SW General, Inc. d/b/a Southwest Ambulance *and* International Association of Fire Fighters Local I-60, AFL–CIO. Case 28–CA–094176

May 8, 2014

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND HIROZAWA

On August 8, 2013, Administrative Law Judge Donna N. Dawson issued the attached decision. The Respondent filed exceptions, a supporting brief, and a reply brief. The General Counsel filed an answering brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified[2] and set forth in full below.

AMENDED CONCLUSIONS OF LAW

1. Substitute the following for the judge's Conclusion of Law 2.

"2. The Charging Party, International Association of Fire Fighters Local I-60, AFL–CIO (the Union), is a labor organization within the meaning of Section 2(5) of the Act and is the recognized collective-bargaining representative of a bargaining unit composed of full-time and regular part-time EMT, EMT-I, Paramedics, and Registered Nurses."

2. Insert the following after the judge's Conclusion of Law 3 and renumber the subsequent paragraph.

"4. The Respondent violated Section 8(a)(1) of the Act by notifying the Union, after the fact, of its decision to discontinue longevity pay."

AMENDED REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally discontinuing longevity payments as described in article 44 of the July 1, 2009 to July 1, 2012 collective-bargaining agreement, as extended to September 8, 2012, we shall order it to notify and, on request, bargain collectively and in good faith with the Union before implementing any changes in wages, hours, or other terms and conditions of employment. In addition, we shall order the Respondent to rescind the unlawful change and resume issuing biannual longevity payments to eligible employees until an agreement has been reached with the Union or a lawful impasse in negotiations occurs. We shall further order the Respondent to make employees whole for any losses sustained as a result of the unlawful change, in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), plus interest as set forth in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). The Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters, and shall compensate the affected employees for the adverse tax consequences, if any, of receiving one or more lump-sum backpay award(s) covering periods longer than 1 year.

ORDER

The National Labor Relations Board orders that the Respondent, SW General, Inc. d/b/a Southwest Ambulance, Mesa, Arizona, its officers, agents, successors, and assigns, shall

1. Cease and desist from

[1] We adopt the judge's finding that the Respondent's unilateral cessation of longevity payments violated Sec. 8(a)(5) and (1) for the reasons stated in her decision and in *Finley Hospital*, 359 NLRB 156, 157 (2012). The Respondent did not except to the judge's finding that it violated Sec. 8(a)(1) by informing the Union, after the fact, of its decision to cease issuing longevity payments. Accordingly, we adopt that finding as well.

Member Miscimarra does not adopt the finding that the Respondent violated Sec. 8(a)(1) by a statement it made to the Union. The complaint did not allege an 8(a)(1) violation based on such a statement, the complaint was not amended at the hearing to allege such a violation, and the parties did not litigate this issue. To the contrary, the record expressly negates such an allegation. Before the Respondent presented its case in chief, it asked for a clarification of the issues in the case, and counsel for the General Counsel stated: "The alleged unfair labor practices are set forth specifically in the complaint. . . . And those are the only allegations being made at this time. Those are the only allegations that this hearing is going to determining [sic]" (Tr. 118). Accordingly, Member Miscimarra would reverse the judge's 8(a)(1) finding. Member Miscimarra also dissents from the majority's finding that the judge properly concluded the Respondent violated Sec. 8(a)(5) by discontinuing longevity payments following expiration of the collective-bargaining agreement. Because the contract language expressly limits Respondent's longevity pay obligation to specified dates during "each year of this Agreement," Member Miscimarra believes that the Board cannot reasonably conclude the Respondent implemented a "change" by giving effect to this language and limiting its longevity payments to the agreement's term. See *Finley Hospital*, supra, 359 NLRB 156, 165–167 (Member Hayes, dissenting).

The Respondent excepted to the judge's ruling to exclude CFO Roy Ryals's testimony regarding his intent in drafting the original longevity pay provision in the parties' 2001 collective-bargaining agreement. We find, for the reasons stated by the judge, that the exclusion of that testimony was not an abuse of discretion.

