

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

DAYCON PRODUCTS COMPANY, INC.

and

Case 05-CA-035043

DRIVERS, CHAUFFEURS, AND HELPERS LOCAL  
UNION NO. 639 A/W INTERNATIONAL  
BROTHERHOOD OF TEAMSTERS

**COUNSEL FOR THE ACTING GENERAL COUNSEL’S STATEMENT OF POSITION**

On February 28, 2013, in response to the National Labor Relations Board’s (“the Board”) application for enforcement of its own decision,<sup>1</sup> the United States Court of Appeals for the Fourth Circuit (“the Fourth Circuit”) remanded the case back to the Board for the Board to apply or distinguish the “sound arguable basis” test. On May 21, the Board accepted the remand and invited the parties to file statements of position on the issue raised by the Fourth Circuit’s remand. The Fourth Circuit raised only one issue as part of its remand: the applicability of the “sound arguable basis” test in contract modification cases to the instant case.

As discussed below, the Board should find that the “sound arguable basis” test is inapplicable in the case at hand, as it has not been—nor has it ever been—directly presented with any interpretation of a clause from the contract in question that would allow Daycon Products Company, Inc. (“Daycon”) to unilaterally reduce unit employees’ wage rates. Yet even if the Board applies the “sound arguable basis” test, the Board should conclude that Daycon lacks a “sound arguable basis” for any contractual interpretation it may be relying on, as the clear and unambiguous contractual language, extrinsic evidence relevant to the parties’ bargaining, and lack of evidence of any contrary intent all demonstrate that there was no arguable basis justifying Daycon’s actions. In sum, the

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<sup>1</sup> On August 12, 2011, the National Labor Relations Board unanimously found that Respondent, Daycon Products Company, Inc. violated Sections 8(a)(5) and (1) and Section 8(d) of the National Labor Relations Act when it unilaterally reduced the contractual wage rate of eight bargaining unit employees. Daycon Products Company, Inc., 357 NLRB No. 52 (2011).

Board should reach the same conclusion that it unanimously reached two years ago: that Daycon violated Sections 8(a)(5) and (1) and Section 8(d) when it unilaterally modified its collective-bargaining agreement by unilaterally reducing the contractual wage rate of eight bargaining unit employees.

**Background**

The Board succinctly and accurately recounted the factual background of the case in its 2011 decision. Daycon Products Company, Inc., 357 NLRB No. 52 (2011). Briefly, during the term of the parties' 2004-2007 collective-bargaining agreement, Daycon mistakenly raised the wages for eight employees. When the parties began their negotiations for a successor collective-bargaining agreement, Daycon provided Drivers, Chauffeurs and Helpers Local Union No. 639, a/w International Brotherhood of Teamsters ("Local 639") with a wage schedule that listed each unit employee and that employee's hire date, job title, and actual wage rate, including the actual wage rate of the eight employees who had mistakenly received raises during the term of the 2004-2007 collective-bargaining agreement. Both Daycon and Local 639 relied on this information in their negotiations for a successor collective-bargaining agreement. Daycon and Local 639 agreed on a new collective-bargaining agreement, which was to be effective from March 3, 2007 through January 31, 2010. As a part of this collective-bargaining agreement, Daycon and Local 639 agreed on wage raises for unit employees: each unit employee was to receive a \$0.55/hr annual raise to his/her wage rate in each of the three years of the contract's term.

Nearly two years later, Daycon discovered that the eight unit employees had mistakenly received raises during the term of the expired 2004-2007 collective-bargaining agreement. Subsequently, Daycon decided to reduce the wage rates for those eight unit employees. Daycon then informed the employees, as well as Local 639, of its intent to reduce the employees' wage rates. Local 639 opposed such a reduction. Without an agreement from Local 639 on the issue, Daycon then unilaterally reduced the eight employees' wage rates.

