

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

FARO SCREEN PROCESS, INC.

Respondent

and

Case 07-CA-102899

**LOCA 591, SIGN AND DISPLAY UNION,
INTERNATIONAL UNION OF PAINTERS AND
ALLIED TRADES OF THE UNITED STATES
AND CANADA (IUPAT), AFL-CIO/CLC**

Charging Union

**GENERAL COUNSEL'S EXCEPTIONS TO THE DECISION OF THE
ADMINISTRATIVE LAW JUDGE¹**

Counsel for the General Counsel Eric S. Cockrell, pursuant to Section 102.46 of the Board's Rules and Regulations, respectfully submits these Exceptions to the Decision of the Administrative Law Judge David I. Goldman's Decision, which issued on March 27, 2014.

1. Counsel for the General Counsel excepts to the Administrative Law Judge's Decision that Respondent's conduct did not undermine the Unit's support for and denigrate the Charging Union's status when it posted on January 23, 2013, the Memorandum announcing the rescission of the unlawful unilaterally implemented wage increase because the Charging Union objected to it, in violation of Section 8(a)(1) of the Act. (ALJD P 12, L 17-31)

¹ References will be designated as follows: Tr = Transcript; GC Ex. = General Counsel's Exhibit; R. Ex. = Respondent's Exhibit; CGCB = Counsel for the General Counsel's Brief; ALJD = Administrative Law Judge's Decision; J = Joint Exhibits; Respondent's Brief Affirming the ALJ's Decision = RBAALJD.

2. Counsel for the General Counsel excepts to the Administrative Law Judge's Decision limiting the remedy to the period of January 23, 2013, to January 31, 2013, rather than the make whole remedy sought by CGC, consisting of the contractually-mandated 2% wage increase implemented on February 1, 2013, on top of the 2% unlawful unilateral wage increase granted on January 2, 2013.

(ALJD P 2, L 10-13).

3. Counsel for the General Counsel excepts to the Administrative Law Judge's Decision characterizing the remedy sought by Counsel for the General Counsel as a surcharge and a "theory profoundly hostile to collective bargaining." (ALJD P 15, L 27; P 2, L 20 – 21).

4. Counsel for the General Counsel excepts to the Administrative Law Judge's Decision finding that the 2013 collective bargaining agreement is "the agreed-to-fruit of collective bargaining," and thus there is no basis to include the remedy sought by the CGC – a wage increase that the parties did not bargain. (ALJD P 15, L 36 – 41).

5. Counsel for the General Counsel excepts to the Administrative Law Judge's Decision finding that the unilateral implementation of the wage increase was limited by Respondent to the date a successor contract was effective, and merely a "bridge" to that date. (ALJD P 16, L 9 – 27).

6. Counsel for the General Counsel excepts to the Administrative Law Judge's finding that the Counsel for the General Counsel "disavows any claim that the parties' new agreement-- the 2013 Agreement- should be *interpreted* to require a

2% increase above and beyond the wage rate unilaterally imposed effective January 1, 2013.” (ALJD P 15, fn 12).

Respectfully submitted this 15th day of May 2014.

/s/ Eric S. Cockrell

Eric S. Cockrell
Counsel for the General Counsel
National Labor Relations Board, Region 7
Patrick V. McNamara Federal Building
477 Michigan Avenue – Room 300
Detroit, Michigan 48226-2569
Direct Dial: (313) 226-6994
Fax: (313) 226-2090
E-mail: eric.cockrell@nlrb.gov

CERTIFICATE OF SERVICE

I certify that on the 15th day of May 2014, I electronically served copies of the Counsel for the General Counsel's Exceptions to the Decision of the Administrative Law Judge on the following parties of record:

Robert E. Day, Esq.
Law Offices of Robert E. Day, P.C.
300 River Place-Suite #5600
Detroit, MI 48207-4291
E-mail: rday@rdaypc.com

Robert Gonzalez, Business Manager
District Council 1 M, International
Union of Painters and Allied Trades,
(IUPAT), AFL-CIO/CLC
14587 Barber Ave.
Warren, MI 48088-6002
E-mail: rgonzalez@iupatdc1m.org