[2] We shall modify the judge's Conclusions of Law and recommended Order to conform to her findings and to the Board's standard remedial language. We shall substitute a new notice in accordance with our decision in *Durham School Services*, 360 NLRB 694 (2014).

(a) Unilaterally discontinuing biannual longevity payments as described in article 44 of the July 1, 2009-July 1, 2012 collective-bargaining agreement, as extended to September 8, 2012.

(b) Notifying the International Association of Fire Fighters Local I-60, AFL–CIO (the Union), after the fact, that Respondent had decided to cease issuing longevity payments contained in the July 1, 2009-July 1, 2012 collective-bargaining agreement, without giving the Union notice or an opportunity to bargain.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Before implementing any changes in wages, hours, or other terms and conditions of employment, notify and, on request, bargain collectively and in good faith with the Union as the exclusive representative of its employees in the following appropriate unit:

> All full-time and regular part-time EMT, EMT-I, Paramedics and Registered nurses, but excluding any on-call part-time employees, office clerical employees, guards, watchmen and supervisors as defined in the Act.

(b) Resume issuing biannual longevity payments to eligible employees as described in article 44 of the July 1, 2009-July 1, 2012 collective-bargaining agreement until an agreement has been reached with the Union or a lawful impasse in negotiations occurs.

(c) Make employees whole for any losses sustained as a result of the unlawful change made on December 3, 2012, with interest, in the manner set forth in the remedy section of this decision.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of money to be reimbursed under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facilities in Mesa, Arizona, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 3, 2012.

(f) Within 21 days after service by the Region, file with the Regional Director for Region 28 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
National Labor Relations Board
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT unilaterally discontinue issuing biannual longevity payments as described in article 44 of the July 1, 2009-July 1, 2012 collective-bargaining agreement, as extended through September 8, 2012.

WE WILL NOT notify the International Association of Fire Fighters Local I-60, AFL–CIO (the Union), after the fact, of our decision to cease making longevity payments contained in the July 1, 2009-July 1, 2012 collective-bargaining agreement, when we have not given the Union notice and an opportunity to bargain.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

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

WE WILL, before implementing any changes in your wages, hours, or other terms and conditions of employment, notify and, on request, bargain collectively with the Union as the exclusive bargaining representative of employees in the following appropriate unit:

> All full-time and regular part-time EMT, EMT-I, Paramedics and Registered Nurses, but excluding any on-call part-time employees, office clerical employees, guards, watchmen and supervisors as defined by the Act.

WE WILL resume issuing biannual longevity payments to eligible employees as described in article 44 of the July 1, 2009-July 1, 2012 collective-bargaining agreement until an agreement has been reached with the Union or a lawful impasse in negotiations occurs.

WE WILL make you whole, with interest, for any losses sustained as a result of the unlawful cessation of biannual longevity payments on December 3, 2012.

SW GENERAL, INC. D/B/A SOUTHWEST AMBULANCE

The Board's decision can be found at www.nlrb.gov/case/28–CA–094176 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273–1940.

Daniel B. Rojas, Esq., and *Paul Irving, Esq.,* for the Acting General Counsel.

Todd A. Dawson, Esq. (Baker & Hostetler, LLP), of Cleveland, Ohio, for the Respondent.

Philip Elias, V.P. and Union Representative, for the Charging Party.

DECISION

STATEMENT OF THE CASE

DONNA N. DAWSON, Administrative Law Judge. This case was tried in Phoenix, Arizona, on April 23, 2013. The Charging Party Union, International Association of Fire Fighters, Local Union I-60, AFL–CIO (the Union) filed the charge in this case on December 3, 2012, and the Acting General Counsel (AGC) issued the complaint on January 31, 2013. (GC Exhs. 1(a) and 1 (c)[1] The complaint alleges that Southwest General, Inc., d/b/a Southwest Ambulance (Respondent) violated Section 8(a)(5) and (1) of the Act when it made a unilateral change in working conditions without having afforded the Union notice, and an opportunity to bargain. More specifically, the complaint alleges that upon expiration of the most recent collective-bargaining agreement, from 2009–2012 (the 2009 Agreement) (Jt. Exh. 4), Respondent unilaterally discontinued biannual longevity payments to unit employees, pursuant to said agreement. Respondent denied, in its answer[2], that it had any obligation to continue longevity payments once the 2009 Agreement expired, and denied any other unlawful conduct alleged in the complaint. The Respondent asserted several affirmative defenses, including that any contractual dispute that exists should be deferred to an arbitrator, and not interpreted by the Board. (GC Exh. 1(e); Tr. 222–223.)[3]

