

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

DAYCON PRODUCTS COMPANY, INC.

and

Case No: 5-CA-35043

DRIVERS, CHAUFFEURS AND HELPERS LOCAL
UNION NO. 639 a/w INTERNATIONAL
BROTHERHOOD OF TEAMSTERS

**POSITION STATEMENT OF THE CHARGING PARTY,
TEAMSTERS LOCAL UNION NO. 639, ON REMAND**

John R. Mooney
Mooney, Green, Saindon,
Murphy & Welch, P.C.
1920 L Street, N.W. Suite 400
Washington, D.C. 20036
(202)783-0010

*Attorney for Charging Party,
Teamsters Local Union No. 639*

Date: June 18, 2013

TABLE OF CONTENTS

I. STATEMENT OF THE CASE..... 5

II. FACTUAL BACKGROUND..... 7

 A. The Parties & Their Bargaining History..... 7

 B. Mid-term Contract Modification 9

III. STATEMENT OF THE ISSUE..... 11

IV. ARGUMENT..... 11

 A. The Sound Arguable Basis Test Does Not Apply to Daycon’s Unilateral
 Modification of the Contract 12

 B. Assuming, *Arguendo*, that the Sound Arguable Basis Test Does Apply, Daycon
 Nevertheless Cannot Succeed on a Sound Arguable Basis Defense. 15

V. CONCLUSION..... 19

TABLE OF AUTHORITIES

U.S. Circuit Court Cases

NLRB v. Daycon Prods. Co., 2013 U.S. App. LEXIS 4299 (4th Cir. Feb. 28, 2013) 6, 7, 12

National Labor Relations Board Cases

Bath Iron Works Corp., 345 NLRB 499 (2005) passim

Chapin Hill at Red Bank, 359 NLRB No. 125 (2012)..... 15, 17

Chase Mfg., Inc., 200 NLRB 886 (1972)..... 19

Clevenger Logging, Inc., 220 NLRB 768 (1975) 18, 19

Conoco, Inc., 318 NLRB 60 (1995)..... 15

Daycon Prods. Co., 357 NLRB No. 52 (2011)..... 6

Daycon Prods. Co., Case 05-CA-035043, 2011 NLRB LEXIS 711 (Dec. 12, 2011)..... 6

Daycon Prods. Co., Case 5-CA-35043, 2010 NLRB LEXIS 10 (Jan. 8, 2010)..... 6

E.I. Du Pont De Nemours & Co., 259 NLRB 1210 (1982) 18, 19

Johnson-Bateman Co., 295 NLRB 180 (1989)..... 13

Kenosha Auto Transp. Corp., 302 NLRB 888 (1991)..... 17

Nassau County Health Facilities, 227 NLRB 1680 (1977)..... 16, 17

NCR Corp., 271 NLRB 1212 (1984) 12, 15

Penn Tank Lines, Inc., 336 NLRB 1066 (2001) 18, 19

San Juan Bautista Med. Ctr., 356 NLRB No. 102 (2011)..... 16, 17

Vickers, Inc., 153 NLRB 561 (1965) 12, 15

Other Authorities

Pennsylvania State Troopers' Ass'n v. Pennsylvania Labor Relations Bd., 761 A.2d 645 (Pa. Commw. 2000)..... 13

Pennsylvania. State Sys. of Higher Educ. v. Pennsylvania Labor Relations. Bd., 2012 Pa.
Commw. Unpub. LEXIS 616 (Pa. Commw. 2012) 14

Wilkes-Barre Township v. Pennsylvania Labor Relations Bd., 878 A.2d 977 (Pa. Commw. 2005)
..... 14

Statutes

29 U.S.C. § 158(d) 11

**POSITION STATEMENT OF THE CHARGING PARTY,
TEAMSTERS LOCAL UNION NO. 639, ON REMAND**

Charging Party, Teamsters Local Union No. 639 (“Union”), by counsel and pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board (the “Board”), respectfully submits this Position Statement on remand to the Board.

I. STATEMENT OF THE CASE

Daycon Products Company, Inc. (“Daycon”) and the Union were signatories to a collective bargaining agreement (“2007 Contract”) that established wages for all covered employees from March 3, 2007 to January 31, 2010. These wages were negotiated by the parties during the course of negotiations in reliance on a wage schedule (“Seniority List”) provided by Daycon to the Union, pursuant to a specific request from the Union, at the onset of negotiations for the 2007 Contract. Daycon provided the Seniority List and represented the wages therein as accurate. As a result, the Seniority List became the starting point for negotiations on the issue of wages for the 2007 Contract. From the ratification of the 2007 Contract through almost the first two years of the contract term, Daycon complied with the negotiated wage terms.

