

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

In the Matter between)	
)	
KERRY INC.,)	
)	
Respondent,)	
)	
And)	Case Nos. GR-7-CA-52965 &
)	GR-7-CA-53192
LOCAL 70, BAKERY, CONFECTIONERY,)	
TOBACCO WORKERS AND GRAIN)	
MILLERS INTERNATIONAL UNION,)	
AFL-CIO,)	
)	
Charging Union.)	

**BRIEF IN SUPPORT OF RESPONDENT'S EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGE'S DECISION AND ORDER**

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I. PROCEDURAL HISTORY

The hearing in this matter was held on January 25-26, 2011, at the National Labor Relations Board ("NLRB" or the "Board") regional office in Grand Rapids, Michigan, before the Honorable Keltner W. Locke, Administrative Law Judge ("ALJ"). The underlying Charges were filed by Local 70, Bakery, Confectionary, Tobacco Workers and Grain Millers International Union, AFL-CIO ("Union"). The parties timely filed Post-Hearing Briefs on March 23, 2011. On September 27, 2011, the ALJ issued a Decision and Order ("DO"). On October 24, 2011, in response to a joint request for an extension, the Board granted the parties an extension through and including November 22, 2011 to file Exceptions and supporting briefs. References herein are made to the Official Reported Proceedings, as Transcript pages and line numbers (Tr. ____, ln. ____), Decision pages (DO ____), General Counsel Exhibits (GC Ex. # ____), Union Exhibits (Un. Ex. # ____) and Respondent Exhibits (R. Ex. # ____).

II. STATEMENT OF CASE (EXCEPTIONS 1, 2 & 3)

The General Counsel alleged that Kerry Inc. ("Respondent") violated Sections 8(a)(5) and (1) of the National Labor Relations Act (the "Act") by engaging in the following conduct: (1) failing to bargain over the decision to change its regularly scheduled work week of five, eight-hour days to an alternate schedule of three, twelve-hour days and one six-hour day; (2) implementing certain new terms and conditions of employment directly related to the Respondent's change in the weekly schedule (*i.e.*, weekly vacation pay, breaks, daily overtime terms and shift premiums); (3) paying overtime based on hours worked over forty in a week rather than over eight hours per day; and (4) by conducting meetings with employees regarding the work schedule change after notifying the Union. The General Counsel also alleged that the Respondent violated Section 8(d) of the Act by changing: (1) the weekly vacation pay from forty hours per week to forty-two hours per week; (2) the manner in which it paid shift premiums; and (3) the daily break schedules.

The ALJ found, in large part, that the General Counsel failed to prove the majority of violations that were alleged in the Complaint, including his finding that the Respondent did not violate the Act with respect to changing its work schedules from five, eight-hour days to three, twelve-hour days and one six-hour day (DO 35) and did not violate the Act with respect to its payment of overtime (for work over forty hours per week rather than over eight hours per day). (DO 18) The ALJ found only that the Employer violated Section 8(d) of the Act by (1) changing the daily break schedules (DO 51); and (2) changing the manner in which it paid shift premiums to some employees (DO 51). The Respondent's Exceptions are limited to the ALJ's finding that the Respondent violated the Act by allegedly changing the application and payment of shift premiums, and factual findings related thereto.

Specifically, the ALJ held that the Respondent failed to pay shift premiums to “some” employees as required by the Collective Bargaining Agreement (“CBA”). (DO 8, 19, 41-43) In support of this finding, the ALJ credited the testimony of Bernard Kowalski, a forklift driver (“Hi-lo operator”), who testified that he did not believe that he was receiving shift differential pay since the Respondent changed the work schedule to a twelve hour schedule. (DO 38) In addition to Kowalski’s misleading testimony, the ALJ heavily relied on the Respondent’s Answer to the Complaint that admitted changing the application and payment of shift premiums “with regard to some, but not all Unit employees.” (DO 39-42) The ALJ’s finding is wrong because the evidence in the record shows that all employees, including Kowalski, received a shift premium after the work schedule was changed. (Tr. 323, lns. 1-25; R. Ex. #16) Moreover, the Respondent’s Answer in this regard addressed the fact that some employees who were not previously receiving shift premiums began to receive them after the schedule change while other employees continued to receive shift differential pay in the same manner as before the schedule change. Thus, no employees were harmed as the schedule change related to shift differential pay. Accordingly, the Board should overrule the ALJ’s finding that the Respondent violated Sections 8(a)(5) and (1) and 8(d) of the Act with respect to changing the application and payment of shift differential premiums.