After the trial, the Acting General Counsel and the Respondent filed briefs, which I have read and considered. Based on the entire record in this case, including the testimony of witnesses, and my observation of their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation with an office and place of

[1] Exhibits received into evidence are referred to here as "GC Exh."for General Counsel Exhibit; "R Exh." for Respondent Exhibit; and "Jt. Exh." for Joint Exhibit. The parties' briefs will be referred to here as "GC Br." for General Counsel's brief, and "R Br." for Respondent's brief.

[2] During the trial, Respondent amended its answer to admit to pars. 5(a) and 5(b) of the complaint. (Tr. 89.)

[3] Respondent also asserted, as an affirmative defense, that the complaint must be dismissed because the President's purported appointments of two new Board members were unconstitutional and invalid. Respondent argued that the Board lacks a quorum since the expiration of member Becker's term on January 3, 2012 (citing *New Process Steel v. NLRB*, 1380 S.Ct. 2635, 2640 (2010) (held "two [remaining Board] members may [not] continue to exercise that delegated authority once the group's (and the Board's) membership falls to two." (GC Exh. 1(e).) This argument lacks merit here, however, as the Board rejects any ruling that it does not have the requisite three-board member authority. I am aware that the United States Court of Appeals, D.C. Circuit, in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), concluded that the President's recent recess appointments to the Board were not valid. However, as noted by that Court, this conclusion is in conflict with at least three other courts of appeals' rulings. See *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004), cert denied 544 U.S. 942 (2005); *U.S. v. Woodley*, 751 F.2d 1008 (9th Cir. 1985); *U.S. v. Allocco*, 305 F.2d 704 (2d Cir. 1962). Thus, the Board has rejected this argument, as the issue regarding the validity of recess appointments "remains in litigation, and pending a definitive resolution, the Board is charged to fulfill its responsibilities under the Act." See *G4S Regulated Security Solutions*, 359 NLRB 947, 947 fn. 1 (2013), citing *Belgrove Post Acute Care Center*, 359 NLRB 633, 633 fn. 1 (2013).

business in Mesa, Arizona (Respondent's facility), provides emergency and nonemergency ambulance services throughout the State of Arizona by contracting with hospitals, nursing homes, municipalities, counties and other local government entities (Tr. 119, 120–121). During a representative 1-year period, ending December 3, 2012, Respondent purchased and received goods and materials valued in excess of $50,000 directly from suppliers located outside the State of Michigan. During that same representative period, Respondent received gross revenues in excess of $250,000. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The parties admit, and I also find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Background

Respondent Southwest Ambulance contracts with municipalities and other government entities, including unincorporated areas of counties within the State of Arizona to provide emergency 911 ambulance services. It also provides critical care and convalescent facility ambulance transportation services between hospitals, and between hospitals and nursing homes and vice versa. Id.

Respondent has admitted, and I find, that since 1992 (Jt. Exhs. 1(e) and 1(c)), and at all relevant time periods here, Respondent has recognized the Union as the exclusive collective-bargaining representative of the unit. This recognition has also been embodied in successive collective-bargaining agreements, including the most recent 2009 Agreement. (GC Exhs. 1(e), p. 2 and 1(c), p. 2; Jt. Exhs. 1–4; Tr. 121.) The employees of the respondent (the unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act, and include:

> All full-time and regular part-time EMT, EMT-I, Paramedics and Registered Nurses, but excluding any on-call part-time employees, office clerical employees, guards, watchmen and supervisors as defined in the Act.

(Jt. Exhs. 4; GC Ex. 1(e).)[4] The unit currently includes approximately 800 employees (Tr. 88, 121), of Respondent's Southwest Emergency Medical Services Group's Maricopa, Pinal, Pima and Graham County nonfire integrated ambulance operations. (GC Exh. 1(e); Jt. Exh. 4, p. 4.)