In early 2009, Daycon informed the Union that it believed that certain employees’ wage rates were erroneous as a result of a clerical that predated the 2007 Contract. It contended that the error occurred in 2004. Despite its obligation to comply with the wages rates bargained into the 2007 Contract for the entire term of the agreement, Daycon further announced that it would unilaterally modify the employees’ wages to cure its alleged error. In May 2009, Daycon implemented wage reductions without the Union’s consent and over the Union’s objections.

The Union filed an Unfair Labor Practice Charge challenging this conduct on June 4, 2009. The Region issued its Complaint on September 1, 2009. Administrative Law Judge Bruce Rosenstein (the “ALJ”) conducted an evidentiary hearing on November 9 and 10, 2009. The parties filed post-hearing briefs and, on January 8, 2010, the ALJ issued a decision finding in favor of Daycon and dismissing the allegations in the Complaint. *Daycon Prods. Co.*, Case 5-CA-35043, 2010 NLRB LEXIS 10 (Jan. 8, 2010).

The Acting General Counsel and Union filed exceptions to the ALJ’s decision. Daycon filed cross-exceptions. In its August 12, 2011 decision, the Board overturned the ALJ’s decision, finding that “the current wage actually earned by each employee in early 2007” was “the basis for computing wages and wage rates in” the 2007 Contract. *Daycon Prods. Co.*, 357 NLRB No. 52, at *4-5 (2011). 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. *Daycon Prods. Co.*, Case 05-CA-035043, 2011 NLRB LEXIS 711, at *2 (Dec. 12, 2011).

On December 27, 2011, the Board applied to the United States Court of Appeals for the Fourth Circuit for enforcement of its order. The Fourth Circuit heard oral argument on January 31, 2013 and issued a decision on February 28, 2013. The decision found that the “rate of pay” that Daycon was obligated to pay under the 2007 Contract was based on the wage rates set forth in the Seniority List and “there is no contrary indication that ‘rate of pay’ refers to the rates that would have existed had Daycon not made the clerical errors years earlier, during the term of the 2004 Agreement.” *NLRB v. Daycon Prods. Co.*, 2013 U.S. App. LEXIS 4299, at *14-15 (4th Cir. Feb. 28, 2013). The Fourth Circuit noted, however, that the Board’s decision did not consider

the historic sound arguable basis test used in other contract modification cases and remanded the case to the Board “to expressly apply or distinguish the ‘sound arguable basis’ test.” *Id.* at 15-16.

The Union files its Position Statement showing why (a) the sound arguable basis test is not applicable to this case; and (b) even if, assuming *arguendo*, the sound arguable basis test does apply, Daycon nevertheless cannot succeed on a sound arguable basis defense and is liable for violating the Act by its unlawful contract modification.

II. FACTUAL BACKGROUND

A. The Parties & Their Bargaining History

Daycon is a Maryland-based corporation and engages in the manufacture and distribution of janitorial, maintenance, and hardware supplies. At all times relevant to this matter, the Union has represented Daycon’s drivers, warehouse employees, and repairmen.

The Union and Daycon have been parties to a series of multi-year collective bargaining agreements, including the agreement effective from March 3, 2007 to January 31, 2010 (“2007 Contract”) here at issue. Over the course of the parties’ bargaining history, they have agreed to wages increases of varying types, including percentage-based increases, cents-on-the-dollar annual raises, and catch-up raises. (Tr. 48-49). Catch-up raises are a type of raise than an employee receives annually on the anniversary of his hire date, until such time as the wage rate reaches the same level as the highest paid employee in his or her job classification. (Tr. 49).