### **Procedural History**

As noted above, this case is again before the Board on the Board's acceptance of the case on remand from the Fourth Circuit. Previously, the Board found that Daycon violated Sections 8(a)(5) and (1) and Section 8(d) when it unilaterally reduced the contractual wage rate of the eight bargaining unit employees. Id. In doing so, the Board reversed the recommendation of Administrative Law Judge Bruce D. Rosenstein to dismiss the complaint allegations. Judge Rosenstein found that Daycon had not unilaterally modified employees' wages in the then-existing collective-bargaining agreement between Daycon and Local 639. Id. at \*1. In doing so, Judge Rosenstein agreed with Daycon's core argument that it did not actually modify employees' wages, but merely corrected certain employees' wages that were inflated because of a prior administrative mistake. Id. at \*5. A unanimous Board, however, rejected both Judge Rosenstein's conclusion and his reasoning. The Board found "[t]here was *no* mistake as to the basis for computing wages and wage raises in" the collective-bargaining agreement at issue—the parties relied upon each employee's actual wage rate at that time. Id. at \*1-2 (emphasis in original). Accordingly, the Board concluded that, once the parties entered into a new collective-bargaining agreement relying on the actual wages earned by unit employees in early 2007, Daycon "was barred from unilaterally altering unit employees' wages rates contained therein." Id. at \*2. In doing so, the Board distinguished the caselaw that Judge Rosenstein relied upon, as neither case arose during the term of a collective-bargaining agreement setting wage rates that the employer in question unilaterally modified. Id. at \*1, fn. 3.

After the Board's unanimous decision, Daycon filed a motion for reconsideration of the Board's decision, or, in the alternative, a motion for clarification. In its motion, Daycon asserted that the Board was required to reconsider its decision because the decision included material factual errors. Daycon argued that Local 639 did *not* rely upon the wage schedule Daycon provided to

Local 639 prior to negotiations for the 2007-2010 collective-bargaining agreement. Furthermore, Daycon asserted that the 2007-2010 collective-bargaining agreement did not contain employees' wages. The Board unanimously denied Daycon's motion in an unpublished decision, finding that Daycon's motion failed to present "extraordinary circumstances" warranting reconsideration under Sec. 102.48(d)(1) of the Board's Rules and Regulations. Subsequently, the Board applied to the Fourth Circuit for enforcement of its order.

On the Board's application for enforcement of its order, the Fourth Circuit decided to neither grant nor deny the Board's application, but instead remand the case to the Board on one specific issue: for the Board to apply or distinguish its "sound arguable basis" utilized in contract modification cases. *NLRB v. Daycon Products Company, Inc.*, 2013 WL 749657, at \*5-6 (4th Cir. Feb. 28, 2013)(unpublished). Before doing so, however, the Fourth Circuit soundly rejected Daycon's principal argument that an employer is permitted under the National Labor Relations Act to unilaterally reduce mistakenly-inflated employee wage rates, regardless of whether a new collective-bargaining agreement is executed after the mistake that inflated the wage rates. *Id.* at \*4. The Fourth Circuit stressed that the cases relied upon by Daycon lacked any analysis of the question under a contract modification theory, such as is present in the case at bar. *Id.* at \*4. Accordingly, the Fourth Circuit sided with the Board's argument that there was no legal authority supporting the proposition that an employer's mistake under a prior collective-bargaining agreement privileged it to make a unilateral mid-term modification of the mistake during the term of a subsequent collective-bargaining agreement. *Id.* at \*4. However, the Fourth Circuit determined that the Board, in its analysis of the case, had not mentioned its own "sound arguable basis" test, let alone discussed its applicability. *Id.* at \*5. Without such an explanation from the Board, the Fourth Circuit concluded it did not have a legitimate basis at that time to enforce the Board's order. *Id.* at \*5. Accordingly, the Fourth Circuit determined it was "appropriate to give the Board the chance to expressly apply or distinguish the 'sound arguable basis' test." *Id.* at \*6.