Respondent's chief operating officer (COO), Roy Ryals, is responsible for most of Southwest Ambulance's operations, including management-union negotiations and contract administration and internal adjudication of grievances and labor disputes. (Tr. 120.) He has participated in collective-bargaining negotiations between Respondent and the Union, as the lead negotiator or conegotiator, since at least the late 1990's or early 2000's, as well as the drafter of 2009 Agreement at issue here. (Tr. 121–124.) John Karolzak, employed by Respondent's parent company, Rural/Metro Corporation, is Respondent's Southwest Zone vice president. Tuesday Kramer is the human resource manager and Cassandra Collins is the payroll manager. Roy Ryals and Cassandra Collins testified during the trial, but Karolzak and Kramer were not called as witnesses.[5]

The current union president is Adam Lizardi,[6] who has held that position since January 2012. Prior to that, he was the Union's business manager for several years, serving on the Union's contract negotiations team since about 2006. Other union officers with whom Lizardi works on his negotiations team are Kevin Burkhart, treasurer; P J Elias, vice president; Eddy Dobiecki and Michael Lovett, business managers (Tr. 91–92, 101). Only Lizardi testified at the hearing.

Longevity Pay

1. History

Respondent and the Union first reached an agreement on language concerning longevity pay during negotiations of their 2001 collective-bargaining agreement. This language was set forth in article 45 of that agreement, entitled "Longevity Pay"; and referred to biannual payments for long-term employees after they reached a qualifying threshold of service with Respondent. Respondent and the Union continued to include a "Longevity Pay" article in successive collective-bargaining agreements from June 2003 through September 2009[7] (Jt. Exhs. 1–4), without any lapses in agreements between May 2001 through September 2012. (Tr. 102.) In fact, the language contained in the "Longevity Pay" articles remained virtually unchanged in these agreements, except for the 2003 Agreement, in which the parties agreed to add a separate tier of longevity pay for employees with 15 years or more seniority. (Id.)

The parties stipulated that pursuant to these collective-bargaining agreements, Respondent issued biannual longevity payments (in June and December)[8] to eligible unit employees from 2001 through June 2012, the month during which the most recent 2009 Agreement initially expired. (Jt. Exh. 8.)

According to current Union President Adam Lizardi, the Union initially wanted the longevity pay provision to give senior employees an opportunity to continue to receive a raise during a time when Respondent had placed caps on annual hourly wage increases at 10 years of service.[9] (Tr. 109–111.)

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[4] EMT- Emergency Medical Technician.

[5] Respondent initially denied in its answer that Ryals and Collins were supervisors, but amended its answer during the trial to admit they were supervisors and agents of Respondent. (GC Exh. 1(e); Jt. Exh. 8; Tr. 32.)

[6] Lizardi is also an Emergency Medical Technician, with just over 19 years of service with Southwest Ambulance/Respondent. (Tr. 90.)

[7] The 2001 collective-bargaining agreement (2001 Agreement) was to remain in effect until 2004, but the parties entered into negotiations early and signed a new collective-bargaining agreement that became effective in June 2003 (2003 Agreement) through June 2006, keeping the "Longevity Pay" provision in art. 45. In the subsequent 2006 and 2009 Agreements, this provision was placed in art. 44. The 2006 Agreement was effective from August 2006 through July 1, 2009, and the last and most recent agreement became effective on July 1, 2009 (2009 Agreement). (Jt. Exhs. 1–4.)

[8] These payments were included in either the first or second pay checks issued in June and December of each year from 2001 through June 2012. (Tr. 96–97.)