Prior to the 2007 Contract here at issue, the parties were bound by a collective bargaining agreement effective from January 16, 2004 to January 31, 2007 (“2004 Contract”). (Tr. 40, GC Ex. 3, at 1). The 2004 Contract included only percentage-based increases, which increased wages 3% yearly for 2004, 2005, and 2006. (GC Ex. 1, at 13). Prior to the 2004 Contract, the parties

were bound by a collective bargaining agreement effective from January 16, 2001 to December 31, 2003 (“2001 Contract”). (GC Ex. 7). The 2001 Contract provided for catch-up raises. (*Id.*)

At the time of negotiations for the 2007 Contract, Business Agent Douglas Webber represented the Union in negotiations with Daycon. (Tr. 40-41). Webber had not been involved in any prior contract negotiations with Daycon. (Tr. 40). Webber wanted to institute a uniform system of wage increases and make catch-up raises applicable to all employees in the bargaining unit. (Tr. 49). In order to prepare appropriate proposals, Webber requested from Daycon a list of all current employees’ wage rates. (Tr. 41-43; GC Ex. 4). Daycon provided Webber with a Seniority List, which detailed specifically each employee’s name, job title, and hourly rate of pay as of January 8, 2007. (GC Ex. 5). Webber and the Union relied upon the Seniority List to formulate the Union’s economic proposals for negotiating the 2007 Contract. (Tr. 44). The Seniority List became the starting point for negotiations on the issue of wages for the 2007 Contract. (*See id.*)

The Union’s membership ratified the 2007 Contract on May 20, 2007. (*See* GC Ex. 6 at 34). The Contract established a uniform system of wage increases. Article IX expressly provided that “Retroactive to February 1, 2007 and effective on March 3, 2007 each employee shall receive the following increase to his/her rate of pay” and went on to detail wage increases of 55¢/hour due on the date of ratification and the first and second anniversaries of the date of ratification. (*See id.* at 13). Employees hired after February 1, 2004 were also entitled to catch-up raises, which would increase their wages by 33¢/hour, 35¢/hour, and then 40¢/hour on the anniversaries of their hire dates during the 2007 Contract term until their wage rates reached that of the highest paid employee in the same classification. (*See id.* at 15).

B. Mid-term Contract Modification

Following ratification, Daycon complied with the wage terms under the 2007 Contract until early 2009. (*See* Tr. 51-52). In early 2009, Jodie Kendall, Human Resources Director for Daycon, began auditing the wage rates at which employees were paid. (Tr. 180-81). Having joined Daycon only on June 18, 2007, Kendall was not present during the 2007 Contract negotiations. (Tr. 183). Kendall calculated all the wage increases required under the 2007 Contract, predecessor collective bargaining agreements, and any premiums owed for night work or special licenses. (Tr. 162-64, 168, 181-82). After completing the calculations, Kendall believed that Daycon erroneously gave eight employees wage increases that they were not entitled to receive under the 2004 Contract in place at that time. (Tr. 162).

Daycon described the allegedly erroneous wage rates as the product of one or more clerical errors, which occurred when someone punched the wrong numbers on a calculator or confused multiplication with addition. (Tr. 60-61, 124, 184, 204, 214; GC 8). According to Daycon, these clerical errors were made by Daycon in 2004, prior to both the 2007 Contract and negotiations for the 2007 Contract. (Tr. 54, 142, 212; GC Ex. 18).

Kendall and Daycon President John Poole decided to reduce all eight employees' hourly wages. Daycon's plan was to progressively decrease the employees' wage rates over a 6-month period until they were back to the allegedly correct hourly wage rate. (Tr. 195-96). Daycon would not require employees to repay the amounts they had been overpaid, unless the Union "contested" the wage decreases, in which case Daycon could require repayment. (Tr. 196, 214; GC Ex. 11). As Kendall specifically stated at trial, recouping the overpayment "was never our intent." (Tr. 142).

Daycon also planned to provide several of the eight employees with bonuses, made in three installments in May, August, and November, to soften the wage cuts. (Tr. 72-73). Three of the eight employees would get no bonuses. (Tr. 73). Daycon informed Webber that if the Union continued contesting the wage cuts, then Daycon may forgo the bonuses altogether. (Tr. 72-73, 110). Kendall and Poole met with the eight employees on April 24, 2009 and informed them of the clerical errors, the anticipated wage rate cuts, tentative bonuses, and threat of full repayment. (Tr. 190).