## Argument

- 1. The “sound arguable basis” test does not apply in this case because Daycon has not proffered any contractual interpretation that allowed it to unilaterally reduce employees’ wage rates.***

The Board’s lack of mention of its “sound arguable basis” test in the underlying decision is not all that surprising, given that Daycon did not argue to the Board that unilaterally reduced employees’ wage rates because it had a specific interpretation of a particular clause in the parties’ 2007-2010 collective-bargaining agreement that gave it a basis for its actions. Daycon’s principal defense is that it was privileged to modify employees’ wage rates because of its own clerical error predating the parties’ 2007-2010 collective-bargaining agreement. Thus, the Board can and should conclude that its “sound arguable basis” test is not applicable in this particular contract modification case, because Daycon has not identified anything resembling a contractual “interpretation.”

Section 8(d) 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). When the General Counsel alleges that an employer has violated Section 8(a)(5) by violating Section 8(d)’s prohibition on contract modification, the General Counsel has the burden of showing: (1) a contractual provision; and (2) that the employer has modified the provision. Bath Iron Works Corp., 345 NLRB 499, 501 (2005), *aff’d* 475 F.3d 14 (1st Cir. 2007). The core allegation is that the employer has failed to adhere to the contract. Id. The Board is limited to determining whether the employer has altered the terms of a contract without the consent of the other party. Id. at 501(citing Oak Cliff-Golman Baking Co., 202 NLRB 614 (1973), *supp. by* 207 NLRB 1063 (1973), *enf’d* 505 F.2d 1302 (5th Cir. 1974)). In terms of defenses, a defense to the contract modification can be that the union consented to the change. Id. An employer may also defend on the grounds that it has not actually modified the contract, but that it has merely interpreted a contractual clause. Where an

employer has a “sound arguable basis” for its interpretation of a contractual clause and is not motivated by anti-union animus, acting in bad faith, or seeking to undermine the union’s status as the employees’ collective-bargaining representative, the Board ordinarily will not find a violation. *Id.* at 502. A rationale for the Board not finding a violation in cases where the employer is acting on an interpretation of its contractual clause with a sound basis is that, in such instances, there is a lack of proof that the that the employer has actually modified the contract.

First and foremost, Daycon’s defense—at root—has never been that it has a “sound arguable basis” for an interpretation of a collective-bargaining agreement that shields its unilateral mid-term modification from legal liability. Rather, Daycon’s core defense is that it was privileged to unilaterally reduce the employees’ wages that were mistakenly inflated due to its own administrative error under the prior collective-bargaining agreement. *Daycon Ans. Br. to Exceptions* at 11. Both the Board and the Fourth Circuit have soundly rejected this defense. See Daycon Products Company, Inc., 357 NLRB No. 52, at \*1; see also NLRB v. Daycon Products Company, Inc., 2013 WL 749657, slip op. at \*4.

For certain, Daycon has cited the Board’s caselaw for its “sound arguable basis” test, and there is little mystery as to why. *Daycon Br.* at 11. As articulated above, the Board’s “sound arguable basis” test is a lesser standard, and far easier for an employer to maintain a successful defense than under other labor law doctrines as the “clear and unmistakable waiver” standard or the typical unilateral change standard. Yet even under a less-demanding standard of merely demonstrating a good-faith reliance on a sound interpretation of a contractual clause, an employer still must do more than merely claim it has a “sound arguable basis” for its modification. Rather, an employer must identify the contractual clause at issue, articulate the basis for its action, and establish that basis was grounded in a sound interpretation of the contractual clause at issue.

Notably, Daycon fails to articulate what its contractual “interpretation” is, let alone why it enjoys a “sound arguable basis.” Reviewing Daycon’s prior brief to the Board in answer to the

General Counsel's exceptions, Daycon failed to advance *any* contractual interpretation, or even to point to a contractual clause from the parties 2007-2010 collective-bargaining agreement under which it could arguably reduce employees' wages. There is only one contractual clause at issue here, and it is patently unambiguous and hardly subject to interpretation. The parties' 2007-2010 collective-bargaining agreement provided that each unit employee was to receive a \$0.55/hr annual raise to his/her wage rate in each of the three years of the contract's term. Daycon fails to articulate any possible "interpretation" of this contractual clause.<sup>2</sup>