/s/ Eric S. Cockrell
Eric S. Cockrell
Counsel for the General Counsel
NLRB, Region 7
eric.cockrell@nlrb.gov

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**BRIEF IN SUPPORT OF COUNSEL FOR THE GENERAL COUNSEL'S
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Eric S. Cockrell
Counsel for the General Counsel
National Labor Relations Board, Region 7
477 Michigan Avenue – Room 300
Detroit, Michigan 48226-2569
E-mail: eric.cockrell@nlrb.gov
Direct Dial: (313) 226-6994
Fax: (313) 226-2090
E-mail: eric.cockrell@nlrb.gov

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I. SUMMARY OF ARGUMENTS

Counsel for the General Counsel (CGC) respectfully excepts to portions of the Administrative Law Judge's Decision (ALJD).

The Administrative Law Judge (ALJ) erred in finding that Respondent's conduct did not violate Section 8(a)(1) of the Act by undermining the Unit's support for the Charging Union and denigrating its status as the Unit's exclusive collective-bargaining representative when it posted a memorandum to employees on January 23, 2013, announcing the unilateral rescission of a previously granted unlawful unilateral wage increase and blaming the wage rescission on the

¹Counsel for the General Counsel does not except to Administrative Law Judge Goldman's denial of Respondent's Motion to defer the Section 8(a)(5) allegation to the parties' grievance arbitration procedure. (ALJD PP 9-10, L 12-30). Also, Counsel for the General Counsel does not except to the ALJ's finding that Respondent unilaterally implemented an early 2 percent wage increase and unilaterally rescinded same on January 23, 2013, in violation of Section 8(a)(1) and (5) of the Act. (ALJD P 12, L 1-13).

Charging Union. Respondent's conduct not only undermined Unit employees' support for the Charging Union, it caused such disaffection to the extent that employees wanted to engage in a strike of Respondent.

The ALJ erred in denying the remedy sought by CGC, which the ALJ incorrectly refers to as a "surcharge" and "profoundly hostile to collective bargaining," and instead granted a remedy for the limited period of January 23, through January 31, 2013, only. The remedy as ordered by the ALJ is inappropriate under these circumstances, and in effect gives Respondent the benefit of its wrong doing. Respondent should be ordered to implement the contractually-mandated 2% wage increase above and beyond the 2% unilaterally implemented wage increase of January 2, 2013, until such time as Respondent negotiates in good faith with the Charging Union with respect to the 2% wage increase unlawfully and unilaterally implemented in January 2, 2013, and unlawfully and unilaterally rescinded on January 23, 2013.

The ALJ erred in finding that the 2013 collective bargaining agreement reached by the parties on January 10, 2013, is "the agreed-to-fruit of collective bargaining," and that the unilateral wage increase of January 2, 2013, was merely a "bridge" to the date the successor collective bargaining agreement was effective, and thus there is no basis to include a remedy that the parties did not bargain.

Finally, the ALJ erred in his characterization of the interchange between the ALJ and CGC as referenced in footnote 12 of the ALJD, because CGC did not disavow any claims that the parties' successor contract should be interpreted to

require a 2% wage increase above and beyond the unlawfully and unilaterally implemented January 2, 2013, wage increase.

II. ARGUMENT²

After commencing negotiations with the Charging Union for a successor collective bargaining agreement, Respondent unlawfully and unilaterally implemented a 2% wage increase, in violation of Section 8(a)(1) and (5) of the Act. Respondent gave no notice to the Charging Union of this action. (ALJD P 11, L 5-8; P 12, L 1-13).

The parties reached agreement, including a long overdue increase in wages, on January 10, 2013. At the contract ratification vote on January 17, 2013, Charging Union learned, for the first time, of Respondent's unilateral grant of the 2% wage increase. The bargaining Unit ratified the collective bargaining agreement. (ALJD P 1, L 1-13).