Throughout March and May 2009, Webber and Daycon had numerous communications concerning Daycon's unilateral decision to reduce wages rates during the contract term. In a letter to Daycon's counsel on April 23, 2009, Webber conveyed the Union's position that mid-contract was not an appropriate time for Daycon to renegotiate wages and that regardless of a clerical error in 2004, both parties intended for their bargaining positions for the 2007 Contract to be based on the wages stated in the Seniority List prepared by Daycon. (GC Ex. 9). In its May 1, 2009 response, Daycon's counsel stated that the company was entitled "to correct an obvious clerical error made by its payroll department." (GC Ex. 11). Daycon's express claim of entitlement obviously encompassed errors made before the 2007 Contract's terms were negotiated. Daycon's counsel similarly threatened that "should the Union continue to contest the Company's right to correct the error on a going forward basis, we reserve the right to seek recovery for the full amount of overpayments mistakenly remitted to the bargaining unit employees." (*Id.*)

On May 3, Daycon unilaterally implemented the wage rate cuts. (Tr. 139). Daycon paid out the first bonus installment in its May 22 payroll, the same payroll period in which the wage

cuts would first be visible. (*Id.*) The promised second and third bonus installments were never paid by Daycon. (Tr. 74).

III. STATEMENT OF THE ISSUE

1. Per the Fourth Circuit's remand instructions, does the sound arguable basis test apply to this case?

IV. ARGUMENT

Section 8(d) of the Act provides, in relevant part, that “where there is in effect a collective-bargaining contract... no party to such contract shall terminate or modify such contract.” 29 U.S.C. § 158(d) (2012). Effectively, § 8(d) obligates both parties to honor the contractual terms to which they agreed and creates an unfair labor practice when a party takes action inconsistent with the contract terms. *See Bath Iron Works Corp.*, 345 NLRB 499, 501 (2005).

In a case alleging a contract modification by an employer in violation of § 8(d), the General Counsel's burden is to show the existence of a contractual provision and that the employer altered the terms of that contractual provision. *Id.* Unlike in an § 8(a)(5) case concerning a unilateral change following contract expiration, where the issue is whether the contract *privileged* the employer's conduct, the issue in an § 8(d) contract modification case is whether the contract *forbade* the employer's conduct. *Id.* at 501-02. An employer can mount two possible defenses in a contract modification case – either that the union consented to the modification or that the employer acted in good faith reliance on a sound and arguable interpretation of the contract. *Id.* The remedy for contract modification is requiring the employer to honor the actual terms of the contract. *Id.* at 501.

Here, the Fourth Circuit remanded this case to the Board with instructions “to expressly apply or distinguish the ‘sound arguable basis’ test.” *NLRB v. Daycon Prods. Co.*, 2013 U.S. App. LEXIS 4299, at *15-16. As such, the facts that the 2007 Contract set employee wages and that Daycon’s wage reduction conflicted with the terms of the 2007 Contract are settled and remain law of the case. *See id.* The only question that remains is whether the sound arguable basis test applies in this case. An employer succeeds on a sound arguable basis defense if it has a sound arguable basis for ascribing a particular meaning to the parties’ contract, takes actions consistent with its interpretation of the contract, and was not motivated by union animus, acting in bad faith, or seeking to undermine the union’s status as collective-bargaining representative. *Bath Iron Works Corp.*, 345 NLRB at 502; *NCR Corp.*, 271 NLRB 1212, 1212-13 (1984); *Vickers, Inc.*, 153 NLRB 561, 570-71 (1965). As shown below, Daycon is liable for violating the Act by its unlawful contract modification because (a) the sound arguable basis test is not applicable to this case; and (b) even if, assuming, *arguendo*, the sound arguable basis test does apply, Daycon nevertheless cannot succeed on a sound arguable basis defense.

A. The Sound Arguable Basis Test Does Not Apply to Daycon’s Unilateral Modification of the Contract

Where the only allegation is the assertion of an unlawful modification of the contract within the meaning of Section 8(d), the Board is “limited to determining whether the employer has altered the terms of a contract without the consent of the other party.” *Bath Iron Works Corp.*, 345 NLRB at 501. The “sound arguable basis” test is applied when a case necessarily turns on two conflicting interpretations of a collective bargaining agreement. *Id.* at 502. In the case at hand, there is *no* basis in the contract for Daycon’s reduction of employee wages. Consequently, the “sound arguable basis” test is not applicable.

