

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

In the Matter of

MIKE SELL'S POTATO CHIP CO.

and

Case 9-CA-072637

BAKERS LOCAL UNION NO. 57

COUNSEL FOR THE ACTING GENERAL COUNSEL'S LIMITED EXCEPTIONS
AND
SUPPORTING ARGUMENT AND CITATIONS

On July 3, 2012, Administrative Law Judge Paul Bogas issued a Decision and proposed remedy in the above-captioned matter. Pursuant to the Board's Rules and Regulations Section 102.46(b)(1), Counsel for the Acting General Counsel herein submits these limited exceptions to the proposed remedy of the Decision, followed by supporting argument and citations:

1. The Administrative Law Judge's failure to specifically require Respondent to deposit monies into the employees' health savings account in order to restore them to the *status quo ante*. (ALJD p. 11, ll. 27-40, p. 12 ll. 19-23)
2. The Administrative Law Judge's proposed order, contrary to Board law, requiring Respondent to restore the previous lawful contractual health and welfare benefits only upon the Union's request. (ALJD p. 11, ll. 19-23)

ARGUMENT AND CITATION OF AUTHORITIES

Exception 1:

The Judge in the present case correctly found that Respondent violated Section 8(a)(5) and (1) of the Act by implementing changes to the contractual health and welfare benefits

provided to employees represented by the Union, without following procedures set forth in the contractual reopening clause and without obtaining the Union's consent. However, the Judge's recommended remedy for Respondent's actions does not sufficiently redress the violative conduct and make employees whole. In his decision, the Judge identified the standard remedy for an unlawful contract modification as "honor[ing] the contract," and wrote that he would "order the Respondent to restore and maintain" the health and welfare benefits provided for by the collective bargaining agreement between the parties. (ALJD p. 11 ll. 26-28, 31-32) The Judge then cited to *Kraft Plumbing & Heating*, 252 NLRB 891, 891 fn.2 (1980), enfd. mem 661 F.2d 940 (9th Cir. 1981) for the proposition that Respondent should reimburse unit employees for any *expenses* resulting from the modification of the collective-bargaining agreement (emphasis added). (ALJD p. 11, ll. 32-35) Absent from the Judge's discussion of a remedy, however, is any reference to reimbursing unit employees for the contributions Respondent failed to make into employees' health savings accounts. ¹/ Although the loss of these contributions does not necessarily amount to "expenses" for the unit employees, it constitutes a significant loss of benefits.

While honoring the contract is a part of the remedy for violations such as this one, a more complete and accurate statement of the Board's standard remedy in Section 8(a)(5) cases involving unilateral changes resulting in losses to employees is "to make whole any employee affected by the change." *Grand Rapids Press*, 325 NLRB 915, 916 (1998), enfd. mem. 208 F.3d 214 (6th Cir. 2000). In the instant case, making employees whole would be accomplished by not only reimbursing employees for *expenses*, but affirmatively reimbursing them for the *losses* they

¹ The Judge correctly determined that under the parties' collective bargaining agreement, Respondent must maintain employee health savings accounts into which employees may make pre-tax contributions and Respondent is obligated to contribute \$500 and \$1,000, respectively, to the health savings accounts of individual-plan participants and family-plan participants. (ALJD p. 3, ll. 22-25) The Judge correctly found that Respondent violated Section 8(a)(1) and (5) of the Act by slashing its required contractual contributions in half. (ALJD p. 3, ll. 40-43).

suffered; specifically, depositing the full amount required by the contract in employees' health savings accounts so as to restore them to the place they would have been in had there been no unlawful unilateral change. Ordering such a remedy is supported by *Kraft Plumbing & Heating*, 252 NLRB 891, 891 fn.2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), in which the Board upheld the administrative law judge's recommendation that respondent be ordered to reimburse employees for trust fund contributions that it unlawfully had failed to make.

In contrast to the Judge's discussion of his proposed remedy, the proposed order instructs Respondent to make employees whole for all losses they may have suffered, not just expenses. However, the remedy section of the Judge's Decision explains the basis for the remedial provisions of the Order, and the Order may be interpreted in light of that explanation. For these reasons, and to resolve any ambiguity between the Remedy section and the proposed Order, the Order should be amended to specifically require Respondent to deposit the full amount of contributions it failed to make to affected employees' health savings accounts.

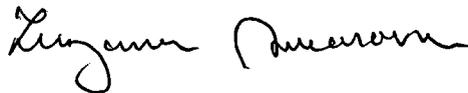
Exception 2:

The Judge's recommended order instructs Respondent, in relevant part, to "take the following affirmative action necessary to effectuate the policies of the Act . . . upon the B&C Union's request" (ALJD p. 12, ll. 17-19) Ordering Respondent to take the specified actions only upon the Union's request is contrary to Board law. In the case of unilateral changes resulting in losses to employees, the standard Board remedy is to make employees whole for any losses they have suffered as a result of those changes. *Goya Foods of Fla.*, 356 NLRB No. 184 (2011). The Board requires a union to demand rescission of the unlawful change only if the unlawful change confers a benefit on bargaining unit employees. *Id.* When no benefits have been gained, employees should be made whole even if their union chooses not to demand

restoration of the lawful status quo. *Id.* In the instant case, Respondent *decreased* its contribution amount after employees' deductibles were met, and *slashed* its contribution to employees' health savings accounts by half. (ALJD p. 3, ll. 34-43; pp. 10, ll. 22-24) Based on the foregoing, and since there was no benefit that employees gained as a result of the Respondent's unlawful change, the Order should be modified to delete language requiring the Union to take the superfluous step of requesting restoration of the prior lawful contractual benefits.

Dated at Cincinnati, Ohio this 31st day of July 2012.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Zuzana Murarova". The signature is fluid and cursive, with a large initial "Z" and a long, sweeping tail.

Zuzana Murarova
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CERTIFICATE OF SERVICE

July 31, 2012

The undersigned hereby certifies that the foregoing Counsel for the Acting General Counsel's Exceptions and Supporting Citations and Argument was served by electronic mail to the following persons:

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