Rather, Daycon's argument is exactly the same as the argument that both the Board and the Fourth Circuit already rejected: that an employer is free to unilaterally correct a mistake in employees' wage rates at any time it sees fit, even if that mistake occurred prior to the execution of a new collective-bargaining agreement that includes a clause covering employees' wages. Daycon has not advanced any "interpretation" whatsoever—Daycon merely claims there was a mistake that it corrected. The Board already disposed of this argument nearly two years ago:

There was *no* mistake as to the basis for computing wages and wage raises in [the 2007-2010 collective bargaining agreement]. It was the current wage actually earned by each employee in early 2007. [Daycon] does not contend that it was mistaken as to these amounts. Consequently, once it entered into the [2007-2010 collective-bargaining agreement] it was barred from unilaterally altering unit employees' wage rates contained therein.

Daycon Products Company, Inc., 357 NLRB at \*2.

With no offering of any contract "interpretation" as the basis for its unilateral modification of employees' wages, the case at hand is more akin to Oak Cliff-Golman Baking Company than Bath Iron Works. In Bath Iron Works, the Board dismissed the General Counsel's allegations that the employer unlawfully modified multiple collective-bargaining agreements when it unilaterally merged its pension plans into the pension plan of its corporate parent. Bath Iron Works, 345 NLRB at 503. The Board determined that the General Counsel had not met his burden of showing that the

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<sup>2</sup> Indeed, Daycon did not advance any other interpretation of this when this case was originally before the Board: "The contract provided for a \$0.55 per hour across the board wage increase." *Daycon Br.* at 17.

collective-bargaining agreements had been modified, as the Board held that the employer acted on a reasonable interpretation of contractual clauses at issue—the employer maintained that each of the collective-bargaining agreements at issue incorporated by reference its pension plan documents, which unambiguously allowed the employer the right to modify or amend the plan, including the right to merge it with its corporate parent’s pension plan. Id. at 503, 499-500. On the other hand, Oak Cliff-Golman Baking Company involved an employer which did not articulate any contractual “interpretation” that it alleged allowed it to unilaterally reduce employees’ wage rates. Much like the case at hand, the collective-bargaining agreement set forth specific and unambiguous wage rate increases for employees. Oak Cliff-Golman Baking Company, 202 NLRB at 615. When the employer determined that its financial troubles necessitated a reduction in costs, the employer unilaterally revoked a wage increase it had already given to employees, thereby reducing their wage rates. Id. at 615. The Board concluded that the employer’s unilateral change in wages ... manifestly constitutes a “modification” within the meaning of Section 8(d), and therefore violated Section 8(a)(5). Id. at 616. In doing so, the Board found that the contractual clause was clear and unambiguous, and did not warrant any interpretation. Id. at 617.

The case at bar is plainly more in the vein of Oak Cliff-Golman Baking Company than Bath Iron Works, as Daycon has not primarily defended its conduct on the basis of any contractual interpretation, nor has Daycon even articulated a contractual “interpretation.” Like Oak Cliff-Golman Baking Company, the contractual clause addressing employees’ wage rates is clear and unambiguous, and the basis for the employer’s unilateral reduction of employees’ wage rates was for some reason other than an interpretation of that contractual clause. In Oak Cliff-Golman Baking Company, the employer asserted that economic necessity privileged its unilateral action. In the case at bar, Daycon claims that its clerical mistake during the term of the prior collective-bargaining agreement privileges its unilateral action. In contrast to Bath Iron Works, Daycon has not advanced *any* contractual interpretation that privileged its unilateral action, let alone a contractual

interpretation that has a sound, arguable basis. Accordingly, the Board should conclude that the “sound, arguable basis” test does not apply, and that Daycon unlawfully modified its collective bargaining agreement with Local 639 and thus violated Section 8(a)(5).

