

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

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

October 3, 2013

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## **I. INTRODUCTION**

The General Counsel seeks to substitute bluster for argument in opposing Respondent Southwest Ambulance's exceptions to the Administrative Law Judge's ("ALJ") decision in this case. These efforts are insufficient, however, to conceal the flaws in the ALJ's reasoning. Thus, for the reasons discussed below and in the principal brief filed by Southwest in support of its exceptions, the ALJ's Decision and Recommended Order should be rejected, and General Counsel's Complaint should be dismissed in its entirety.

## **II. ARGUMENT**

### **A. The General Counsel's Waiver Argument Improperly Ignores The 2009 CBA.**

Curiously, in a case that raises the issue of whether a contractual benefit survives expiration of the parties' collective bargaining agreement, the General Counsel insists that the parties' collective bargaining agreement is irrelevant. The threshold question in this case is whether the parties intended to create an ongoing practice when they agreed to six longevity payments on specified dates during the term of their last CBA. The General Counsel maintains that this question is irrelevant and that the parties' intentions in agreeing to the CBA should be ignored. This position, which is woven through the General Counsel's arguments in a number of respects, cannot withstand minimal scrutiny.

#### **1. The 2009 CBA Is Critical To The General Counsel's 8(a)(5) Argument Because It Defines Southwest's Longevity Pay Obligation.**

The General Counsel strenuously argues that consideration of the 2009 CBA is improper because it has alleged a Section 8(a)(5) violation and not a violation of the contract. According to the General Counsel, the only issue is whether Southwest unilaterally modified a term or condition of employment (*i.e.*, longevity pay) after the 2009 CBA expired. (General Counsel's Answering Brief ("Ans. Br.") 7-10). Moreover, the General Counsel claims that contract interpretation is never an appropriate subject in an NLRB proceeding. (*Id.*). Both arguments are incorrect.

It is well-settled that “[t]he Board. . . has the authority to interpret collective bargaining agreements in order to resolve unfair labor practice cases.” *NLRB v. USPS*, 8 F.3d 832, 837 (D.C. Cir. 1993). This is precisely the type of case in which such interpretation is required. While the General Counsel insists that the Board needs only to decide whether there was a modification of a term or condition of employment, that question first requires the Board to define the term or condition that allegedly was changed. Here, the definition of that term—*i.e.*, longevity pay—is controlled by the 2009 CBA. The CBA therefore cannot be ignored.

Moreover, as explained in Southwest’s principal brief, the 2009 CBA defined the longevity benefit as consisting of six installments on specified dates. Thus, the employment term or condition at issue in this case was defined to expire of its own accord, once Southwest made the sixth and final payment. *There was no change.* The General Counsel’s argument accordingly must fail, and the ALJ’s decision should be rejected.

**2. The General Counsel’s “Ongoing Practice” Theory Overlooks The Parties’ History Of Collective Bargaining.**

The General Counsel also suggests that the 2009 CBA is irrelevant because Southwest had a “policy” of paying longevity bonuses twice each year. (Ans. Br. 10-12). The evidence upon which the General Counsel relies to establish this alleged “policy” is the fact that Southwest paid longevity bonuses twice each year from June 2001 through June 2012. (*Id.*).

This reasoning, however, again ignores the parties’ collective bargaining agreements. As the ALJ noted, the parties’ relationship was governed by an uninterrupted series of collective bargaining agreements between 2001 and 2012. (ALJD at 4). Each of these agreements contained an independent longevity article. (*Id.*). Thus, Southwest’s payment of longevity bonuses from 2001 to 2012 was not pursuant to any “policy.” Rather, it was simply in satisfaction of its contractual obligations. Because the ALJ accepted the General Counsel’s flawed reasoning on this point (ALJD at 14), her decision is fatally flawed as well.

3. **The General Counsel's Waiver Argument Cannot Be Reconciled With D.C. Circuit Precedent Based On The Terms Of The 2009 CBA.**

The D.C. Circuit has previously rejected application of the NLRB's "clear and unmistakable" waiver standard under circumstances such as those presented in this case. In fact, the D.C. Circuit has specifically held that the Board's waiver doctrine "imposes an artificially high burden on an employer who claims its authority to engage in an activity is granted by [a collective bargaining] agreement." *Enloe Med. Ctr. v. NLRB*, 433 F.3d 834, 837 (D.C. Cir. 2005); *see also NLRB v. USPS*, 8 F.3d 832, 838 (D.C. Cir. 1993) (rejecting NLRB's application of waiver principles in determining whether CBA authorized unilateral action by the employer). In lieu of the waiver standard, the D.C. Circuit has found that "the proper inquiry [in such cases] is simply whether the subject that is the focus of the dispute is 'covered by' the agreement." *Enloe Med. Ctr.*, 433 F.3d at 838.

Notably, the General Counsel does not dispute that its claim would fail under the D.C. Circuit's analysis. Rather, the General Counsel argues that the Court's reasoning applies only in cases in which the Board is interpreting language that was in effect at the time of the employer's unilateral change.<sup>1</sup> (Ans. Br. 13-14). The General Counsel provides no basis for this argument, other than the fact that *Enloe Med. Ctr.* and *USPS* both happened to involve unexpired CBAs. Nothing in either opinion, however, suggests that the D.C. Circuit based its decision on this fact.

Moreover, the rationale behind the D.C. Circuit's "contract coverage" analysis applies with equal force in this case. The parties agreed in the 2009 CBA that Southwest would pay longevity bonuses on "December 1<sup>st</sup> and June 1<sup>st</sup> of each year of this Agreement." The threshold issue in this case is whether this language should be interpreted as authorizing Southwest to discontinue longevity pay following payment of the sixth installment. This is precisely the type of contract

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<sup>1</sup> Though it attempts to restrict the D.C. Circuit's reasoning to NLRB cases interpreting active contract language, the General Counsel simultaneously maintains that contract interpretation is never appropriate in an NLRB proceeding (as explained above). (Ans. Br. 7).

interpretation question addressed by the D.C. Circuit in *USPS* and *Enloe Medical Center*, *supra*. Thus, the NLRB's waiver doctrine does not apply in this case, and the ALJ's decision should be rejected.

