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March 16, 2011

UPS NEXT DAY AIR DELIVERY

Lester Heltzer, Executive Secretary
National Labor Relations Board
1099 14th Street, N.W., Room 11602
Washington, DC 20570

Re: Comar, Inc.
Cases 4-CA-28570 and 4-CA-33903

Dear Executive Secretary Heltzer:

I represent the Charging Party, United Steelworkers, in the above-referenced proceeding. Enclosed for filing with the Board, pursuant to Rules and Regulations Section 102.48(d)(1), are an original and seven copies of the Union's Motion for Reconsideration, and Exhibit, of the Board's February 22, 2011 Order denying the Union's Request for Review. I have also enclosed a Certificate of Service upon the Acting General Counsel, the Regional Director, Respondent's Counsel and Respondent.

Respectfully submitted,

BLITMAN & KING LLP

James R. LaVaute

JRL:dm
Enclosures

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March 16, 2011

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

COMAR, INC.,)	
)	
Respondent,)	Cases 4-CA-28570
)	4-CA-33903
and)	
)	
UNITED STEEL, PAPER AND FORESTRY,)	
RUBBER, MANUFACTURING, ENERGY,)	
ALLIED INDUSTRIAL AND SERVICE WORKERS)	
INTERNATIONAL UNION,)	
)	
Charging Party.)	

**CHARGING PARTY'S MOTION FOR RECONSIDERATION
OF THE BOARD'S DENIAL OF THE CHARGING PARTY'S
REQUEST FOR REVIEW**

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Charging Party United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (the "Union"), pursuant to Section 102.48 (d)(1) of the Board's Rules and Regulations, moves the Board for reconsideration of its February 22, 2011 Order denying the Union's Request for Review of the Acting General Counsel's decision affirming the Regional Director's compliance determination.

In its order denying the Request for Review, the Board stated:

We find that the Regional Director did not clearly err in concluding that the Respondent fulfilled its obligation to bargain with the Union concerning the Board-ordered unit and fully complied with the Board's Orders. The essence of the Union's disagreement with the Region's position is the Union's argument that the Board-ordered unit consists solely of employees who have formerly worked at the Vineland facility and relocated to the Buena facility. [Board Order at page 3].

Although the Union argument described in the quoted passage was a point being made by the Union, it was not the only basis argued for finding that the Employer was failing to meet its obligation to bargain with the Union. A separate basis argued for finding the Employer's bargaining unlawful was the fact that Comar was insisting on changing the description of the bargaining unit. As the Union pointed out in its appeal to the General Counsel (Exh. A, pages 2, 8 and 10-11) and in its Request for Review, page 9, the Regional Director's contention that Comar had not tried to change the unit, just who was in the unit, was an erroneous statement. As pointed out by the Union, Request for Review pages 2, 9 and 11-12, Comar was unlawfully insisting on a change in the unit description. At the related unit clarification hearing in 4-UC-440, this was confirmed by the Comar director of human resources. He testified that "it was Comar's proposal "to find [sic; should read "to define"]", under the new contract, the finishing

department and the jobs that made up the finishing department as the new bargaining unit . . .” [TR 88, Exh. B to the Request for Review].

Indeed, the Regional Director found in her May 12, 2010 determination that Comar’s proposal was to change the unit description. See page 5 (“Respondent proposed that the parties negotiate for a contract covering finishing department employees”); page 7 (referring to “Respondent’s proposed bargaining unit description”). See the Board’s January 25, 2010 Order at 3, referring to “Respondent’s proposal to enlarge the unit”. Comar’s proposal to change the unit description is to be contrasted with the Union’s proposal (Exh. G, Request for Review), that mirrored the Board’s description of the unit.

It is well settled that it is unlawful for a party to insist to impasse on a change in the bargaining unit description. The Board explained in Antelope Valley Press, 311 NLRB 459, 461 (1993):

As we have stated, a union is entitled to take the unit description as given; it cannot be forced to bargain about the unit description, and it need not tolerate any effort by the Respondent to alter the description of the unit.

And the Board explained further:

Thus, in determining whether an employer’s contract proposal is lawful, we shall first look to see whether the employer has insisted on a change in the unit description. In accord with long-established precedent, we shall continue to find any such insistence to be lawful, even if the unit is described in terms of work performed.

Id. at 461. The Board reiterated in Bremerton Sun that an employer is not entitled to insist to impasse on a change in the unit description. Bremerton Sun Publishing Co., 311 NLRB 467, 471 (1993); accord, Spentonbush/Red Star Cos., 319 NLRB 988, 994 (1995). This is so even if, as found here, the unit is described in terms of function as opposed to job classifications.