**2. Assuming, arguendo, that the “sound arguable basis” test applies, Daycon lacked any sound arguable basis in the 2007-2010 collective-bargaining agreement for its unilateral modification of employees’ wage rates.**

Even if the Board concludes that the “sound arguable basis” test is applicable in this case, the Board should conclude, as it did two years ago, that Daycon unlawfully modified its collective bargaining agreement with Local 639 and thus violated Section 8(a)(5), because Daycon’s contractual “interpretation” is neither sound nor arguable. For one, the collective-bargaining agreement clause at issue is clear and unambiguous—and inconsistent with any strained “interpretation” Daycon may be offering. Second, extrinsic evidence establishes that the parties’ intent was to use employees’ actual wages as the starting point for negotiations for employees’ wages in the 2007-2010 collective-bargaining agreement. Finally, there is no contrary evidence supporting Daycon’s assumed argument.

To determine whether an employer’s contractual interpretation has a “sound arguable basis,” the Board applies traditional principles of contract interpretation. First and foremost, the Board looks to the parties’ actual intent, as reflected by the actual contract language. The Board will also consider extrinsic evidence, such as the parties’ bargaining history relative to the contractual clause itself. See, e.g., Conoco, Inc., 318 NLRB 60, 62 (1995), *enf. denied*, 91 F.3d 1523 (D.C. Cir. 1996).

In the present case, the Board should conclude that even if Daycon’s arguments can be untangled to discern a contractual “interpretation” that privileged its unilateral reduction of employees’ wage rates, such an “interpretation” has neither a sound nor arguable basis. As indicated above, the 2007-2010 collective-bargaining agreement included a clause on employees’ wage rates that required Daycon, in each year of the contract, to increase unit employees’ wage rate by \$0.55/hr “to his/her rate of pay.” As suggested by the Fourth Circuit (yet never actually articulated by

Daycon to the Board), Daycon interprets “to his/her rate of pay” to mean the unit employee’s wage rate without the increases that were mistakenly given during the term of the prior collective-bargaining agreement. NLRB v. Daycon Products Company, Inc., 2013 WL 749657, slip op. at \*5. Daycon’s interpretation is completely lacking in any sound or arguable basis. To begin with, “to his/her rate of pay” is clear and unambiguous, and Daycon’s strained interpretation flatly contradicts the plain language of the parties’ agreement. Furthermore, the extrinsic evidence of the parties’ bargaining history on this point definitively establishes that it was the employees’ *actual* wage rates that set the framework for the parties’ negotiations—and ultimate agreement—on employees’ wages. At the outset of negotiations, Daycon provided Local 639 with a wage schedule with the employees’ actual wages. As the Board already determined, Daycon and Local 639 relied on this information to negotiate the wage increases memorialized in the parties’ 2007-2010 collective-bargaining agreement.<sup>3</sup> Furthermore, as stated by the Fourth Circuit, “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.” Id. at \*5. In light of the plain language of the parties’ collective-bargaining agreement and the relevant extrinsic evidence admitted into the record, Daycon’s possible “interpretation” that “rate of pay” refers to wage rates without the mistakenly-given raises lacks a sound and arguable basis.<sup>4</sup>

Arguably, the Board already reached this conclusion two years ago, when it determined that “[t]here was *no* mistake as to the basis for computing wages and wage raises in [the 2007-2010

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<sup>3</sup> Daycon previously included in its motion for reconsideration that the Board had made a material factual error when it concluded that the parties had relied on employees’ actual wages in 2007. As the undersigned argued nearly two years ago, Daycon and Local 639 walked down a path in their negotiations for employees’ wages that began at the same starting point: the wage structure that Daycon provided to Local 639 at the outset of negotiations, which unquestionably showed each unit employees’ actual rate of pay at that time.

