

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

CAREY SALT COMPANY, a subsidiary of
COMPASS MINERALS INTERNATIONAL, INC.
Respondent,

and

Case Nos. 15-CA-020035
15-CA-061694

UNITED STEEL, PAPER AND FORESTRY,
RUBBER, MANUFACTURING, ENERGY,
ALLIED INDUSTRIAL AND SERVICE WORKERS
INTERNATIONAL UNION and
LOCAL UNION 14425

Charging Parties.

**CHARGING PARTY UNION'S CROSS-EXCEPTIONS
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

Emma Rebhorn
Assistant General Counsel
United Steelworkers
Five Gateway Center – Suite 807
Pittsburgh, PA 15222
Phone: (412) 562.2562
Fax: (412) 562.2574
Erebhorn@usw.org

*Attorney for United Steel, Paper and
Forestry, Rubber, Manufacturing,
Energy, Allied Industrial and Service
Workers International Union and
Local Union 14425*

Now come Charging Parties United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union and its Local Union 14425 (collectively, “Union”), and do hereby respectfully submit these Cross-Exceptions to limited portions of the Decision of the Administrative Law Judge (“ALJD”) in accordance with the Rules and Regulations of the National Labor Relations Board (“Board”), Section 102.46:

- 1. The Union excepts to the ALJ’s use of a *Wright Line* analysis in determining whether Respondent discriminatorily withheld a wage increase, because Respondent’s motivation for withholding the wage increase was not in dispute. The Board is urged to find that there is no dispute regarding the motive of the challenged employment action in this case. (ALJD at 14 L. 25-ALJD at 18 L. 45).**

The ALJ correctly found that Respondent withheld a scheduled wage increase as retaliation against its employees for filing unfair labor practice charges. (ALJD at 17). In reaching this conclusion, however, the judge unnecessarily applied a *Wright Line* analysis to determine whether Respondent’s delay of the March 2011 wage increase was an unlawful retaliation for the Union’s participation in the prosecution of unfair labor practice charges 15-CA-19704 and 15-CA-19738. *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981). A *Wright Line* analysis is necessary only when an employer’s motivation for an adverse employment action is unclear. In *Valley Hospital Medical Center*, for example, the Board held that the application of a *Wright Line* analysis was in error when “all of the statements that undisputedly motivated [an employee’s challenged] discharge were protected under the Act.” *Valley Hosp. Med. Ctr., Inc.*, 351 NLRB 1250, 1254 (2007). The Board explained that “Wright Line applies [only] where the motive for a challenged employment action is in dispute.” *Id.* at 1251 n.5.

Respondent has never disputed its motive for the employment decision challenged here. Rather, Respondent repeatedly admitted that the petition for Section 10(j) relief was the reason it had not instituted the wage increase. It admitted this on March 10, when it posted and emailed a notice that said the wage “increase will not be made until we successfully resist the injunction that the National Labor Relations Board (NLRB) is seeking against us.” (ALJD at 4). It did so again on March 14, when Respondent said “the only way [the employees would] get a raise, [is if they would] wait on the Judge’s decision on the 10(j).” (ALJD at 16). It did so again in a March 31, 2011, email in which it erroneously claimed that the 10(j) injunction would “prohibit[] any 2011 increase.” (ALJD at 21). And Respondent continued to admit this fact at trial. (Tr. 28 (“The Company changed its mind, because General Counsel was seeking 10(j) injunctive relief . . . ”)).¹

As the Board explained in *Valley Hospital*, when the motivation for an employment decision is uncontested, the only remaining question is whether the action that motivates the employment decision enjoys the protection of the Act. *Valley Hosp.*, 351 NLRB at 1251 n.5. That is, of course, the case here. Filing and cooperating with the prosecution of a Board charge is a quintessential protected act. *Copper Craft Plumbing, Inc.*, 354 NLRB No. 108, at *26 (2009) (“[I]t is axiomatic that an employee's filing a charge with the Board is also protected activity.”).

¹ Respondent claims that the Section 10(j) injunction sought an unconditional or “full return to the terms and conditions that existed” prior to Respondent’s initial, pre-impasse implementation on March 31, 2010. This is false, as the Union reminded Respondent in March 2011. Rather, the Section 10(j) petition requested “an interim order of relief” that would involve Respondent “rescinding, upon request, Respondent’s unilateral changes to employees’ terms and conditions of employment.” (General Counsel’s Exhibit (“GCX”) 22a at 12). Maybe the Union would have requested Respondent to rescind the scheduled wage increases, and maybe the Union would not have. In any case, the court denied the Region’s petition and the Union never had that opportunity. In the absence of such a request, Respondent acted unlawfully when it rescinded and postponed the wage increase on its own.