Antelope Valley Press, supra; Batavia Newspapers Corp., 311 NLRB 477, 480 (1993). Even if the parties here discussed a change in the unit description, such remained a permissive subject of bargaining and could not be insisted upon to impasse after the Union refused to consider changing the description. Taylor Warehouse Corp., 314 NLRB 316, 317 (1994).¹

This point was argued to the General Counsel and to the Board, and it was not addressed by either. The Board's finding that the Board-ordered unit is not limited to the relocated employees did not obviate resolution of the unit description violation. This is a material error in deciding this matter and is a basis for granting this Motion for Reconsideration.

Dated: March 16, 2011

Respectfully submitted,

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By: _____


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¹ The Region has found insufficient evidence that the parties in these discussions ever had reached final agreement on the composition of the unit. May 12, 2010, Amended Compliance Determination at 7. That being the case, the Union was entitled to refuse to consider further Comar's proposed expanded unit description. Taylor Warehouse, id.

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ORDER SECTION

UNITED STATES OF AMERICA
BEFORE THE GENERAL COUNSEL
NATIONAL LABOR RELATIONS BOARD

COMAR, INC.,)

Respondent,)

and)

UNITED STEEL, PAPER AND FORESTRY,)
RUBBER, MANUFACTURING, ENERGY,)
ALLIED INDUSTRIAL AND SERVICE WORKERS)
INTERNATIONAL UNION,)

Charging Party.)

Cases 4-CA-28570
4-CA-33903

**CHARGING PARTY'S APPEAL TO GENERAL COUNSEL
FROM REGIONAL DIRECTOR'S AMENDED
COMPLIANCE DETERMINATION**

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United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (the “Union”), pursuant to Section 102.53(a) of the Board’s Rules and Regulations, appeals to the General Counsel from the May 12, 2010 Amended Compliance Determination of the Regional Director.

BACKGROUND

These matters involve Board decisions in Comar I, 339 NLRB 903 (2003), and Comar II, 349 NLRB 342 (2007). The Board’s order in Comar I requires Comar to bargain for a new collective bargaining agreement covering the existing bargaining unit of relocated employees. In Comar II, 349 NLRB at 360, the Board rejected Comar’s contention that operational changes made by it had eviscerated the unit and reiterated that Comar was to bargain for a contract covering the relocated workers, wherever they were assigned in Buena.

Nevertheless, from the commencement of negotiations for the collective bargaining agreement in 2007, Comar proposed changing the unit description and expanding (tripling) the bargaining unit to cover the entire non-union finishing department. The Union considered this proposal and discussed it, but the parties never reached a complete collective bargaining agreement. When Comar started an anti-union campaign, the Union realized that it would not be able to obtain majority status in a finishing department unit, and it advised Comar that it was no longer willing to consider an expanded unit. Rather, the Union expressly insisted that a contract be negotiated for the Board-ordered relocated unit. Comar in February 2009 refused to engage in further negotiations under these circumstances, and it was only after that refusal that Comar filed a unit clarification petition seeking its finishing department unit (Case 4-UC-440), now pending before the Board.

The Union on May 7, 2009 requested that the Region reopen the above compliance cases because of Comar's refusal to negotiate a contract for the relocated unit, as required by the Order in Comar I. The Regional Director declined to reopen the cases. On appeal of that compliance determination, the Union argued to the General Counsel that the Employer's failure to comply with the Board's order in Comar I by conditioning future meetings and negotiations for a new contract on the Union's willingness to agree to a different bargaining unit, was a violation of the Order in Comar I. By letter dated August 31, 2009, the General Counsel refused, on procedural grounds, to entertain the Union's appeal.

On January 25, 2010 the Board issued its Order remanding this matter to the Regional Director. Order at 1. The Regional Director was ordered to issue an amended compliance determination containing a detailed explanation of the evidence she relied on to support her decision not to reopen compliance proceedings. Order at 7. The Board noted the Union will be entitled to appeal such determination to the General Counsel, and to subsequently file with the Board a request for review of the General Counsel's Decision on Appeal. Order at 7. On May 12, 2010 the Regional Director issued her amended Compliance Determination [attached to this Appeal as Exhibit A], in which she again refused to reopen compliance. This is the Union's appeal to the General Counsel.

The Region's October 31, 2008 letter conditionally closing the compliance cases, the Union's May 7, 2009 request to the Region to reopen the cases, the Region's June 16, 2009 letter refusing to do so, the Board's January 25, 2010 Order, and the Regional Director's May 12, 2010 Amended Compliance Determination, are attached as Exhibit "A". Additionally, inasmuch as the Regional Director extensively relies on her unit clarification decision in Case 4-UC-440, and the

testimony in that proceeding bears on the issues here, that decision and the underlying transcript record are submitted as Exhibit “B”.

ARGUMENT

POINT I

AT ALL TIMES MATERIAL, THE BOARD ORDERED UNIT WAS COMPRISED OF THE RELOCATED VINELAND UNIT WORKERS.