III. THE EVIDENCE IN THE RECORD SHOWS THAT ALL EMPLOYEES RECEIVED SHIFT PREMIUM PAY (EXCEPTIONS 1, 2 & 3)

In finding that the Respondent violated Sections 8(a)(5) and (1) and Section 8(d) of the Act by unilaterally changing its payment of shift premiums, the ALJ relied exclusively on the Respondent’s admission in its Answer to Complaint that it changed some of the employee’s receipt of shift premiums and on the testimony of Bernard Kowalski. (DO 8, 19, 38-43) The ALJ’s finding in this regard should be overruled because the Respondent’s Answer was premised on the fact that employees began to receive shift premiums who were not previously receiving

them and because the evidence in the record with respect to Kowalski (and all other bargaining unit employees) actually shows that they did receive their shift premium pay. (Tr. 323, lns. 1-25, Ex. #16)

Article 6.9 of the CBA provides for an hourly shift premium of \$0.10 for second shift work and \$0.15 per hour for third shift work. (GC Ex. #2, Art. 6.9) It does not specify the hours of the second and third shift. (GC Ex. #2) As the ALJ correctly found, the Respondent has the right to set the work schedule. (DO 35) The change of schedules at issue resulted in all employees working some hours that used to be during the second or third shift. (Tr. 322, lns. 2-18) Thus, the Respondent paid every employee a shift premium. (Tr. 335, ln. 22 - Tr. 336, ln. 2) Nevertheless, Kowalski testified that his hourly rate was \$14.82 and that he was not aware that this amount included a shift premium. (Tr. 170, lns. 9-12) He also testified that he did not see a shift differential payment in his paycheck. (Tr. 177, ln. 1) Notably, as discussed in more detail below, Kowalski's hourly wage rate with the shift premium is actually \$14.81. (R. Ex. #16) This one cent differential is noteworthy because it shows that not only was Kowalski speculating as to his wage rate at the hearing, but by his own admission of his hourly wage rate (despite being one cent off), he was receiving his shift differential pay. The formula detailed below confirms that Kowalski received such shift premium differential pay.

Tasha Milburn ("Milburn"), Respondent's Director of Human Resources, testified that after the schedule change, all employees received shift premiums (Tr. 335, ln. 22 - Tr. 336, ln. 2), however, the shift premiums are included in an employee's base pay rate when reported on the Respondent's payroll system ("Lawson"), so it would not be seen as a separate itemized line on their paycheck. (Tr. 310, lns. 6-8). The ALJ "credited" Kowalski's testimony over that of Milburn based on his observation that the Answer admitted that the Respondent changed the

application of shift premiums “with regard to some, but not all Unit employees.” (DO 38) The ALJ’s finding is flawed in a number of respects.

Milburn accurately testified that in order to determine whether or not an employee was receiving their shift premium, one would have to review the wages provision of the CBA to calculate their pay rate and then add in the contractual shift premium, depending upon the applicable shift. (Tr. 318, lns. 9-13) Milburn additionally testified that when the Respondent changed the schedule, it went to four shifts (Shifts A, B, C and D) where A and B shifts receive the second shift differential and C and D shifts receive the third shift differential because the employees on those shifts had previously worked second or third shift. (Tr. 322, lns. 2-18) Moreover, because of the schedule change, employees that previously worked the first shift (7:00 a.m. to 3:00 p.m.) without shift differential began to receive shift differential pay after the schedule change because all the shifts now included at least some hours that were formerly part of the second and third shifts. (Tr. 323, lns. 1-25) For this reason alone, the Respondent stated in its Answer to the Complaint that it changed its shift differential pay with respect to “some” employees. Milburn’s testimony explained that the “some” was the addition of shift pay, not the removal of shift pay. Accordingly, “some” employees received more compensation than in the past because even employees who were previously working on the first shift without a shift premium began to receive either a second or third shift premium after the schedule change; nobody was denied a shift premium. Therefore, any Board remedy would require the Respondent to take money away from employees rather than provide backpay.