<sup>4</sup> The sheer speciousness of this argument—that adding \$0.55/hr to an employee’s rate of pay is somehow subject to interpretation—echoes Daycon’s prior argument, advanced in its motion for reconsideration, that the Board committed a material factual error and that the parties’ 2007-2010 collective-bargaining agreement did not actually contain employees’ wages. As the undersigned argued nearly two years ago, Daycon’s argument ignores the basic proposition that the wage clause from that collective-bargaining agreement calls only for an employee to make simple calculations to determine what their correct wage rate should be. There is no interpretation necessary, let alone a sound and arguable basis for interpreting a basic matter of addition.

collective-bargaining agreement]. It was the current wage actually earned by each employee in 2007.” Daycon Products Company, Inc., 357 NLRB at \*1-2. The Fourth Circuit indicated as much when it stated, albeit in *dicta*, that it was “most probable that the Board concluded that Daycon’s interpretation of the [collective-bargaining agreement] was not sound or arguable.” NLRB v. Daycon Products Company, Inc., 2013 WL 749657, slip op. at \*5.

The record evidence establishes a clear intention of the parties to calculate employees’ wage raises using employees’ actual wage rates as the starting point for the calculation. In this respect, the instant case is similar to Saint Vincent Hospital, 320 NLRB 42 (1995). In that case, the Board found that an employer unlawfully modified its collective-bargaining agreement when it discontinued a contractual health insurance plan that the parties previously intended to be included in their collective-bargaining agreement. *Id.* at 42, 44. As discussed by the Board in Bath Iron Works, the Board, in St. Vincent Hospital, found there was no “sound arguable basis” to support the employer’s position, as the Board “found that the employer's interpretation ran counter to the clear intention of the parties and that ‘there [was] absolutely no indication of a contrary intent.’” Bath Iron Works, 345 NLRB at 502 (quoting St. Vincent Hospital, 320 NLRB at 44). In the case at hand, the Board can similarly conclude that there is no “sound arguable basis” for Daycon’s presumed claim that “rate of pay” is to be interpreted as referring to anything but the actual rate of pay that the unit employees were receiving in 2007. Not only is there record evidence that the parties actually relied on the employees’ actual wage rates in their negotiations for the 2007-2010 collective-bargaining agreement, but there is, as in St. Vincent Hospital, absolutely no record evidence that the parties had a contrary intent in 2007. Accordingly, the Board should reach the same conclusion: Daycon has no “sound arguable basis” for whatever contractual “interpretation” it is possibly offering.

## CONCLUSION

In sum, the Board should reach the exact same conclusion that it reached nearly two years ago: Daycon violated Sections 8(a)(5) and (1) and Section 8(d) when it unilaterally modified the 2007-2010 collective-bargaining agreement by reducing employees' wage rates. Seeing as Daycon has not even offered an interpretation of a contractual clause, under which it could unilaterally modify employees' wage rates, the Board could conclude that its "sound arguable basis" test is not even applicable. Yet even if the Board applied its "sound arguable basis" test, the Board should conclude that any contractual interpretation offered by Daycon lacks a "sound arguable basis," as the clear and unambiguous language of the parties' collective-bargaining agreement is not open to interpretation, extrinsic evidence establishes that the parties intended employees' actual rate of pay in 2007 to serve as the basis for subsequent wage increases, and there is no evidence that the parties had any contrary intent.

Dated at Baltimore, Maryland, this 18th day of June 2013.

Respectfully Submitted,

/s/ Sean R. Marshall

Sean R. Marshall, Esq.

Counsel for the Acting General Counsel

National Labor Relations Board, Region 5

100 South Charles Street

Bank of America Center, Tower Two, 6<sup>th</sup> Floor

Baltimore, MD 21201

**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed this Counsel for the Acting General Counsel's Statement of Position on June 18, 2013, and, on that same day, copies were electronically served on the following individuals by electronic mail:

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

Mr. John R. Mooney  
Mooney, Green, Saindon, Murphy & Welch PC  
1920 L Street, NW, Suite 400  
Washington, DC 20036  
***JMooney@mooneygreen.com***

/s/ Sean R. Marshall  
Sean R. Marshall  
Counsel for the Acting General Counsel  
National Labor Relations Board, Region 5  
100 South Charles Street  
Bank of America Center, Tower Two, 6<sup>th</sup> Floor  
Baltimore, MD 21201