After the Charging Union confronted and questioned Respondent regarding the unilateral wage increase but did not request that the wage increase be rescinded and instead notified Respondent that Charging Union expected the February 1, 2013, 2% raise be implemented as negotiated and on top of employees' current wage, Respondent unlawfully and unilaterally rescinded the wage increase, in violation of Section 8(a)(1) and (5), posted a notice to employees announcing the rescission, and placed the onus for that rescission on

² CGC relies on ALJ Goldman's findings of fact and conclusions of law, except as indicated otherwise.

the Charging Union, which CGC believes, contrary to the ALJ's determination, violates Section 8(a)(1). (ALJD P 1, L 12-16; P 11, L 1-41; P 12, L 1-13, 17-27).

A. Exception 1: Counsel for the General Counsel excepts to the Administrative Law Judge's Decision that Respondent's conduct did not undermine the Unit's support for and denigrate the Charging Union's status when it posted on January 23, 2013, the Memorandum announcing the rescission of the unlawful unilaterally implemented wage increase because the Charging Union objected to it, in violation of Section 8(a)(1) of the Act. (ALJD P 12, L 17-31)

In *Regency House of Wallingford, Inc.*, 356 NLRB No. 86 (2011), citing *Billion Oldsmobile-Toyota*, 260 NLRB 745, 754 (1982), enfd. 700 F.2d 454 (8th Cir. 1983), the Board determined that the employer denigrated the union when it put the onus on the union for the employer's rescission of an unlawful, unilateral wage increase. In so doing, the Board also rejected the employer's argument that its comments were protected by Section 8(c) of the Act. While CGC concedes that Respondent's conduct herein does not rise to the egregious level of the employer's recidivist conduct in *Regency House*, nonetheless it provides a framework within which to consider Respondent's actions.

Rather than accepting responsibility for its unlawful unilateral changes, including the grant and rescission of an early wage increase to Unit employees, Respondent "compounded" its conduct by blaming the Charging Union for the rescission remedy, thereby undermining the Charging Union in the eyes of Unit employees.

The ALJ erroneously concluded that the circumstances of Respondent's

conduct, including its January 23, 2013 memorandum, alone, was insufficient to constitute unlawful undermining and denigration of the Union's status as Unit employees' collective bargaining representative when compared to more egregious and extensive employer misconduct. (ALJD P 12-14). The ALJ stated that he had "no doubt at all that employees would reasonably have a tendency to dislike returning to their prior pay levels for the week, and might well wish that the union had not objected." (ALJD 13, L 6-8). In reaching this conclusion, the ALJ tacitly acknowledges that Respondent's January 23 memorandum could have a detrimental impact on the Unit's support for the Charging Union. That Respondent's conduct was not as egregious or extensive as conduct cited by the ALJ does not mitigate the potential or the actual effect of Respondent's conduct in undermining the authority of the collective bargaining representative. (ALJD 12-14).

Respondent's memorandum to employees placing the onus of the rescission of the wage increase on the Charging Union did not occur in a vacuum. Respondent had already granted the wage increase. The Board has long recognized that unilateral wage increases are inextricably linked to undermining and denigrating a union in the eyes of Unit employees because no matter how justified the wage increase in Respondent's view, it "necessarily" tends to undermine the authority of the collective bargaining representative. *Embossing Printers*, 268 NLRB 710, 717 (1984), enfd. 742 F.2d 1456 (6th Cir. 1984). The rescission of the

wage increase, blamed on the Charging Union, further compounded the undermining and denigrating effect.

Respondent's January 23 Memorandum, in and of itself, was sufficient to violate Section 8(a)(1) of the Act. Respondent's conduct, in fact, caused disaffection among Unit employees. The memorandum stated that Respondent was rescinding the wage increase because of the Charging Union's objection. (Tr 57-58, 100, 136; J 7). Employees expressed their displeasure to the Charging Union's steward in the form of threatening a work stoppage. (Tr 57, 100, 136; GC 1(i), 1(n); J 7).

B. Exception 2: Counsel for the General Counsel excepts to the Administrative Law Judge's Decision limiting the remedy to the period of January 23, 2013, to January 31, 2013, rather than the make whole remedy sought by CGC, consisting of the contractually-mandated 2% wage increase implemented on February 1, 2013, on top of the 2% unlawful unilateral wage increase granted on January 2, 2013. (ALJD P 2, L 10-13).