The Board in 2003 found the relocated employees who had worked at the Applicator Division in Vineland, 339 NLRB 903, 912 (2003), to continue to constitute a separate appropriate unit at the new location. In the 2007 decision, the Board expressly rejected Comar’s claim that the unit no longer was viable because of operational changes, even to the extent that “operational changes result in the unit employees doing the same type of work on the same equipment as non-unit employees within a broader facility or group”. 349 NLRB 342, 360 (2007). The judge first pointed out, *id.* at 357 and 358 n. 32, that Comar could arguably have challenged the reasonableness of the unit if it “had first met its obligation under the Board’s order to rescind its unilateral changes, recognize the Union [and] bargain for a new contract” – something Comar is not complying with because it will not negotiate a contract for the ordered unit. Moreover, the judge went on to state, *id.* at 360:

Even if I were to consider the current state of the unit, including all of the changes – whether lawful or unlawful – that the Respondent has made to the former Vineland Employees’ working conditions from the time of the relocation until the compliance hearing, I would not invalidate the unit. . . . As found in the underlying unfair labor practices decision, the unit has a “deeply absorbed” bargaining history of well over 40 years. *Comar*, 339 NLRB at 910. Where there is such a lengthy history of collective bargaining for a unit, the Board has required continued recognition even when operational changes result in the unit employees doing the same type of work on the same equipment as non unit employees within a broader facility or group. [Citations omitted]. Absent “compelling circumstances” the history of meaningful bargaining in this case is sufficient to

establish the continued appropriateness of a separate unit, even if other factors support a contrary result. [Citation omitted]. . . .¹

The unit in both Board decisions is described as “all hourly paid production workers who are performing the work that was formerly done as part of the Applicator Division of Comar, Inc. at its facility then located in Vineland, New Jersey . . .” The unit workers in 2003 were the relocated Vineland employees. In the 2007 decision, the unit workers remained the employees who had been relocated from Vineland, even though they had been reassigned, dispersed amongst and/or were outnumbered by, the larger non-union Buena finishing department workforce. Thus, during the bargaining in question now, the unit that the Board ordered Comar to bargain a contract for was the relocated employee group.²

Moreover, the 2009 unit clarification hearing established there are no recent substantial changes that have taken place in the Finishing Department or in the current unit. Comar II, 349 NLRB at 360-361, found the changes in operations through 2005 relied on by Comar for the proposition that the unit has ceased to exist were “‘the assorted incremental improvements’ that the respondent made to its manufacturing process over a period of approximately five years”. Id. at 361. At the UC hearing, Comar’s counsel (TR 10) and its witnesses confirmed that there have been no meaningful changes between 2005 and now or even since as early as 2002 (TR 24-27, 48-49, 109, 198). This was confirmed by Union witness testimony (TR 173-76).

Comar essentially relies on the same facts and circumstances now for the proposition that a Finishing Department unit is appropriate, that it relied on in the two prior Board proceedings for the proposition that the relocated workers unit had been subsumed into the Finishing Department

¹ This discussion makes it plain that the unit is comprised of the relocated workers.

² Freeman Decorating Co., 335 NLRB 103 (2001), cited by the Regional Director for the proposition that “unit coverage survives despite turnover”, ACD at 9 n.11, is not apposite. That case did not involve an employer’s failure to comply with a Board remedial order requiring, as here, bargaining for a contract covering an identified, distinct group of employees.

so that the current unit was not appropriate.³ That contention was raised as early as 2001, with Comar's motion to reopen the hearing in Comar I, and the same arguments were relied on in the later proceeding in Comar II. See Comar I, 339 NLRB at 903 n.1; and Comar II, 349 NLRB at 360-361. The argument that technological changes in the finishing department have rendered the "bargaining order moot", Comar II, 349 NLRB at 363, was characterized by the judge as audacious. Id. at 362. Measured against this backdrop, Comar's recently flipped position must be recognized as a tactical maneuver to avoid ever complying with the requirement that it negotiate for an agreement covering the relocated unit.

In Comar I, the Board modified the unit description to reflect that it was no longer tied to Vineland. See Comar II, 349 NLRB at 347. In Comar II, the description was maintained, id. at 356 n.30, and so was the identity of the employees comprising the unit, regardless of what jobs they did and where they worked at the Buena campus. Id. at 360. The discussion of this issue in Comar II also makes it clear that the unit was a function of both the description and the relocated group of workers. This is a current example of the long-recognized "need for flexibility in shaping the unit to the particular case", NLRB v. Hearst Publications, 322 U.S. 111, 134 (1944). The Board's handling of the unit issue is a reflection of the unique history and setting of this case, as opposed to the Regional Director's recent formulaic pronouncement that it is a unit described by function as opposed to job descriptions and therefore it is appropriate to alter its coverage dramatically.

