disregarding exceptions that failed to state "on what grounds the purportedly erroneous findings should be overruled"), *enforced*, 456 F.3d 265 (1st Cir. 2006).

[51] *Bonanza Sirloin Pit*, 275 NLRB 310, 310 (1985); *accord Thriftway Supermarket*, 294 NLRB, 173, 173 n.2 (1989).

[52] *See Hospital del Maestro v. NLRB*, 263 F.3d 173, 174-75 (1st Cir. 2001) (reviewing Board's refusal to consider exceptions for abuse of discretion); *NLRB v. Washington Star Co*., 732 F.2d 974, 976 (D.C. Cir. 1984) (noting the Board's "broad discretion in making an applying its own procedural regulations" regarding exceptions).

[53] 29 C.F.R. § 102.46(b)(1).

Board just because it prevailed before the administrative law judge.[54] When it filed its cross-exceptions, Daycon was aware of the judge's evidentiary rulings, and it failed to properly and fully except to them. It cites no extraordinary circumstances for its failure to do so.[55] Accordingly, the Court has no jurisdiction to review those rulings.[56]

After the Board issued its Order reversing the judge's conclusion on the merits, Daycon did file a motion for reconsideration in which it raised the objections to the judge's evidentiary rulings that it presses here. But by that time, "'it was too late.'"[57] Daycon had to challenge those rulings in its cross-exceptions,

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[54] *NLRB v. Cast-A-Stone Prods. Co.*, 479 F.2d 396, 397 (4th Cir. 1973) (court lacks jurisdiction under Section 10(e) to consider arguments not raised through cross-exceptions, even though judge recommended dismissal of complaint); *see also Prod. Workers Union of Chicago & Vicinity, Local 707 v. NLRB*, 161 F.3d 1047, 1054 (7th Cir. 1998) (same); *NLRB v. GAIU Local 13-B*, 682 F.2d 304, 311 (2d Cir. 1982) (rejecting union's argument "that since it had prevailed before the ALJ it should be excused for not having filed timely cross-exceptions with the Board"); *NLRB v. R.J. Smith Constr. Co.*, 545 F.2d 187, 192 (D.C. Cir. 1976) ("The mere fact that the Company prevailed before the trial examiner does not constitute 'extraordinary circumstances' justifying us from relieving it of its burden.").

[55] *Daniel Constr.*, 731 F.2d at 198 (refusing to consider argument not raised to Board in absence of "extraordinary circumstances").

[56] *Elizabethtown*, 212 F.3d at 265.

[57] *Spectrum*, 647 F.3d at 349 (quoting *Parkwood Dev. Ctr., Inc. v. NLRB*, 521 F.3d 404, 410 (D.C. Cir. 2008)); *see also U.S. Mosaic Tile Co., Inc. v. NLRB*, 935 F.2d 1249, 1257 (11th Cir. 1991) ("We find it entirely reasonable for the Board to require parties to present all their arguments in their exceptions to the ALJ's report, unless the Board finds exceptional circumstances."); *A.H. Belo Corp. (WFAA-TV)*

which the Board disregarded as procedurally deficient. The Board denied the motion for reconsideration, finding that Daycon "fail[ed] to present 'extraordinary circumstances' warranting reconsideration under Section 102.48(d)(1)."[58] (A. 83-85.) And in its opening brief, Daycon has not even contested the denial of its motion for reconsideration, much less shown, that the Board abused its discretion by denying that motion.[59] Because Daycon failed to meet the minimum requirements to preserve these issues under the Board's Rules and Regulations, this Court has no jurisdiction to consider them.[60]

In any event, Daycon's arguments have no merit. Although Board hearings should, "so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts,"[61] the Board has considerable discretion

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v. NLRB, 411 F.2d 959, 967 (5th Cir. 1969) (defense raised for first time in motion for reconsideration "came entirely too late").

[58] 29 C.F.R. § 102.48(d)(1) states that "[a] party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration, rehearing, or reopening of the record after the Board decision or order."