Exception 3: Counsel for the General Counsel excepts to the Administrative Law Judge's Decision characterizing the remedy sought by Counsel for the General Counsel as a surcharge and a "theory profoundly hostile to collective bargaining". (ALJD P 15, L 27; P 2, L 20 – 21)

Exception 4: Counsel for the General Counsel excepts to the Administrative Law Judge's Decision finding that the 2013 collective bargaining agreement is "the agreed-to-fruit of collective bargaining," and thus there is no basis to include the remedy sought by the CGC - a wage increase that the parties did not bargain. (ALJD P 15, L 36 – 41).

Exception 5: Counsel for the General Counsel excepts to the Administrative Law Judge's Decision finding that the unilateral implementation of the wage increase was limited by Respondent to the date a successor contract was effective, and merely a "bridge" to that date. (ALJD P 16, L 9 – 27).

The Board has held that it “cannot” and “should not” require rescission of unlawful wage increases and other benefits. *M.A. Harrison Mfg. Co., Inc.*, 253 NLRB 675, 687 - 688 (1980), enfd. 682 F.2d 580 (6th Cir. 1982). The Board reasoned that it is “neither authorized nor qualified in effect to proscribe the best bargaining techniques and strategy for the Union” because such judgment belongs to the Union based, in part, on the long-term interests of employees.

In *Long Mile Rubber Co.*, 245 NLRB 1337, 1345 (1979), the Board held that the backpay period began when the respondent made a unilateral change on November 9, 1978, and ended on December 18, 1978, *when the parties began negotiations which included the subject matter of the respondent’s unilateral change* [emphasis added]. There has been no such bargaining herein.

Respondent unilaterally implemented a 2% wage increase during the parties’ contract negotiations, did not notify the Charging Union or afford it a meaningful opportunity to bargain about the early wage increase, and then blamed the Charging Union for the wage rescission after negotiating - at the bargaining table - a change in wage rates. (ALJD 11-12). At no time did Respondent negotiate with the Charging Union concerning the subject matter of the unilateral change as the parties did in *Long Mile Rubber*. The Union negotiated the contractual wage increases without knowledge that the Respondent had already granted a wage increase—the base from which the Charging Union was negotiating wages had changed, unbeknownst to it. The ALJ misapprehends this crucial aspect and effect of Respondent’s unilateral wage increase, when he describes the

remedy sought by the CGC as a surcharge and “hostile to collective bargaining.” There are no “fruits” of collective bargaining here for the Charging Union, when Respondent knowingly changes the terms of the negotiations without advising the Charging Union. Indeed, the limited remedy ordered by the ALJ is a satisfactory harvest for Respondent, the fruits of its unlawful acts. Unit employees are entitled to the remedy consisting of the unilaterally granted 2% wage increase of January 2 in addition to the negotiated and contractually-mandated 2% wage increase effective February 1, 2013, until the parties bargain over this specific issue.

The Board has reasoned that the appropriate remedy must provide that a union, at its option, “may” request that a respondent rescind its unilaterally-granted wage increase. *Jerry Cardullo Ironworks, Inc.*, 340 NLRB 515, 521-522 (2003). See also *Great Western Broadcasting Corp.*, 139 NLRB 93, 96 (1962). The Board further reasoned in *Jerry Cardullo Ironworks* that such remedy is appropriate “because such unilateral action denigrates the Union in the eyes of the unit employees.”

The only appropriate remedy is to restore the wage increase that Respondent rescinded as of January 23, 2013, and calculate the February 1 contractual 2% wage increase on that hourly wage, unless the Charging Union decides that it is in the best interest of the Unit to pursue an alternative remedy. Any other remedy rewards Respondent for its duplicitous actions both at and away from the bargaining table -- granting and rescinding the 2% wage increase in January 2013.

In *Mid-Wilshire Health Care Center*, 337 NLRB 72, 81 (2001), although the employer took steps to correct the mistaken implementation of wage rates and immediately entered into negotiations with the union, which resulted in substantial concessions that benefited the union, the Board nonetheless modified the administrative law judge's finding that a remedial order was unwarranted. The Board reasoned that the employer's initial unlawful conduct, the unilateral rescission of a mistakenly granted unilateral wage increase, was not rendered moot because it subsequently negotiated with the Union which resulted in the eventual reinstatement of the wage increases.