Further, the unit continues to meet the standards of appropriateness that are applied by the Board. It is well established that an appropriate unit is all that is required; and just because it is

³ See e.g., Comar I, 339 NLRB at 910: "Respondent argues that the unit employees were merged . . . into the existing finishing department at Buena and therefore no longer constituted a separate unit." In Comar II, 349 NLRB at 356 n. 30, the judge rejected Comar's "concern that the General Counsel is somehow attempting to bring the entire Finishing Department at the Buena facility within the bargaining unit."

arguable that a finishing department unit would also be appropriate, that does not mean the Board-ordered unit is not still appropriate. NLRB v. Zayre Corp., 424 F.2d 1159, 74 LRRM 2084, 2089 (5th Cir. 1970). As the court in Zayre emphasized, these unit employees have “statutory bargaining rights” that may not be overridden by the employer’s invocation of an “appropriate unit” strawman. Id. at ____, 74 LRRM at 2089. The Board “shap[ed] the unit to the particular case”, and its Orders should not be evaded by this recalcitrant employer.

Moreover, the unit employees do have common interests different from the other hourly employees: they pay a considerably lower premium than all other finishing department employees for unique health insurance coverage (benefits and employee costs at the 1999 benefit plan level) and they are governed by numerous different terms and conditions of employment, as shown by Comar’s rescission [see letters in April and May, 2007, included in Exhibit “C”] of its unilaterally changed terms and conditions for these employees that it had implemented to bring them into line with its other hourly employees. And as found by ALJ Bogas, there is no uniform set of wage rates in the finishing department, 349 NLRB at 352.⁴

Most importantly, this unit has a long-standing history of bargaining as a separate group. As already decided by the Board, the 40-year historical unit factor is controlling. 339 NLRB at 910; 349 NLRB at 360 (“even if other factors support a contrary result.”). See P.J. Dick Contracting, 290 NLRB 150, 151 (1988) (“Units with extensive bargaining history remain intact unless repugnant to Board policy or interfere with rights guaranteed by the Act.”). As pointed out by the Board in Canal Carting, Inc. Inc., 339 NLRB 969, 970 (2003), “the Board usually applie[s] the community-of-interest and plant-wide unit tests only when delineating units of previously unrepresented employees, not, as here, when it is assessing historical units that have had long

⁴ The wage rate listing provided by Comar to the Union for the finishing department in August, 2007 [See Exhibit “D”)], continues to bear this out.

periods of successful collective bargaining.” [citation omitted]. As the Board also noted in Canal Carting, “a history of meaningful bargaining . . . alone suggests the appropriateness of a separate bargaining unit and . . . compelling circumstances are required to overcome the significance of bargaining history.” Id. at 970 (citation omitted). Apropos here, this principle recognizes that “differences in degree among the employees’ community of interest [do not] constitute ‘compelling circumstances’ that would warrant disturbing the parties’ historical . . . unit.” These principles apply to a variety of Board proceedings. Met Electrical Testing Co., Inc., 331 NLRB 872 (2000). Against the above facts and principles, there is no basis to ignore the Board-ordered unit and the employees already found by the Board as comprising it, and Comar’s obligation to bargain for a contract covering it.

In her amended Compliance Determination, the Regional Director contends that Comar has not tried to change the unit, just who is in the unit, and has therefore acted properly. See Amended Compliance Determination at 9. That conclusion fails on several counts.

First, it is factually erroneous. Comar was insisting on a change in the unit description. Comar’s Director of Human Resources testified that it was Comar’s proposal “to find [sic; should be “define”], under the new contract, the finishing department and the jobs that made up the finishing department as the new bargaining unit . . .” (TR 88). This was a change in the unit description, a permissive subject that Comar could not lawfully insist on over the Union’s objection. Batavia Newspapers Corp. 311 NLRB 477, 480 (1993). The Regional Director failed to take this factor into account.

Second, her conclusion ignores the now eleven year history of the case and the evolution of the unit description. Until current events, all parties - including the Region, the Division of Enforcement Litigation, the Union and Comar – considered the unit as described to be comprised

of the relocated Vineland workers, wherever assigned. In its settlement agreement in Comar II, which Comar executed on November 21, 2007, Comar agreed (paragraph 7) to “bargain with the Union as required by the remedial bargaining provisions set forth in the Board’s Orders in Comar I, as enforced, and Comar II.” See attached conformed copy in Exhibit “E”. This included the requirement to bargain for a new contract in the Board ordered unit. Under Board law, Comar is estopped from challenging the status of remaining finishing department employees following its agreement in the prior proceedings to a unit that did not include them. Grancare, Inc., 331 NLRB 123, 128 n.8 (2000). See also Keeler Die Cast v. NLRB, 185 F.3d 535, 162 LRRM 2028, 2032 (6th Cir. 1999), where the court rejected the employer’s claim that the unit “should be re-certified as a larger, and presumably more pro-management, electoral body”, refusing to “subvert [the] voluntary agreement” previously made by the employer, union and the Board.⁵

Third, the attempt in bargaining to dramatically alter the employees encompassed within the stated unit, is an attempt to effect a “fundamental change in the scope of the bargaining unit” even if the description remains unchanged; such is a non-mandatory subject of bargaining.

