

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 28**

In the Matter of:

**SW GENERAL, INC. d/b/a
SOUTHWEST AMBULANCE**

and

**INTERNATIONAL ASSOCIATION OF
FIRE FIGHTERS LOCAL I-60, AFL-CIO**

Case No. 28-CA-094176

**EXCEPTIONS OF RESPONDENT
SW GENERAL, INC. D/B/A SOUTHWEST AMBULANCE
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

September 5, 2013

Todd A. Dawson, Esq.
BAKER & HOSTETLER, LLP
3200 PNC Center
1900 East 9th Street
Cleveland, Ohio 44114-3485

*Attorneys for Respondent
SW General, Inc. d/b/a
Southwest Ambulance*

In accordance with Section 102.46 of the Rules and Regulations of the National Labor Relations Board (“NLRB” or “Board”), 29 C.F.R. § 102.46, Respondent SW General, Inc. d/b/a Southwest Ambulance (“Southwest”) excepts to Administrative Law Judge Donna N. Dawson’s Decision in the above-captioned case, dated August 8, 2013 (“ALJD”) on the following grounds:

1. The ALJ erroneously held that the decision of the Circuit Court of Appeals of the District of Columbia’s decision in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), does not invalidate the National Labor Relations Board’s decision in *Finley Hospital*, 359 N.L.R.B. No. 9 (Sept. 28, 2012). (ALJD at p. 2, n.3; p. 14, n. 24).

2. The Regional Director was without authority to issue the Complaint in this case for the reasons explained in *Hooks ex rel. NLRB v. Kitsap Tenant Support Servs.*, 2013 U.S. Dist. LEXIS 114320 (W.D. Wash. Aug. 13, 2013).

3. The ALJ erroneously held that Respondent witness Roy Ryals was precluded from testifying concerning the meaning of language he drafted during contract negotiations in 2001. (Tr. 123-24).

4. The ALJ erroneously held that the parties’ understanding of the relevant contract language “is a legal dispute rather than a factual one.” (ALJD at p. 9, lines 14-15).

5. The ALJ erroneously found that “the parties did not discuss or come to an agreement, nor include in any agreement, what would occur to [sic] longevity pay once the 2009 agreement expired.” (ALJD at p. 9, lines 22-23).

6. The ALJ mistakenly characterized Southwest as “aver[ring] . . . that the Union implicitly waived its right to bargain when it failed to grieve or file a charge in connection to Respondent’s termination of wage increases under Article 36 of the 2009 Agreement.” (ALJD at p. 13, lines 7-10).

7. The ALJ erroneously held that Southwest “effected a unilateral change of an existing term or condition of employment, without bargaining to impasse.” (ALJD at p. 13, lines 14-15).

8. The ALJ erroneously held that “there is simply no dispute in this case that Respondent changed a term and condition of employment pending negotiations for a new contract.” (ALJD at p. 13, lines 19-21).

9. The ALJ erroneously held that “there is clearly no express waiver encompassed in the 2009 Agreement.” (ALJD at p. 13, line 23).

10. The ALJ erroneously found that longevity payments were an “ongoing practice.” (ALJD at p. 13, n.23).

11. The ALJ erroneously held that the National Labor Relations Board’s decision in *Finley Hospital*, 359 N.L.R.B. No. 9 (Sept. 28, 2012) is controlling in this case. (ALJD at p. 13, lines 27-40).

12. The ALJ erroneously found that “[t]he contract language in the instant case, like that in *Finley Hospital*, and the other Board cases cited there, *AlliedSignal* and *General Tire*, sets limits on the effective periods of the contractual obligation, but fails to provide for the employer’s post-expiration conduct or obligation or authorize unilateral changes by the employer. (ALJD at p. 14, lines 22-25).

13. The ALJ erroneously found that the parties’ tentative agreement to include a longevity pay article in their successor agreement is evidence that they intended for longevity pay to be payable following expiration of the prior agreement, regardless of whether a successor agreement is ultimately signed. (ALJD at p. 14, lines 32-36).

14. The ALJ erroneously held that the D.C. Circuit decisions in *NLRB v. USPS*, 8 F.3d 832, 838 (D.C. Cir. 1993); *Enloe Medical Ctr. v. NLRB*, 433 F.3d 834, 837 (D. C. Cir. 2005) are not binding and, in any event, do not support Southwest’s position. (ALJD at p. 14, lines 38-40; p. 15, lines 1-14).

15. The ALJ erroneously held that the Union's acknowledgement that the Company properly terminated wage increases upon the expiration of the prior labor agreement does not establish that longevity pay was terminated as well. (ALJD at p. 15, lines 16-27).

Respectfully submitted,

/s/ Todd A. Dawson

Todd A. Dawson (OH#0070276)

tdawson@bakerlaw.com

BAKER & HOSTETLER LLP

3200 PNC Center

1900 East 9th Street

Cleveland, Ohio 44114-3485

Telephone: (216) 621-0200

Facsimile: (216) 696-0740

Attorneys for Respondent

SW General, Inc. d/b/a Southwest Ambulance

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 5th day of September, 2013, a true copy of the foregoing was filed electronically with the Executive Secretary. Copies were also sent by electronic mail to:

Daniel B. Rojas, Esq.
National Labor Relations Board,
Region 28
2600 N. Central Avenue, Suite 1400
Phoenix, AZ 85004
Daniel.Rojas@nlrb.gov

Paul R. Irving, Esq.
National Labor Relations Board,
Region 28
2600 N. Central Avenue, Suite 1400
Phoenix, AZ 85004
Paul.Irving@nlrb.gov

Adam Lizardi
International Association of Fire Fighters, Local I-60, AFL-CIO
P.O. Box 4110
Mesa, AZ 85211-4110
alizardi@locali60.org

/s/ Todd A. Dawson

One of the Attorneys for
SW General, Inc. d/b/a Southwest Ambulance