[59] *NLRB v. USA Polymer Corp*., 272 F.3d 289, 296 (5th Cir. 2001) (reviewing Board's denial of motion for reconsideration under abuse of discretion standard); *Mosaic Tile*, 935 F.2d at 1254 ("[T]he Board's decisions on whether to grant motions for reconsideration are, like other procedural determinations, within its discretion.").

[60] *Int'l Ladies' Garment Workers Union v. Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975) (refusing to consider objection that it was denied procedural due process because employer failed to raise that issue before the Board).

[61] 29 U.S.C. § 160(b).

on evidentiary rulings.[62] Such rulings are reviewed for abuse of discretion,[63] and the party challenging the ruling must prove prejudice.[64] Daycon has shown neither.

Daycon's claim (Br. 34) is that it was prevented from questioning witnesses about wage proposals and the parties' intent during contract negotiations. Yet, it has not explained how the admission of such evidence would have resulted in a different outcome. Regardless of what happened during bargaining, the parties ultimately agreed that "each employee shall receive" an annual 55¢ "increase to his/her rate of pay" for the duration of the contract. And Daycon admits (Br. 24) that this plain language demonstrates the parties' intent. Because Daycon has not shown that it was prejudiced by the judge's evidentiary rulings, its argument must be rejected.

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[62] *Arta Group, Inc. v. NLRB*, 730 F.2d 586, 591 (10th Cir. 1984) (the "decision not to consider evidence is within the discretion of the ALJ").

[63] *See Reno Hilton Resorts v. NLRB*, 196 F.3d 1275, 1285 n.10 (D.C. Cir. 1999) (reviewing judge's refusal to admit evidence for abuse of discretion); *Canadian Am. Oil Co. v. NLRB*, 82 F.3d 469, 475 (D.C. Cir. 1996) (same).

[64] *Exxon Chem. Co. v. NLRB*, 386 F.3d 1160, 1166 (D.C. Cir. 2004) (employer failed to demonstrate prejudice from ALJ's exclusion of evidence); *Desert Hosp. v. NLRB*, 91 F.3d 187, 190 (D.C. Cir. 1996) (employer "failed to show that any prejudice resulted from its inability to present the additional evidence at the hearing").

CONCLUSION

Daycon and the Union bargained for specific wage rates to be earned by each employee during each year of the contract. These terms of employment were set out in the parties' collective-bargaining agreement. Yet Daycon modified those terms when it reduced the wages of eight employees mid-contract without the Union's consent. The Board correctly determined that Daycon violated the Act by doing so, and it respectfully requests that the Court enter a judgment enforcing the Board's Order in full.

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April 2012

STATEMENT REGARDING ORAL ARGUMENT

The Board believes this case involves the application of settled principles of law to largely undisputed facts, making oral argument unnecessary. If argument is held, however, the Board requests that the parties be given equal time to assist the Court in resolving the issues in this case.

RESET FORM

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 12-1022 **Caption:** NLRB v. Daycon Products Company, Inc.

CERTIFICATE OF COMPLIANCE WITH RULE 28.1(e) or 32(a)
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(s) Linda Dreeben (by MF)

Attorney for National Labor Relations Board

Dated: April 2, 2012

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD	)	
	)	
Petitioner	)	
	)	
and	)	No. 12-1022
	)	
DRIVERS, CHAFFEURS AND HELPERS LOCAL UNION NO. 639	)	
	)	
	)	
Intervenor	)	
	)	Board Case No.
v.	)	5-CA-35043
	)	
DAYCON PRODUCTS COMPANY, INC.	)	
	)	
Respondent	)	

CERTIFICATE OF SERVICE

I certify that on April 2, 2012 I electronically filed the foregoing with the Clerk of the Court of the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and service will be accomplished by the CM/ECF system.