Raymond F. Kravis Center for the Performing Arts, 351 NLRB 143, 163 (2007).

The Regional Director’s insistence that the unit is described by “function” and therefore can now be magically transformed by tripling its size, ignores this history and well-settled Board law. This description has been crafted by the Board over an eleven-year period, at each instance along the way finding it to be comprised of the relocated workers. Board law does not allow the transformation declared by the Regional Director. Comar’s seeking to add the approximately 29

⁵ In addition to Comar’s position during the prior proceedings, see attached Comar letter dated March 22, 2007 to employees (acknowledging the unit was the “unionized Applicator Division . . . employees”) [See Exhibit “H”] and Comar’s counsel’s letter dated May 24, 2007 with its attachment referencing that it was required by the Board to rescind changes made to “terms and conditions of employment for the former Applicator Division bargaining unit employees presently employed at Buena” [See Exhibit “C”]. Given those substantial changes unique to the relocated Vineland employees, it can hardly be said that the non-unit finishing department employees have an “overwhelming community of interest” with the unit employees. Dennison Mfg. Co., 296 NLRB 1034, 1036 (1989).

hourly Finishing Department employees who are presently non-union, [See Exhibit “H”] to the 10 employees of the relocated unit that is represented by the Union, results in non-represented employees subsuming the represented employees, a circumstance not recognized in accretion cases. Safety Carrier, 306 NLRB 960, 969 (1992) (accretion is “the addition of a relatively small group of employees to an existing unit”); Ryder Logistics, Inc., 329 NLRB 1493 n.1 (1999) (adding a majority of non-represented employees to a unit would result in an unlawful union recognition).

Even if the wording of the existing unit description might be interpreted in a vacuum as covering the entire finishing building workforce, it is improper to add the heretofore unrepresented workers to the unit. In her Amended Compliance Determination, the Regional Director (Decision at 9-12) has relied on her unit clarification decision, where she relied on cases involving units described by function (as opposed to units described by classification) as authority for adding heretofore unrepresented workers to the unit. See, e.g. The Sun, 329 NLRB 854 (1999); Bremerton Sun Publishing Co., 311 NLRB 467 (1993); Unit Clarification decision at 11. In doing so, however, she ignored fundamental requirements applicable to all unit clarification cases, that (1) no change is being sought in the unit description, (2) there must be recent substantial changes in employees or in operations, and (3) the group sought to be added must not have been excluded historically. Nothing in The Sun or Bremerton Sun changed those requirements.

Bremerton Sun was an unfair labor practice proceeding involving the employer’s demand for a change in the language describing the unit. Under that case, insisting on a change in unit description is unlawful “even if the unit is described in terms of work performed.” See Batavia Newspapers Corp., 311 NLRB 477, 480 (1993). In this case, the employer at the bargaining table

was demanding that the unit be described as the finishing department (TR 87-88).⁶ As Batavia and Bremerton Sun make clear, notwithstanding The Sun, Comar's efforts to change the description of the unit render unit clarification unavailable.

Unit clarification is also not available because there is no issue regarding an existing classification which has undergone recent substantial changes in duties, or a new classification whose unit placement is in doubt. Bethlehem Steel Corp., 329 NLRB 243 (1999). In The Sun, the Board simply held that where the units are described by work performed, the traditional community of interest analysis in accretion cases was inapplicable. The decision did not alter the requirement that in any unit clarification case, there has to be substantial recent changes in order for that type of proceeding to be available. Indeed, in The Sun, the Board discussed precedent involving functionally described units and noted that in each instance, "the employers created new job classifications which involved the performance of unit work." In The Sun itself, the employer "removed work by creating new job classifications that clearly involved the performance of unit work . . ." Id. at 859.

In applying The Sun in subsequent unit clarification cases, the Regions have recognized that that case does not dispense with the "recent substantial changes" element of all unit clarification proceedings. In the Beacon Journal Publishing Co., Case 8-UC-339 2001, the Regional Director specifically noted that The Sun "developed a new legal standard regarding unit classification situations for new employees where the scope of the unit is based not on classifications but on work performed," id. at 14, but he nevertheless distinguished The Sun on the basis that there, "the creative services department was newly established". Id. at 13.

⁶ Thus, the employer was not merely trying to identify new classifications in the Finishing Department that belong in the Board-ordered unit because they perform functions historically performed by unit members, *à la* Developmental Disabilities Interstate, Inc., 334 NLRB 1166 (2001). Here, it is not newly created classifications that are in issue.