Granted, the ultimate conclusion regarding the unlawfulness of Respondent's conduct is just as clear even if a *Wright Line* analysis is required. In reaction to the 10(j) petition, Respondent repeatedly admitted that the employees' protected activity was the reason it delayed the scheduled 2011 wage increases. The motivational link could not be clearer, and Respondent unequivocally admits the link in its Exceptions: "the relief sought in the 10(j) proceeding was the driving force behind the Company's decision not to proceed with an increase [in wages] during the pendency of the 10(j)." (Exceptions at 13). Respondent's frank admission that the Section 10(j) petition was the "driving force" behind its decision leaves little question about whether it would have instituted the wage increase in the absence of the petition. Respondent would not have done so. The lack of ambiguity surrounding Respondent's actions leaves the *Wright Line* analysis unnecessary.

2. The Union excepts to the extent that the ALJ was inconsistent in his finding that Respondent discussed its withholding of the wage increase with Local Union officials on March 14, 2011. (ALJD at 16 LL. 1-5; ALJD at 19 L. 35; ALJD at 23 LL. 32-34; ALJD at 24 LL. 2-4).

During a regularly scheduled meeting between labor and management representatives on March 14, 2011, Local Union President Mark Migues questioned Respondent's Mine Manager Gord Bull about whether bargaining unit employees would receive the scheduled wage increase. (ALJD at 16 LL.1-11; ALJD at 24 LL. 1-9). The ALJ made two findings that this meeting occurred on March 14. First, the ALJ found that the meeting occurred on March 14 while discussing Respondent's motivation for withholding the wage increase in connection to the Section 8(a)(3) and Section 8(a)(4) allegations of Case 15-CA-20035. (ALJD at 16 LL. 1-5). Second, the ALJ found that the meeting occurred on March 14 when discussing whether Bull made a statement that violated Section 8(a)(1) during the meeting. (ALJD at 24 LL. 2-4).

However, in a third instance, the ALJ wrote that the meeting occurred on March 10, the date Respondent posted and emailed its employees an announcement of the delay. (ALJD at 19, LL. 28, 35). It is clear that the ALJ was discussing the same meeting in all three instances, because he attributes identical statements to Bull. (*See* ALJD at 19 LL. 35-38 (“When asked . . . whether the employees were going to receive a raise that year, Bull respondent by asking whether ‘they’ were going to drop the 10(j) ‘charges.’”). Given the inconsistency, the Union excepts for the purpose of clarifying the record, and requests that the Board modify the ALJ’s decision so that it is consistent in finding that Respondent discussed its withholding of the wage increase with Local Union officials on March 14.

3. The Union excepts to the extent that the ALJ did not find that Respondent’s delay of the wage increase scheduled for March 2011 violated Section 8(a)(3) of the National Labor Relations Act. (ALJD at 17 LL. 22-29; ALJD at 18 LL. 9, 45; ALJD at 25 LL. 34-36).

The National Labor Relations Act (“NLRA”) protects employees against discrimination that interferes with employees’ protected concerted activities, thereby discouraging their membership in a labor organization. Case 15-CA-20035 charged that Respondent’s two-month delay in instituting a scheduled wage increase was discriminatory, in violation of NLRA Section 8(a)(3). (GCX 1(j)). The ALJ found it “unnecessary to conclude” that the delay violated 8(a)(3) “because the remedy for such a violation would be the same as that for the 8(a)(4) violation,” which the ALJ had concluded was substantiated. (ALJD at 17). The Union objects to the ALJ’s failure to find that Respondent violated 8(a)(3), because that violation had independent merit, and because Respondent has objected to the ALJ’s finding that it violated 8(a)(4).

Here, the ALJ held that “the credited evidence does not establish that Respondent delayed the wage increase because of any protected activity other than the filing of the unfair labor

practice charge,” and the resulting Section 10(j) petition. (ALJD at 17). However, the distinctions between Section 8(a)(3) and 8(a)(4) are not only the protected employee activities those sections protect, but the unlawful employer motivations they protect against. As the Board acknowledges, “the fact is that Section 8(a)(3) and (4) are different allegations which raise different issues presented by different defenses.” *Bouley, Inc.*, 306 NLRB 385, 386 (1992). Section 8(a)(3) protects against discrimination “to encourage or discourage membership in any labor organization.” 29 U.S.C. § 158(a)(3). Section 8(a)(4) protects against discrimination “against an employee because he has filed charges or given testimony under the Act.” 29 U.S.C. §158(a)(4). Here, Respondent was clearly motivated to discriminate against employees because of their participation, through the Union, in the Section 10(j) process. (*See* Union’s Brief in Opposition to Respondent’s Exceptions, at 12-15). However, Respondent had an additional motivation, which was to denigrate the Union’s role in the process that ultimately led to Respondent’s instituting the delayed wage increase.