In the case at bar, it belies reason that Respondent could assert that the implementation and rescission of the early January 2 % wage increase was an error. In fact, the ALJ determined that it "was not an inadvertent mistaken change made by the Respondent." (ALJD 12, L 9). Respondent's conduct was definite, Respondent communicated the same to Fordham on or about January 4, and, in fact, precluded any meaningful opportunity to bargain on the part of the Charging Union. (Tr 88, 90). In addition, Respondent did not "immediately" engage the Union in negotiations in an effort to resolve the unilateral implementation and rescission of the wage increase. Indeed, at no time has Respondent negotiated with the Charging Union regarding its unilateral changes to Unit employees' wages.

Respondent's communications with the Charging Union and Unit employees during January 2013 lacked any statement that the early 2 % wage increase was gratuitous, that it was limited in duration to January 2013, or that the

earlier unilaterally-granted wage increase would be folded into the parties' subsequent agreed-upon contractual wage increases. Respondent's communications lacked any reference that the unilaterally-granted wage increase would constitute a bonus for Unit employees. Specifically, during the parties' final bargaining session on January 10 when they consummated their successor three-year collective bargaining agreement and before Unit employees ratified the agreement, Respondent made no mention of the fact that it had already provided Unit employees with an early and unilateral 2 % wage increase, nor that the same wage increase would be of limited duration, from January 2 to January 31. (Tr 46-47, 51-52, 72-73).

The Board has held that in order to escape liability, a respondent's disavowal of unlawful conduct must be timely, unambiguous, specific in nature to the coercive conduct, and free from other proscribed illegal activity. *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978). Additionally, the Board stated, "Furthermore, there must be adequate publication of the repudiation to the employees involved and there must be no proscribed conduct on the employer's part after the publication." The Board continued, "such repudiation or disavowal of coercive conduct should give assurances to employees that in the future their employer will not interfere with the exercise of their Section 7 rights." Here, at no time has Respondent adequately remedied its unlawful conduct. It has not disavowed its unlawful unilateral granting of a 2% wage increase, the unlawful, unilateral rescission of the raise, and the undermining of the Charging Union in

blaming it for the rescission. Nor has Respondent acknowledged, at any time, its failure to negotiate with the Charging Union regarding its unlawful unilateral changes to Unit employees' wages. Indeed, throughout the unfair labor practice hearing, Respondent portrayed itself as only trying to be a good employer and do right by its employees. This is a self-serving argument which the ALJ swallowed, hook, line and sinker. (ALJD P 1, L 5-7; P 10, L 19-23; PP 15- 16).

C. Exception 6: Counsel for the General Counsel excepts to the Administrative Law Judge's finding that the Counsel for the General Counsel "disavows any claim that the parties' new agreement – the 2013 Agreement – should be *interpreted* to require a 2% increase above and beyond the wage rate unilaterally imposed effective January 1, 2013." (ALJD P 15, fn 12).

At the beginning of the hearing in this matter the ALJ and CGC engaged in colloquy concerning the theory of the remedy sought. A careful analysis of this interchange establishes that Counsel for the General Counsel did not disavow that the parties' 2013 Agreement should be interpreted to require a 2% wage increase above and beyond the wage rate unilaterally imposed effective January 1, 2013:

(Tr 32-34)

JUDGE GOLDMAN (JG): What's the remedy? The remedy is you have to bargain. Isn't that what the contract represents? A bargain?

MR. COCKRELL (CGC): That's true, Your Honor, but there's also the remedy -- I mean our remedy would be that the employees are entitled to that additional two percent as set forth –

JG: But that's not what the parties bargained.

CGC: That's true.

JG: But you're not claiming that?

CGC: Right. But above and beyond what they negotiated --

JG: You're not claiming -- let me understand. You're not claiming the Union thought, hey, with our new contract that begins February 1st, we get two percent plus the two percent he gave in January? Is that what you're -- I mean that wasn't what the deal was.