Similarly, in American Medical Response, Inc., Case 31-UC-296 (2000), the Regional Director distinguished The Sun on the basis that “that case involved a determination with respect to a bargaining unit defined by the work performed and the unit placement of a group of employees in newly created job classifications.” Id. at 6 (emphasis original).⁷

The Regional Director also incorrectly relied in the UC case (Decision at 14) on Armco Steel Co., 312 NLRB 257 (1993), where the Board discussed the applicability of UC Petitions in a number of prior cases. Id. at 259. The Board found that in those cases, it had clarified “unit scope” issues. This is a true statement, but it does not warrant application of unit clarification proceedings to this case. As the Board noted in U.S. Tsubaki, Inc., 331 NLRB 327 (2000), cited by the Regional Director (Decision at 14 n. 12), the case involved a situation where “an employer has transferred some portion of unit employees to a new facility.” Id. at 328. The transfer there occurred in November 1996, with the unit clarification petition being filed February 19, 1997. Id. at 329. Thus, in Tsubaki the “substantial recent changes” requirement of unit clarification proceedings was met. None of the following decisions discussed by the Board in Armco Steel, 312 NLRB at 259, can stand for the proposition that this requirement in unit clarification proceedings is no longer applicable. Thus, Green-Wood Cemetery, 280 NLRB 1359 (1986) was a decertification case where the issue was whether the petition had been filed in the existing unit. The unit was not clarified; unit clarification was not even discussed. Id. at 1360. In Lennox Industries, 308 NLRB 1237 (1992), the Board found “recent, substantial changes that occurred as a result of the corporate-wide reorganization . . . created essentially independent entities, functioning separately and autonomously.” Id. at 1238. In Ameron, Inc., 288 NLRB 747 (1988), the parties had agreed between themselves to submit the unit clarification to the Board. In Rock-

⁷ For this reason, Paper Mfrs. Co., 274 NLRB 491, 497 (1985), relied on by the Regional Director (ACD at 12), is not apposite because the employees at issue were newly hired.

Tenn Co., 274 NLRB 772 (1985), the substantial change was the sale of the two plants in 1983, with the result that the two plants then became owned by separate corporations. The unit clarification petition was filed the following year. Id. at 773. In Renaissance Center Partnership, 239 NLRB 1247 (1979) there was a consolidation; and in South Coast Terminals, 221 NLRB 197 (1975), a new plant was opened to which unit employees were moved.

Conversely, in Batesville Casket Co., 283 NLRB 795 (1987), the Board distinguished Rock-Tenn, on the basis that it there had “specifically noted that the Rock-Tenn corporations had acquired the plants ‘only recently’.” Id. at 797. And the Board in Batesville expressly stated that its decisions did not “indicate[] that the Board should or would interfere with the composition of long established bargaining units in the absence of recent, substantial changes.” Id. (first emphasis added; second emphasis original).⁸ As explained supra, there are no recent substantial changes that have taken place in the Finishing Department or in the current unit.

Finally, the historically excluded finishing department employees may not be added now. In United Parcel Service, 303 NLRB 326, 327 (1991) the Board stated that historically excluded employees, even if “not distinguishable by classification, job function, or geographic location from employees [in the unit],” could not be added to the unit. This principle was reaffirmed in United Parcel Service, 346 NLRB 484 (2006), stating that “a group of employees . . . historically excluded from a unit” cannot lawfully be included in a unit “without an expression of a desire by a majority of these employees to be represented.” In that case the Board refused to allow the addition to a nationwide unit, of previously unrepresented employees in the “disputed classification . . . consist[ing] if a combination of represented and unrepresented employees who

⁸ It is worth repeating in this respect that while Comar purported to recognize the Union in the Board-ordered unit in March 2007 even as it acknowledged the unit was comprised of the relocated workers, it was demanding bargaining over the “composition of the bargaining unit.” [See Exhibit “F”].

performed the same job functions at different UPS facilities.” Id. at 489. It is the fact of exclusion that is important, not whether “such employees were excluded . . . due to agreement of the parties, oversight, mistake, or some other reason.” Robert Wood Johnson University Hospital, 328 NLRB 912, 913 (1999).

POINT II

COMAR FAILED TO MEET ITS OBLIGATION TO BARGAIN A CONTRACT FOR THE UNIT.

As acknowledged by the Regional Director, Amended Compliance Determination at 4, Comar II found that the unit remained intact and Comar was obligated under the Board’s Order to bargain for a contract covering it. This is the unit that existed when the parties were bargaining.⁹ Yet Comar plainly did not bargain for a contract covering it. This violated the Board’s Order, and should have resulted in a reopening of compliance. As the Board has now indicated, Comar had a continuing obligation to comply with the Board’s Order after compliance was conditionally closed. See Order at 5-6.