/s Linda Dreeben (by MF)
Linda Dreeben
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD
1099 14th Street, NW
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(202) 273-2960

Dated at Washington, DC
this 2nd day of April 2012

ADDENDUM

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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

RESPONDENT'S CROSS-EXCEPTIONS
TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

EPSTEIN BECKER & GREEN, P.C.
Mark M. Trapp, Esq.
Paul Rosenberg, Esq.
Attorneys for Daycon Products Company, Inc.

Dated: March 12, 2010

Respondent Daycon Products Company Inc. ("Daycon"), pursuant to Section 102.46 of the National Labor Relations Board Rules and Regulations, cross-excepts to the January 8, 2010 Decision and Order of Administrative Law Bruce D. Rosenstein (the "ALJ") as follows:

1. The ALJ erred in limiting questioning of the business agent for the Charging Party regarding the wage negotiations on the current and prior bargaining agreement, as such questioning would have shown that the wage proposals were the same as in prior negotiations, rather than specifically tailored based on the wage scale document (Tr. at p. 104-05)

2. The ALJ erred in limiting questioning of the business agent for the Charging Party regarding the contractual minimums and their permissive nature, as such questioning would have shown that Daycon had the right to unilaterally raise and to lower wages, so long as it paid the minimums in the collective bargaining agreement. (Tr. at pp. 95-101)

3. The ALJ erred in limiting questioning of the business agent for the Charging Party regarding the union dues being based on the hourly wage rates, as such questioning would have shown that the union was well aware of the various wage rates in place throughout the administration of the contracts. (Tr. at p. 118)

Dated: March 12, 2010
Washington, DC

Respectfully submitted,

EPSTEIN BECKER & GREEN, P.C.

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RELEVANT SECTIONS OF THE NATIONAL LABOR RELATIONS ACT AND THE BOARD'S RULES AND REGULATIONS

Relevant provisions of the National Labor Relations Act,
29 U.S.C. § 151-69 (2000):

Sec. 7. [Sec. 157] Employees shall have the right to self- organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [Section 158(a)(3) of this title].

Sec. 8(a). [Sec. 158(a)] [Unfair labor practices by employer] It shall be an unfair labor practice for an employer--

> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [Section 157 of this title];
>
> * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) [Section 159(a) of this title].

Sec. 8(d). [Sec. 158(d)] [Obligation to bargain collectively] For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

> (1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;
(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and
(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later….

.Sec. 10(e). [Sec. 160(e)] [Petition to court for enforcement of order; proceedings; review of judgment] The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. …

Sec. 10(f). [Sec. 160(f)] [Review of final order of Board on petition to court] Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside.

A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

Relevant provisions of the Board's Rules and Regulations, 29 C.F.R. § 102.46:

§ 102.46 Exceptions, cross-exceptions, briefs, answering briefs; time for filing; where to file; service on the parties; extension of time; effect of failure to include matter in exceptions; reply briefs; oral arguments.

…

(b)(1) Each exception (i) shall set forth specifically the questions of procedure, fact, law, or policy to which exception is taken; (ii) shall identify that part of the administrative law judge's decision to which objection is made; (iii) shall designate by precise citation of page the portions of the record relied on; and (iv) shall concisely state the grounds for the exception. If a supporting brief is filed the exceptions document shall not contain any argument or citation of authority in support of the exceptions, but such matters shall be set forth only in the brief. If no supporting brief is filed the exceptions document shall also include the citation of authorities and argument in support of the exceptions, in which event the exceptions document shall be subject to the 50–page limit as for briefs set forth in § 102.46(j).

(2) Any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged shall be deemed to have been waived. Any exception which fails to comply with the foregoing requirements may be disregarded.

…

(g) No matter not included in exceptions or cross-exceptions may thereafter be urged before the Board, or in any further proceeding.

§ 102.48 Action of the Board upon expiration of time to file exceptions to the administrative law judge's decision; decisions by the Board; extraordinary postdecisional motions.

…

(d)(1) A party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration, rehearing, or reopening of the record after the Board decision or order. A motion for reconsideration shall state with particularity the material error claimed and with respect to any finding of material fact shall specify the page of the record relied on.