**B. The General Counsel's Waiver Argument Is Misdirected And Unsupported.**

In determining whether a party has contractually waived its right to bargain over a subject, the NLRB does not strictly confine its inquiry to the words that appear on the physical pages of the agreement. Rather, "clear and unmistakable evidence of the parties' intent to waive a duty to bargain 'is gleaned from an examination of all the surrounding circumstances.'" *Omaha World-Herald*, 357 NLRB No. 156, 2011 NLRB LEXIS 789 at \*10 (N.L.R.B. Dec. 30, 2011), *quoting Columbus Elec. Co.*, 270 N.L.R.B. 686, 686 (1984).

In this case, the 2009 CBA required longevity payments on "December 1<sup>st</sup> and June 1<sup>st</sup> of each year of this Agreement." (Jt. Ex. 4 at 61, emphasis added). The surrounding circumstances, including the Union's own testimony, confirm that this provision was intended to limit longevity pay to the term of the contract, without the need for further bargaining. The General Counsel's arguments to the contrary are lacking in merit.

**1. The General Counsel The General Counsel's Waiver Argument Misapprehends The Import Of Union President Lizardi's Testimony.**

Union President Lizardi specifically testified that the longevity article of the 2009 CBA was intended to incorporate the years printed on the front cover of the CBA, *i.e.*, July 1, 2009 through July 1, 2012. (Tr. 105-06). He furthermore testified that a similar reference to the agreement's duration in the wages article limited wage increases to the contract's term, and that longevity bonuses were intended as supplemental wage increases for senior employees. (Tr. 108). Even more important, Lizardi testified that the Union did not contest the Company's termination of wage increases following expiration of the 2009 CBA because it understood that this language provided Southwest with the right to discontinue such increases unilaterally. (*Id.*).

In opposing Southwest's exceptions, the General Counsel argues that Lizardi's testimony is insufficient to establish "waiver by inaction," *i.e.*, that the Union waived its right to bargain over longevity pay by failing to contest the Company's right to discontinue wage increases. (Ans. Br. 12-13). Southwest however, has never argued that Lizardi's testimony establishes waiver by inaction. Rather, Lizardi's testimony is critical because it reflects what the parties intended in contractual language referring to the 2009 CBA's duration. Specifically, it confirms that *both parties* intended such references to limit economic benefits to the contractual term.

Southwest specifically explained in its principal brief that it was not relying upon waiver by inaction principles. The General Counsel has puzzlingly ignored this explanation and focused exclusively on waiver by inaction in its opposition brief (an error that the ALJ similarly committed in her decision, *see* ALJD at 13). As a result, Southwest's argument is unrebutted, and the ALJ's decision should be rejected.

**2. The General Counsel's Waiver Argument Incorrectly Relies On *Finley Hospital*.**

Finally, like the ALJ, the General Counsel claims that the NLRB's decision in *Finley Hospital*, 359 N.L.R.B. No. 9 (Sept. 28, 2012), precludes a showing of waiver in this case. But, in addition to its other flaws,<sup>2</sup> the *Finley Hospital* decision is readily distinguishable.

The contract in *Finley Hospital* was silent regarding the employer's obligations following the contract's expiration, and the parties agreed that there had been no consideration of this issue during negotiations. Based on these undisputed facts, the NLRB held that the union had not waived its

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<sup>2</sup> As explained in Southwest's initial brief, *Finley Hospital* was decided by an improperly constituted NLRB. *See Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013); *NLRB v. New Vista Nursing & Rehab.*, 2013 U.S. App. LEXIS 9860 (3d Cir. May 16, 2013); *NLRB v. Enter. Leasing Co. Southeast*, 2013 U.S. App. LEXIS 14444 (4th Cir. July 17, 2013). Moreover, the General Counsel did not have proper authority to issue the complaint in this matter, for the reasons explained in *NLRB v. Kitsap Tenant Support Sers.*, 2013 U.S. Dist. LEXIS 114320 (W.D. Wash. Aug. 13, 2013). In its answering brief, the General Counsel simply declares that *Noel Canning*, *New Vista Nursing*, *Enterprise Leasing*, and *Kitsap Tenant Support* were all wrongly decided. (Ans. Br. at 5). Given the lack of substance in the General Counsel's argument, Southwest will not address these arguments further herein.

right to bargain over the employer's termination of annual wage increases. In this case, as discussed in Section II.B.1, *supra*, Union President Lizardi admitted that the parties intended references to the contract's duration to limit economic benefits to the contractual term.

In addition, the collective bargaining agreement in *Finley Hospital* required the employer to provide ongoing, three percent wage increases to bargaining unit members. The employer discontinued these wage increases solely on the basis of the contract's expiration. Unlike the longevity payments at issue here, there was no claim in *Finley Hospital* that the employer had agreed to a specific number of raises.

Thus, *Finley Hospital* is irrelevant. Moreover, for the reasons explained in Southwest's principal brief, the NLRB's "clear and unmistakable" waiver standard would be satisfied in this case if it applied at all.

### **III. CONCLUSION**

For the reasons set forth above, the ALJ's decision and recommended order should be rejected in their entirety, and the General Counsel's Amended Complaint should be dismissed.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on this 3rd day of October, 2013, a true copy of the foregoing was filed electronically with the Executive Secretary. Copies were also sent by electronic mail to:

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