Daycon argues it did not violate § 8(d) because it had a “sound arguable basis” for its reduction of employee wages. (Br. 19-32). Yet, Daycon fails to specifically identify any plausible interpretation of the *2007 Contract* that would allow it to unilaterally reduce wage rates. *See Johnson-Bateman Co.*, 295 NLRB 180, 186 (1989)(finding the “sound arguable basis did not apply when the employer did not “point to clauses in the contract governing specific rules that are subject to more than one plausible interpretation.”). *See also Pennsylvania State Troopers’ Ass’n v. Pennsylvania Labor Relations Bd.*, 761 A.2d 645 (Pa. Commw. 2000)(holding that an employer must point to contract language that provides an arguable basis for the employer’s actions to support a contractual privilege defense). This is not surprising given the fact that the contract provides *no* such basis for reducing employee wages. In fact, the *2007 Contract* strictly forbids reducing wages through its mandatory wage increase provision.

Rather than identify contract language that supports Daycon’s alleged basis for modification, Daycon claims that “simple logic” requires that the contract “must” permit it to modify the wage rates and that the contract should be “implicitly read as” giving it permission to modify wage rates. (Br. at 24). Daycon’s flawed position is based on its own “logic,” not any contractual language. There is no dispute that the wage rates contained in the *2007 Contract* were based on the actual negotiated rate of pay for Daycon employees in 2007. Further, there is no dispute over the wages actually earned by each employee in 2007. Indeed, Daycon paid according to the negotiated wage scale each and every pay period for 2 years. Daycon admits that it reduced employee wage rates in May 2009. (Br. at 5). It unilaterally terminated the 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. Here, Daycon was not

simply applying existing contract language to calculate wage rates. Instead, Daycon unilaterally prescribed certain meaning to the contract language in violation of its bargaining obligations. *See Wilkes-Barre Township v. Pennsylvania Labor Relations Bd.*, 878 A.2d 977, 983 (Pa. Commw. 2005); *Pennsylvania State Sys. of Higher Educ. v. Pennsylvania Labor Relations Bd.*, 2012 Pa. Commw. Unpub. LEXIS 616 (Pa. Commw. 2012).

Unlike *Bath Iron Works*, this case does not turn on two conflicting interpretations of the contract because there is only one possible interpretation of the wage provision contained in the 2007 Contract – that each employee receives an annual 55¢ “increase to his/her rate of pay” during the contract term. (*See* GC Ex. 6 at 141). In *Bath Iron Works*, the employer applied existing contract language, namely the provision in the contract that specifically referred to “Plan Documents” to support its interpretation that these documents were part of their contract. *See Bath Iron Works Corp.*, 345 NLRB at 503. The Board applied the “sound arguable basis” test and determined that both the employer and the union had “reasonable” interpretations of the contract. *See id.* In contrast, Daycon identifies no contract language that could plausibly allow it to reduce employee wage rates. Rather, Daycon unilaterally prescribed a certain meaning to contractual terms contained in the contract, in violation of its bargaining obligation. There is an important distinction between an employer’s application of the terms in a collective bargaining agreement, which must have a sound arguable basis, and an action that attempts to expand contractual terms through unilateral action. *See Township*, 878 A.2d at 983.

There is only one interpretation of the 2007 contract, which Daycon unmistakably violated when it reduced the wages of eight employees without the Union’s consent. Daycon relies on its own “logic” without identifying any provision in the contract that would allow it to unilaterally reduce wage rates. As such, Daycon is not applying the terms in the Contract, but

expanding the contract terms through unilateral action. Accordingly, the “sound arguable basis” test does not apply.

B. Assuming, *Arguendo*, that the Sound Arguable Basis Test Does Apply, Daycon Nevertheless Cannot Succeed on a Sound Arguable Basis Defense.

Assuming, *arguendo*, that the sound arguable basis test does apply to this case, Daycon nevertheless cannot succeed on a sound arguable basis defense because Daycon lacked a sound and arguable interpretation of the 2007 Contract and acted, not based on a contract interpretation, but out of anti-union motive and a desire to undermine the Union. An employer succeeds on a sound arguable basis defense if it has a sound arguable basis for ascribing a particular meaning to the parties’ contract, takes actions consistent with its interpretation of the contract, and was not motivated by union animus, acting in bad faith, or seeking to undermine the union’s status as collective-bargaining representative. *Bath Iron Works Corp.*, 345 NLRB at 502; *NCR Corp.*, 271 NLRB at 1212-13; *Vickers, Inc.*, 153 NLRB at 570-71.