CGC: Well, Your Honor, and our theory is that the contract was entered into, and above and beyond that Respondent threw out something -- threw out a wage increase, didn't give notice and bargain with the Union, and then once the Union raised it, took it back and then put the onus on the Union for that happening.

JG: Right, but the remedy for a unilateral wage increase isn't like -- isn't a penalty.

CGC: Sure.

JG: It's a duty to bargain. And I understand maybe there's some cases you got to keep the -- if the unilateral change has been official, you got to keep it in effect until -- you know, until you bargain to impasse.

CGC: Sure.

JG: Or reach an agreement. Didn't they reach an agreement? Isn't that what the new contract is? An agreement?

CGC: They reach an agreement, Your Honor.

JG: Almost the --

CGC: They did reach an agreement, but our theory, your Honor, is that this was a unilateral change --

JG: Right.

CGC: -- and it was -- and the effect of that change should be remedied. Now, there may be a question about what the

remedy is, but I think as we -- as our complaint and compliance -- is drafted, you know, we intend to move forward with our remedy as --

JG: Well, I understand. I'm not asking you to give up your case right not --

CGC: I know.

JG: -- but I'm just asking questions so -- Okay. That's -- you know, for what it's worth that's -- I mean it's a very interesting case.

CGC: And you've mentioned that before.

JG: -- but --

CGC: It is an interesting case.

JG: Okay. I'll -- let's move to the witnesses.

This interchange between the ALJ and CGC demonstrates that CGC neither conceded nor asserted that the appropriate remedy should not include the unilaterally-granted 2% wage increase in addition to the contractually-mandated 2% wage increase implemented on February 1, 2013. (Tr 32-34).

The ALJ expressed disbelief and outrage that CGC was seeking a "surcharge" by its remedy requiring respondent to calculate the February 1, 2013 contractual wage increase on top of the unilaterally implemented and unilaterally rescinded 2% wage increase, because, he asserts, the parties negotiated, and reached an agreement on a 2% wage increase. Thus, the Charging Union is only entitled to the benefit of its bargaining, which was a 2% wage increase effective February 1. However, at no time during those negotiations did the Charging Union know that the Respondent had already implemented a 2% wage increase.

III. CONCLUSION

Counsel for the General Counsel respectfully requests that the Board grant his Exceptions and set aside the Administrative Law Judges' Decision with respect to both the Section 8(a)(1) undermining and denigrating conduct and order the remedy sought by Counsel for the General Counsel. (GC 1(g), 2). Based upon the entire record in this case and upon the arguments recited above, it is respectfully submitted that Respondent has committed the unfair labor practices charged and litigated and that the remedy prayed for in the Complaint, Compliance Specification, and CG 1(g) and 2 and any other relief deemed appropriate be granted in full.

Respectfully submitted this 15th day of May 2014.

/s/ Eric S. Cockrell

Eric S. Cockrell
Counsel for the General Counsel
National Labor Relations Board, Region 7
Patrick V. McNamara Federal Building
477 Michigan Avenue – Room 300
Detroit, Michigan 48226-2569
Direct Dial: (313) 226-6994
Fax: (313) 226-2090
E-mail: eric.cockrell@nlrb.gov

CERTIFICATE OF SERVICE

I certify that on the 15th day of May 2014, I electronically served copies of the Brief in Support of Counsel for the General Counsel's Exceptions to the Administrative Law Judge's Decision on the following parties of record:

Robert E. Day, Esq.
Law Offices of Robert E. Day, P.C.
300 River Place-Suite #5600
Detroit, MI 48207-4291
E-mail: rday@rdaypc.com

Robert Gonzalez, Business Manager
District Council 1 M, International
Union of Painters and Allied Trades,
(IUPAT), AFL-CIO/CLC
14587 Barber Ave.
Warren, MI 48088-6002
E-mail: rgonzalez@iupatdc1m.org

/s/ Eric S. Cockrell
Eric S. Cockrell
Counsel for the General Counsel
NLRB, Region 7
eric.cockrell@nlrb.gov