The parties’ discussion in negotiations, insisted on by Comar, about a finishing department unit did not bind the Union to a finishing department unit.¹⁰ Even tentative agreement on changing the unit would not be final and binding on the Union, because no new complete contract was ever reached. Taylor Warehouse Corp., 314 NLRB 516, 517 (1994). Comar was therefore not entitled to insist on its unit proposal. Id.

It is “well settled that the scope of the employees’ bargaining unit is not a mandatory subject of bargaining.” Boise Cascade Corp. v. NLRB, 860 F.2d 471, 129 LRRM 2744, 2746

⁹ The unit was clarified by the Regional Director in 2009, long after these events.

¹⁰ Contrary to the Regional Director, Decision at 8, it was not the Union, but rather Comar, that requested bargaining to determine which employees were in the unit. Moreover, Comar was insisting on a change in the unit description (TR 88). The Union’s proposal tracked the Board-ordered unit [Exhibit “G”].

(D.C. Cir. 1988). Although parties are free to bargain about permissive subjects, insistence upon same to impasse over the objection of the other party is a violation of the bargaining obligation.

NLRB v. Borg-Warner Corp., 356 US 342, 349, 42 LRRM 2084 (1958).

Consequently, it has long been held that the mere fact that a party has consented to bargain over a permissive subject does not convert that subject to a mandatory subject, and does not make unlawful that party's subsequent refusal to bargain further over the permissive subject. In Kit Manufacturing Co., Inc., 150 NLRB 662 (1964), the parties had bargained over the non-mandatory subject of the employer's use of the union label. Negotiations had progressed to the point that the union had offered the use of the union label as part of a proposal that included a union security clause, which proposal was rejected by the employer. Subsequently, the union withdrew its demand for union security and withdrew its offer of the use of the union label which it had tied to the employer's acceptance of some form of union security. The Union's conduct was held to be entirely lawful. The Trial Examiner found that the Employer's claim that the Union had relinquished its right to object to the Union label by bargaining about it and including it in a package proposal, was "specious". Id. at 671. He concluded that to hold that by bargaining over the permissive subject, the Union was bound to that subject even though no collective bargaining agreement was reached, "would penalize the party to negotiations for endeavoring to reach agreement by consenting to bargaining upon issues as to which the Act does not require him to bargain." Id. at 671. The Board found that the employer's insistence on this permissive subject after the union was no longer willing to include it in the contract, was a refusal to bargain. Id. at 673.

This principle was applied more recently by the Board in KFMB Stations, 343 NLRB 748 (2004). Dealing with a contract proposal authorizing the employer to deal directly with the unit

employees and negotiate individual agreements providing for above-scale wages, a permissive subject of bargaining, *id.* at 752, the Board noted that although both parties had the right to make proposals relating to the subject of direct dealing, “these proposals remained permissive subjects of bargaining, and no party could lawfully insist to impasse on their inclusion in the final agreement.” *Id.* The Board’s decision in Cantebury Gardens, 238 NLRB 864, 865 (1978) points out that the principle also applies to an employer’s conditioning negotiations on changing the unit, as Comar has done here.

On February 10, 2009, in the final meeting between the parties, Comar stated there would be no further meetings unless the Union agreed to the finishing department unit (TR 129). This is an unlawful insistence on a permissive subject of bargaining, and it is a violation of the Order in Comar I.

POINT III

THE PENDING UNIT CLARIFICATION PETITION DOES NOT RELIEVE COMAR OF ITS OBLIGATIONS UNDER THE ORDER.

Comar’s unit clarification petition does not relieve Comar of its bargaining obligations. Concourse Nursing Home, 328 NLRB 692, 694 n.10 (1999); Niagara University, 226 NLRB 918, 919 (1976); New York Times Co., 270 NLRB 1267, 1272 (1984).

It is also likely that the UC Petition will be dismissed because it fails to comport with established Board law governing the availability of unit clarification. See Point I, supra.

POINT IV

THE UNION HAS NOT ACQUIESCED IN OR CONSENTED TO A LARGER UNIT BY CONDUCT AWAY FROM BARGAINING.

In her Amended Compliance Determination, the Regional Director has suggested that the Union’s conduct in only requesting changes in matters found to constitute violations of the Act,

(Amended Compliance Determination at 5; 9 n.10; 10) and its entering into a back pay stipulation that resulted from the Region’s Compliance Specification that itself limited the remedy for the “bargaining unit” to the relocated Vineland employees (November 21, 2007 Stipulation [See Exhibit “E”], see Amended Compliance Determination at 6, 10), somehow constituted an acquiescence by the Union in the finishing department unit. The Regional Director’s reliance on these factors is incongruous at best, for the reasons that follow.

The complaint in Comar I alleged in paragraph 10(a):

“on or about September 27, 1999, respondent established new wages, hours and other terms and conditions of employment for the Unit.” [Exhibit “I”].