The Board assesses whether a party’s contract interpretation has a sound arguable basis by applying traditional principles of contract interpretation:

[T]he parties’ actual intent underlying the contractual language in question is always paramount, and is given controlling weight. To determine the parties’ intent, the Board normally looks to both the contract language itself and relevant extrinsic evidence, such as a past practice of the parties in regard to the effectuation or implementation of the contract provision in question, or the bargaining history of the provision itself.

Chapin Hill at Red Bank, 359 NLRB No. 125, at *37-38 (2012); *Conoco, Inc.*, 318 NLRB 60, 62 (1995)(citing to *Mining Specialists*, 314 NLRB 268, 268-69 (1994). *See also Bath Iron Works Corp.*, 345 NLRB at 502 (discussing the *St. Vincent Hospital* case, 320 NLRB 42 (1995), and noting that the employer’s position lacked a sound arguable basis because it ran counter to the clear intention of the parties). When both parties rely on documents or certain information in

bargaining, those items evidence the parties' intent for the subsequent contract and a sound and arguable contract interpretation must be consistent with that intent. *San Juan Bautista Med. Ctr.*, 356 NLRB No. 102, at *14 (2011)(finding no sound arguable basis where the parties relied on information that employer would be required to pay Christmas bonuses under local law, that reliance formed contractual intent, and employer's interpretation conflicted with that intent); *Nassau County Health Facilities*, 227 NLRB 1680, 1683-84 (1977)(finding that parties intended to increase wage rates, and even if done under a mistaken assumption that Medicaid reimbursement rates would continue to rise, employer lacked sound arguable basis for an interpretation contrary to that intention).

Here, not only is Daycon's contract interpretation incorrect, as found by the Fourth Circuit, but it is also lacks sound arguable basis because it is inconsistent with the parties' actual intent for the 2007 Contract. The 2007 Contract required Daycon to give each employee \$0.55/hour annual raises "to his/her rate of pay." (*See* GC Ex. 6 at 34). Both parties clearly understood and acknowledged that the "rate of pay" referred to the specific wage scales provided by Daycon in its 2007 response to the Union's information request. Daycon's claimed interpretation is that "rate of pay" referred to the rate of pay employees were entitled to if a clerical error had never been made in 2004 and if both parties had not relied on the Seniority List wage rates in bargaining the 2007 Contract. Such an interpretation is contrary to the parties' intent at bargaining and the extrinsic evidence in the case. The parties' actual intent is uncontested on the record. The parties intended for the wages listed in the Seniority List to be the starting point for negotiations for the 2007 Contract. (*See* Tr. 44). Contract proposals were based on the wages rates listed in the Seniority List. (*Id.*) The record is devoid of any evidence that the parties were referring to any other wage rates other than those clearly listed in the Seniority List.

As such, Daycon's post-hoc rationalization that the term "rate of pay" referred to something other than the Seniority List is simply not arguable under the parties' actual intent. *See Chapin Hill at Red Bank*, 359 NLRB No. 125, at *37-38; *San Juan Bautista Med. Ctr.*, 356 NLRB No. 102, at *14; *Nassau County Health Facilities*, 227 NLRB at 1683-84.

Further, because the parties' bargaining history shows that they used varying types of raises throughout their contracts – percentage-based increases, cents-on-the-dollar annual raises, and catch-up raises – it was particularly important that these parties would have a clear understanding of exactly which wage rates they were bargaining from so that each could propose the appropriate type of raise for their next contract. (*See* Tr. 48-49). Moreover, from May 2007 to May 2009, Daycon implemented and effectuated the 2007 Contract consistent with the meaning that the wages owed were 55¢ raises on top of the rates stated in the Seniority List by paying those wages. *See Chapin Hill at Red Bank*, 359 NLRB No. 125, at *37-38. In sum, the entire record supports the notion that the 2007 Contract was intended to be based on the wage rates set forth in the Seniority List. *See id.* Thus, though the § 8(d) argument was raised at the ALJ hearing and both parties had an equal opportunity to litigate the issue, the facts of this case offer no support upon which Daycon can sustain its contract interpretation as sound or arguable. (*See* Tr. 23-24, 28).

