Daycon Products Company, Inc. *and* Drivers, Chauffeurs and Helpers Local Union No. 639 a/w International Brotherhood of Teamsters. Case 05–CA–035043

February 27, 2014

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS JOHNSON AND SCHIFFER

On August 12, 2011, the National Labor Relations Board issued a Decision and Order in the above-captioned proceeding finding that Daycon Products Company, Inc. (the Respondent) violated Section 8(a)(5) and (1) and Section 8(d) of the National Labor Relations Act (the Act) by unilaterally reducing the wage rates of eight bargaining unit employees during the term of its 2007 collective-bargaining agreement with Drivers, Chauffeurs and Helpers Local Union No. 639 a/w International Brotherhood of Teamsters (the Union).[1] In so holding, the Board rejected the Respondent's argument that it could lawfully take this action in order to correct overpayments that the employees had received because of an administrative error during the term of the preceding collective-bargaining agreement.

On December 27, 2011, the Board applied to the United States Court of Appeals for the Fourth Circuit for enforcement of its Order. On February 28, 2013, the court issued an unpublished opinion neither granting nor denying the application for enforcement, but instead remanding this proceeding to the Board for further explanation of its reasoning.[2] In agreement with the Board, the court summarily rejected the Respondent's argument that an administrative error during a prior contract term excused its unilateral corrective modification during the term of a subsequent contract.[3] However, the court found that the Board had failed to address the Respondent's other argument that the wage rate changes were lawful under the Board's "sound arguable basis" test for permissible mid-term contract modifications, as set forth in *Bath Iron Works Corp.*, 345 NLRB 499, 502 (2005), affd. sub nom. *Bath Marine Draftsmen's Assn. v. NLRB*, 475 F.3d 14 (1st Cir. 2007).[4] Under that test, the Board will not find a violation of the Act if, in making the change, an employer relied in good faith on a sound and arguable interpretation of the parties' contract to support its actions. *Bath Iron Works*, supra at 502.

The court said it was "most probable" that the Board had concluded the Respondent's contract interpretation "was not sound or arguable," but the court stated that it could not meaningfully evaluate the Board's reasoning because the Board had failed to mention or apply that test.[5] The court therefore remanded this case with directions to apply or distinguish the "sound arguable basis" test.[6]

On May 21, 2013, the Board notified the parties that it had accepted the court's remand and invited them to file statements of position. The General Counsel, the Union, and the Respondent each filed statements of position.

The Board has delegated its authority in this proceeding to a three-member panel.

The parties' 2007 collective-bargaining agreement required the Respondent to give each employee annual 55 cent per hour raises "to his/her rate of pay." The Respondent now argues that the "rate of pay" provision should be understood as referring to wage rates without the mistaken increases given during the prior contract term. We note that the Respondent did not point to this specific contractual provision during the initial litigation phase of this case.

Nevertheless, consistent with the court's remand, we consider whether the Respondent's action was based on a sound arguable interpretation of the "rate of pay" language in the contract. We find that it was not. On its face, there is no apparent reason to view the "rate of pay" language as meaning anything other than the actual pay rate of each employee at the commencement of the new contract's term.[7] Even if there were any facial ambiguity permitting the alternative interpretation suggested by the Respondent, the undisputed evidence of the parties' negotiation of the 2007 contract renders that interpretation completely implausible. During negotiations, the Union requested and received from the Respondent a chart listing each current employee's wage rate. Douglas Webber, the Union's business agent, credibly testified that the Union used the chart "to come up with [its] proposals for the successor contract, for a starting point for wages." There is no evidence that either the Union or the

[1] 357 NLRB No. 52 (2011), motion for reconsideration denied in unpublished Order dated Dec. 12, 2011.

[2] 512 Fed. Appx. 345 (2013).

[3] Id. at 349.

[4] See also *Hospital San Carlos Borromeo*, 355 NLRB 153 (2010).

[5] Id.

[6] Id.

[7] Thus, although pursuant to the court's remand we consider the Respondent's argument under the test set forth in *Bath Iron Works*, we note that there was facial ambiguity as to the meaning of the disputed contract language in that case, and there is no facial ambiguity here. Unlike in *Bath Iron Works*, we are not presented with an issue of contract interpretation.

Respondent discussed or had any reason to understand that the rates in that schedule—the agreed-upon starting point for annual wage adjustments during the contract's term—were subject to change for any reason, including subsequent discovery of a mistake in previous wage calculations. Accordingly, we find that the Respondent has failed to show that it had a sound arguable basis in the 2007 contract for construing that contract's "rate of pay" provision as referring to wage rates without the raises mistakenly given in 2004.[8] We therefore reaffirm the Board's prior finding that the Respondent violated Section 8(a)(5) and (1) and Section 8(d) by making the mid-term wage changes without the Union's consent.

ORDER[9]

The National Labor Relations Board reaffirms its Order set forth in 357 NLRB No. 52 (2011), as modified below, and orders that the Respondent, Daycon Products Company, Inc., Upper Marlboro, Maryland, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 2(c) and reletter the subsequent paragraphs.

"(c) Compensate the above-mentioned employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters."

2. Substitute the attached notice for the notice in the Board's original decision.

Dated, Washington, D.C. February 27, 2014

Mark Gaston Pearce, Chairman

Harry I. Johnson, III, Member

Nancy Schiffer, Member

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[8] Insofar as the Respondent's statement of position can be construed as arguing that its interpretation of the 2007 contract comports with the parties' established seniority structure, we note that an argument that a generalized contract provision (seniority) prevails over a specific provision (wages) lacks a sound arguable basis. See generally Restatement (2d) Contracts, Sec.203(c). In any event, the Respondent failed to raise this argument during the initial litigation before the Board or before the court.

[9] We have modified the Board's original Order in accordance with *Latino Express, Inc.*, 359 NLRB No. 44 (2012), and substituted a new notice to conform to the Order as modified.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT unilaterally reduce the wage rates of bargaining unit employees without first bargaining with the Union and reaching an agreement on any modification to the terms of the contract.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL restore Gerald Jackson, Steven Walker, Alvin Phoenix, Hasmon Abraham, Derrall Bridges, Robert Redmond, Trevor Holder, and Lynette Burton to the wage rates they should have received under our 2007—2010 collective-bargaining agreement with the Union.

WE WILL make the above-mentioned employees whole for any loss of earnings and other benefits suffered as a result of our unlawful reduction of their wages.

WE WILL file a report with the Social Security Administration allocating backpay to appropriate calendar quarters.

WE WILL compensate Gerald Jackson, Steven Walker, Alvin Phoenix, Hasmon Abraham, Derrall Bridges, Robert Redmond, Trevor Holder, and Lynette Burton for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

DAYCON PRODUCTS CO.