The judge found in Comar I that, “effective that same day [9/27/99, id. at 908] Respondent made a number of changes to the terms and conditions of employment of the unit employees” id. at 909. The judge found that the Comar handbook was applied to the unit employees for the first time; seniority list, holiday, personal days, pension plan, 401(k) plan, sick pay, bereavement time, vacation, and bonus eligibility were changed. Id. The judge found that these changes in the wage and benefits package did not affect the appropriateness of the unit. He went on to state that “[f]alling into this same classification of changes that were unlawfully implemented is the merger of seniority lists . . .”, and that, “other changes occurred, id. at 911 (emphasis supplied) which he did not find as violations. He concluded that effective September 27, unlawful changes in wages, benefits and “other terms and conditions of employment of the unit employees at Buena” were made in violation of Section 8(a)(5). Id. at 912. The Board’s order in Comar I, paragraph 2(b), accordingly provides:

Upon request rescind the unlawful changes made in the terms and conditions of employment of the unit employees. Id. at 914.

These quoted sections of the decision and order make it clear that the unlawful changes found to have been made were those that occurred on September 27, 1999, and those were the unlawful changes that the Board order required be rescinded by Comar upon the Union's request.

Changes made by Comar in terms and conditions of employment of the unit employees after September 1999, including their work locations and jobs, were never alleged or found to be violations of Section 8(a)(5). The only 8(a)(5) allegation contained in the 2005 Board pleading in Comar II was a refusal to provide requested information in violation of Section 8(a)(5). Comar II, 349 NLRB at 345. To accord with the Board's order in Comar I that Comar rescind its unlawful changes, the Union's request for rescission was properly limited to items found to be violations of the Act. See, e.g. McClatchy Newspapers, Inc. d/b/a/ The Fresno Bee, 339 NLRB 1214, 1216 n.6 (2003). And, it is plain that in Comar's March 20, 2007 communication [See Exhibit "F"], the changes Comar was offering to rescind in accordance with the Board order in Comar I were limited to the wages, hours and terms and conditions of employment it had changed in September, 1999, not any changes in work assignments that were made after that case and which were never the subject of a Board complaint and unfair labor practice findings. Comar did not offer to rescind work assignments, equipment changes or job content. For the Union to have sought rescission of changes made by Comar that had never been alleged or found to be violations of the Act, would have been unwarranted and indeed foolhardy. To demand rescission of such changes would have put the Union in a position of trying to require actions be taken that it was not entitled to demand under the Board's order.¹¹

¹¹ The Regional Director's December 4, 2006 letter [Exhibit "J"] to Comar is ambiguous as to unspecified changes made after the close of the hearing before Judge Kocol. Neither the letter nor the appendix to it reference reconstituting work locations, equipment and duties as they existed in 1999. The letter states that the bargaining unit is still viable, and "bargaining to modify the unit description would involve a permissive subject." Comar demanded in bargaining that the unit description be changed.

Comar in its letter did not offer to rescind “the effects of changes in working conditions that have taken place since September 1999 to date, which affect the Bargaining Unit.” It only offered to bargain the effects of such changes, which was not an offer to restore the status quo. Comar’s failure to “offer to restore the status quo” regarding those changes renders its “offer” a legally meaningless offer. McKlain E-Z Pack, Inc., 342 NLRB 337, 343 (2003). As the Administrative Law Judge aptly noted in that case, rejecting the employer’s reliance on its offer to bargain made without an offer to restore the status quo:

An offer to bargain over [changes that] have occurred is no substitute for . . . prior notice. Once [changes] have taken place . . . , the union’s position has been seriously undermined and it cannot engage in the meaningful bargaining that could have occurred if the Respondent had offered to bargain at the time the Act required it to do so . . . [I]n cases involving unlawful unilateral changes, the Board’s normal remedy is to order restoration of the status quo ante as a means to ensure meaningful bargain . . . [Citations omitted.] [Quoting from Porta-King Building Systems, 310 NLRB 539 (1993).

The operational changes made by Comar since 1999 were years old by 2007. Even from an effects bargaining standpoint, which is all that Comar proposed, offering to discuss them in 2007 does not meet the requirement that the Union be given timely notice to allow “for meaningful bargaining at a meaningful time.” Willamette Tug & Barge Co., 300 NLRB 282, 283 (1990).

Moreover, the proposition that changes in work assignments, equipment and job content for unit employees could practically have been rescinded at the Union’s demand is not supportable. The rotary machines had virtually been eliminated by 2003. It would have been unwise at best, and futile, for the Union to pursue such demands as part of its bargaining for a contract for unit employees.

CONCLUSION

For all the reasons stated above, the General Counsel should reverse the Regional Director's May 12, 2010 Amended Compliance Determination and direct that the Region reopen compliance, together with further relief consistent with that direction.

Dated: June 17, 2010

Respectfully submitted,

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