Finally, Daycon's sound arguable basis defense fails because Daycon's wage reduction was motivated by anti-union motive and a desire to undermine the Union, rather than a sound contract interpretation. The right to bargain through a chosen representative is a basic principle of collective bargaining and an employer undermines a union when it bypasses a union which represents its employees and instead deals directly with the employees. *Kenosha Auto Transp. Corp.*, 302 NLRB 888, 888, 896 (1991). An employer further undermines the union and acts

with anti-union animus when it takes action to show employees that the union is irrelevant in preserving their wages and the employees are better off dealing with the employer directly. *See Penn Tank Lines, Inc.*, 336 NLRB 1066, 1067-68 (2001) (“[w]here unlawful employer conduct shows employees that their union is irrelevant in preserving... their wages, the possibility of a detrimental or long-lasting effect on employee support for the union is clear.”); *E.I. Du Pont De Nemours & Co.*, 259 NLRB 1210, 1212-13 (1982)(holding that employer undermined the union by unilaterally modifying the contract by granting an extra vacation day, which the union could not contest without losing support); *Clevenger Logging, Inc.*, 220 NLRB 768, 780-81 (1975)(finding that, where employer’s unlawfully threatened subcontracting if the union fought the employer’s unilateral modifications to the pay system, the contract modifications were designed to undermine the union).

Here, Daycon’s wage reduction was motivated by a desire to undermine the Union and show employees that they were incentivized to keep the Union out of representing their interests. Though Kendall stated that Daycon never intended to require the eight employees to repay the five years’ worth of overpaid wages, Daycon admits that it repeatedly threatened the employees that if the Union interfered and contested Daycon’s planned wage reduction, Daycon might force the employees to repay. (Tr. 190, 196, 214; GC Ex. 11). Daycon similarly threatened the employees with the loss of their special bonuses, stating that the planned bonuses would disappear if the Union interfered and contested Daycon’s planned wage reduction. (Tr. 72-73, 110). Ultimately, Daycon threatened employees that if they invoked their § 7 right to have their collective bargaining representative defend their interests regarding the wage reductions, then Daycon would impose economic harm on employees by forcing repayment and withdrawing bonuses. (Tr. 190). As phrased by Daycon, the triggering condition was not whether the

employees contested the wage reductions themselves, but whether the Union as representative did so. (*See id*). Consistent with its desire to undermine the Union, Daycon had no desire to seek repayment but was willing to use the peril of doing so to motivate employees to keep the Union out of wage matters. *See Chase Mfg., Inc.*, 200 NLRB 886, 891 (1972)(finding that empty threats of layoffs were part of a campaign to undermine the union). (*See Tr.* 142). Thus, Daycon's wage reduction efforts sought to incentivize direct dealing and were motivated at diminishing employees' access to and support for their Union representative, rather than a sound arguable contract interpretation. *See Penn Tank Lines*, 336 NLRB at 1067-68; *E.I. Du Pont De Nemours*, 259 NLRB at 1212-13; *Bath Iron Works Corp.*, 345 NLRB at 502; *Clevenger Logging*, 220 NLRB at 781.

V. CONCLUSION

For all the foregoing reasons, the Union respectfully requests that the Board determine that Daycon cannot succeed on a sound arguable basis defense and find for the Acting General Counsel and Union regarding all the allegations in the Complaint.

Respectfully submitted,

/s/ John R. Mooney
John R. Mooney
Mooney, Green, Saindon,
Murphy & Welch, P.C.
1920 L Street, N.W. Suite 400
Washington, D.C. 20036
(202) 783-0010
jmooney@mooneygreen.com

*Attorney for Charging Party,
Teamsters Local Union No. 639*

Date: June 18, 2013

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 18th day of June, 2013, a copy of the foregoing was electronically filed with the National Labor Relations Board.

Furthermore, the undersigned party hereby certifies that on the 18th day of June, 2013, a copy of the foregoing was served, via electronic copy, on the following parties:

Sean R. Marshall, Esq.
National Labor Relations Board, Region 5
Bank of America Center, Tower II
100 South Charles Street - 6th Floor
Baltimore, MD 21201
Sean.Marshall@nlrb.gov

Mark M. Trapp, Esq.
Epstein Becker Green
150 North Michigan Avenue, 35th Floor
Chicago, IL 60601
MTrapp@egblaw.com

Paul Rosenberg, Esq.
Baker, Hostetler LLP
45 Rockefeller Plaza
New York, NY 10111
prosenberg@bakerlaw.com

/s/ John R. Mooney
John R. Mooney