Further, despite the ALJ’s finding, no credibility determination had to be made because Milburn’s testimony did not conflict with Kowalski’s. Rather, Milburn testified that shift premiums were provided, but they did not show up on employees’ paychecks because Lawson includes the shift premiums when calculating the published hourly wage rate. (Tr. 322, lns. 1-

11) Therefore, unless Kowalski reviewed the contract to determine his correct hourly wage and then added his contractual wage increases and the shift premium, he would not know whether he received the appropriate shift premium by viewing his paycheck. (Tr. 323, lns. 12-25) Had Kowalski been aware of Lawson's combining the shift premium with the base wage rate at the time he testified, the ALJ would not have had to make a "credibility" determination because his testimony would have paralleled Milburn's testimony. Indeed, the paycheck stubs from the Respondent's Lawson payroll system show that Kowalski did in fact receive shift premium pay. Kowalski's receipt of the shift premium is evidenced through the below calculation:

Hi-Lo Operator Rate After 1 Year:	\$13.92 (GC Ex. #2, Art. 6)
September 1, 2009 Increase of 2.5%:	\$ 0.35 (GC Ex. #2, Art. 6)
September 1, 2010 Increase of 2.75%:	\$ 0.39 (GC Ex. #2, Art. 6)
Shift Differential of \$0.15:	\$ 0.15 (GC Ex. #2, Art. 6)
<i>Kowalski's hourly wage rate according to Lawson: \$14.81 (R. Ex. #16)</i>	

As a result, Kowalski's base pay as of September 1, 2010 was \$14.66, not \$14.82 as he testified. Thus, by factoring in the \$0.15 shift differential premium, his hourly rate including the shift premium differential is \$14.81. This is the same hourly rate reported on the Respondent's payroll system. (R. Ex. #16) Accordingly, the ALJ's finding that Kowalski was not receiving his shift differential is contrary to the evidence. The same computation for every bargaining unit employee will reveal that none of the employees were denied a shift differential premium. Therefore, because there is no backpay at issue, the Board cannot issue a backpay remedy.

Additionally, since the ALJ found that the Respondent may establish the work schedules without bargaining with the Union, it necessarily follows that it can change the hours of the second and third shift because that is scheduling. So long as the Company continues to pay the contractually established second and third shift premium, it has complied with the law and the contract. The record establishes that the Company did just that. Consequently, the ALJ's finding that the Company violated Sections 8(a)(1) and (5) and 8(d) of the Act was erroneous.

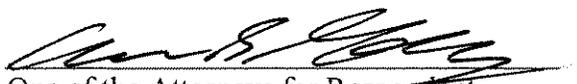
IV. CONCLUSION

For the foregoing reasons, the Respondent requests that the Board grant its Exceptions, and dismiss the Complaint with respect to the allegation that the Respondent violated Sections 8(a)(1) and (5) and Section 8(d) of the Act in the manner and application of its shift differential premium pay.

Dated: November 22, 2011

Respectfully submitted,

KERRY INC.

By: 
One of the Attorneys for Respondent

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STATEMENT OF SERVICE

On **November 22, 2011**, the undersigned, an attorney, filed with the National Labor Relations Board, Office of the Executive Secretary, via the Board's electronic filing system, an electronic copy of the foregoing **Brief in Support of Respondent's Exceptions to the Administrative Law Judge's Decision and Order**, and served copies of same upon the parties below:

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