

**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

**REPLY BRIEF IN RESPONSE TO RESPONDENT'S SUPPORT AND
AFFIRMATION OF THE ADMINISTRATIVE LAW JUDGE'S DECISION**

Counsel for the General Counsel, pursuant to Section 102.46 of the Board's Rules and Regulations, respectfully submits the following Reply Brief.

Respondent on May 9, 2014¹ filed a Support and Affirmation of the Administrative Law Judge's (ALJ) Decision and Brief in Support and Affirmation of the ALJ Decision. Counsel for the General Counsel (CGC) filed Exceptions to the Administrative Law Judge Decision and Brief in support of Exceptions on May 15. In essence, Respondent's Support and Affirmation serves as an answer to CGC's exceptions, albeit prematurely filed, and is treated as such herein.

The ALJ found, and there is no dispute, that Respondent on January 3, 2013, unlawfully and unilaterally implemented a 2 % wage increase without providing notice or opportunity to bargain to the Charging Union, and then subsequently unlawfully and

¹ Hereafter all dates are 2014.

unilaterally rescinded that wage increase without providing notice or opportunity to bargain to the Charging Union, although at all times the parties were at the table negotiating, and had reached agreement on a successor collective bargaining agreement. The dispute herein centers around the make whole remedy sought by the CGC that the unilaterally implemented 2 % wage increase be reinstated, and the February 1, 2013, 2 % wage increase negotiated at the table be calculated on top of the previously implemented unilaterally-granted wage increase until such time as the parties *bargain* a remedy to this situation.

In the Support and Affirmation Respondent asserts:

1. That Respondent's conduct was "benign, limited and not hostile to group bargaining, nor to the Union or the bargaining process." (Support and Affirmation, p. 3; ALJD p. 6 fn. 4)

A violation of Section 8(a)(5) requires neither intent nor animus, nor is the remedy contingent on a finding that a respondent had such frame of mind. 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, including 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, and thus ordered an affirmative remedy of notice posting to employees.

Moreover, as noted by the ALJ,

„, that the unilateral changes in wages made were beneficial to employees does not excuse the violation. Whether beneficial or harmful to employees, the unilateral changes offend the employer’s statutory bargaining obligation. *Allied Mechanical Services*, 332 NLRB 1600, 1609 (2001); *Randolph Children’s Home*, 309 NLRB 341, 343 fn. 3 (1992).

The fact that the parties were engaged in negotiations adds still another layer to the employer’s obligation: where, as here, negotiations for a collective-bargaining agreement are ongoing "an employer's obligation to refrain from **unilateral changes** extends beyond the mere duty to give notice and an opportunity to bargain; it encompasses a duty to refrain from implementation at all, unless and until an overall impasse has been reached on bargaining for the agreement as a whole." *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991) (footnote omitted), enfd. mem. 15 F.3d 1087 (9th Cir. 1994).

(ALJD, P 11; L 30 – 41).

This serves as an appropriate reminder also for remedy purposes because the Board 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 (1990), 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.

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 percent 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 percent wage increase in January 2013.

2. “Based on the ‘Employer group’ historical bargaining history, it is inconceivable, as noted by the Judge, that Respondent intended to fracture historical joint pattern bargaining.” (Support and Affirmation, p. 6)

Contrary to Respondent’s contention, the ALJ concluded that for the last few years, Respondent “enjoyed a competitive advantage over Sawicki & Sons because” Respondent’s employees, “unlike Sawicki & Sons employees, contributed toward the health care insurance premium”. (ALJD P 4; L 19 – 22). Moreover, Respondent fractured the joint pattern bargaining by unilaterally implementing a 2 percent wage increase on January 2, 2013. This argument is one that Respondent has no standing to make.

Conclusion

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

Respectfully submitted this 29th day of May 2014.

/s/ Eric S. Cockrell

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CERTIFICATE OF SERVICE

I certify that on the 29th day of May 2014, I electronically served copies of the Counsel for the General Counsel's Reply Brief in Response to Respondent's Support and Affirmation of the Administrative Law Judge on the following parties of record:

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