When Respondent finally instituted the delayed wage increase, it suggested that both the Board and the Union had been preventing it from doing so. On May 20, 2011, Respondent sent a notice to its employees that read, in part, “we have notified the USW of our desire to place a 2.50% wage increase into effect as of Monday, May 23, 2011. We will keep you advised of further developments.” (GCX 7d). This statement clearly attempted to position the Union as the party responsible for the delayed wage increase. The statement implied that the Union might oppose the wage increase, even though the Union had never indicated—either through the Board or on its own—that it wanted anything other than an immediate implementation of the wage increase that had been scheduled to take effect in March. The Union had, in fact, informed Respondent, “we have never requested cancellation of the March 31, 2010 2.5% wage increase

nor will we seek cancellation of the 2.5% wage increase that was due effective March 25, 2011.”

(GCX 8a at 1 (Email from USW Staff Representative Michael Tourne to Respondent Vice President Victoria Heider, March 31, 2011 (emphasis added))). Respondent’s willful disregard of the Union’s wishes with respect to the wage increase could only serve to alienate employees from their bargaining representative, and thereby “discourag[ing] membership” in the Union in violation of Section 8(a)(3). 29 U.S.C. § 158(a)(3). The ALJ’s conclusion to the contrary was in error.

- 4. The Union excepts to the extent that the ALJ did not find that Respondent failed to give the Union any notice of the delay of the wage increase scheduled for March 2011 because Respondent never informed the proper Union representative of the delay. (ALJD at 20 LL. 16-17).**

The United Steelworkers International Union (“International Union”) is the designated exclusive bargaining representative of all production and maintenance employees employed at Respondent’s Cote Blanche mine. (ALJD at 3). The International Union chartered Local Union 14425 (“Local Union”) to represent its members who work the mine. However, the International Union has always been and remains the entity with which Respondent deals, bargains and contracts concerning employees’ terms and conditions of employment. Respondent recognized this at trial, when Respondent’s counsel asked Mine Manager Gord Bull if “the union ever nominate[d] or instruct[ed]” him to “provide notices . . . to any bargaining-unit member or union representative at the mine?” (Tr. 108 LL. 8-11). Bull replied that the person to whom he was “instructed to give . . . notices” was the “union business agent,” who he identified as “either Mike Tourne or Gary Fuslier.” (Tr. 108 LL. 13, 16, 18). Both Tourne and Fuslier are employed by the International Union as staff representatives. (Tr. 60 LL. -23). For that reason, the ALJ erred when he held that “Respondent informed the Union of its decision 2 weeks before the raise

was to take effect.” (ALJD at 20 LL. 16-17). Respondent discussed withholding the wage increase with Local Union officials on March 14, but Respondent never “informed the Union” of that fact, because Respondent never gave notice that it was withholding the increase to its employees’ exclusive bargaining representative. (See ALJD at 16 LL. 1-5; ALJD at 23 LL. 32-34; ALJD at 24 LL. 2-4)

Dated: July 13, 2012

Respectfully submitted,

s/Emma Reborn

Emma Reborn
Assistant General Counsel
United Steelworkers
Five Gateway Center – Suite 807
Pittsburgh, PA 15222
Phone: (412) 562.2562
Fax: (412) 562.2574
Ereborn@usw.org

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of July, 2012, Charging Party Union's Cross –
Exceptions to the Decision of the Administrative Law Judge was e-mailed to:

Stephen C. Bensinger, T.A.
Andrew T. Miragliotta
National Labor Relations Board, Region 15
600 South Maestri Place, 7th Floor
New Orleans, LA 70130
stephen.bensinger@nlrb.gov
andrew.miragliotta@nlrb.gov
(Attorneys for Petitioner)

Stanley E. Craven
Shawn M. Ford
Spencer Fane Britt & Browne LLP
9401 Indian Creek Parkway, Suite 700
Overland Park, KS 66210
scraven@spencerfane.com
sford@spencerfane.com
(Attorneys for Respondent)

Julie Richards Spencer
Robein, Urann, Spencer, Picard & Cangemi
2540 Severn Avenue, Suite 400
Metairie, LA 70002
jrichard@respclaw.com
(Attorney for Union)

s/ Emma Reborn
Emma Reborn