[9] While Lizardi recalled a pay scale in 2001, when the Longevity Pay article was implemented, that "topped out" at 10 years, the collec-

Respondent asserted that this testimony be disregarded since Lizardi was not present during the 2001 contract negotiation meetings when the parties began to implement longevity pay language. (R. Br.) However, Lizardi recalled that in 2001 union officials offered this explanation to union members when the 2001 Agreement was brought to them for a vote. He also remembered that this historical basis for longevity pay was discussed during subsequent union board meetings, of which he was a part. (Tr. 101–102, 109–111.) Lizardi was credible in his presentation, and Respondent did not present any evidence to dispute this explanation. However, I credit this testimony for historic background only, as it is not material or critical in the determination of liability in this case. Neither Lizardi nor Ryals offered an explanation for maintaining this benefit, nor do I find one is necessary. Lizardi acknowledged, and there is no dispute, that after Respondent removed the caps on hourly wage increases[10] the parties agreed and continued to include longevity pay articles in successor agreements. (Jt. Exhs. 3, pp. 31–32; 4, p. 53.) Thus, I find there is a long-standing history and practice, no matter what the reason or origin, for Respondent and the Union to agree to longevity pay provisions.

While the parties sharply disagree as to whether Respondent had an on-going obligation to issue longevity pay after the expiration of the 2009 Agreement, neither Lizardi nor Ryals recalled any discussions among the Respondent-Union 2009 negotiations team members as to this obligation. (Tr. 109, 170.)

During the trial, the parities disagreed as to whether the longevity pay was a "payment" or "bonus." Respondent made a point of referring to the payments at issue during the trial as "longevity bonuses," and in its answer as "longevity bonuses" and "longevity bonus payments." inferring a distinction between "pay" and "bonus." (GC Exhs. 1(e); Jt. Exhs. 1–4.) However, Respondent did not proffer any arguments to support such a distinction. Nor did it specifically argue that longevity pay was not a mandatory subject of bargaining. Respondent did assert that these payments were separate, stand-alone events, and not an ongoing practice, and did not affect regular wages or otherwise impact future terms and conditions. (R. Br., pp. 7–8.) Both parties repeatedly included articles entitled "Longevity Pay" in their successive collective-bargaining agreements implemented from 2001 through 2012. (Jt. Exhs. 1–4.) When asked to describe "longevity pay" or "longevity bonus," Ryals responded that "[i]t is a payment that's made to employees that have achieved ten-plus years of service." (Tr. 121.) He also repeatedly identified the payment as "longevity pay" during his testimony, even when questioned by Respondent's attorney. (Tr. 57, 150, 163, 166–167.) It matters little to the ultimate question in this case what the parties chose to call the longevity payments. While these payments may not have been a part of regular wages or overtime pay, I find the parties agreed that they be paid to more senior employees as a type of enhancement or addition to regular wages.

2. Article 44 of the 2009 Agreement

The most recent collective-bargaining agreement became effective July 1, 2009, and remained in effect until July 1, 2012. (Jt. Exh. 4.) The "Longevity Pay" provision of the 2009 Agreement in article 44, which is at issue in this case, provided in relevant part:

> 44.1 Every December 1st and June 1st of each year of this Agreement, employees who have completed at least ten years of full-time service but less than 15 years of [full-time] service shall qualify for $100.00 for each year of continuous full-time service in excess of nine years.
>
> 44.2 Employees that have completed 15 or more years of full-time service shall receive $150.00 for each year of continuous [full-time] service in excess of nine years, up to a semi-annual maximum of $3,000.00 and an annual maximum of $6,000.00.
>
> 44.3 Employees on industrial leave shall qualify for this payment for only the first six (6) months of industrial leave.
>
> 44.4 Payments will be made to employees who are active as of the date payment is made. Payments will be paid no longer than 30 days after the qualifying date.
>
> 44.5 An employee must be in good standing as of the qualifying date to receive longevity pay. Good standing shall be defined as not currently on probation for prior actions, being in compliance with attendance and timeliness policies, and maintaining acceptable documentation performance during the prior six (6) month period.

(Jt. Exh. 4, p. 61 of 62.)

3. Other relevant provisions of the 2009 Agreement[11]

Article 3, entitled "Duration of Agreement," Section 3.1 provided, in relevant part: "[t]his Agreement shall be considered effective July 1st, 2009 and shall remain in effect until July 1, 2012." The cover page of the 2009 Agreement contains the following: "Effective Dates: July 1st, 2009–July 1st, 2012." (Jt. Exh. 4, p. 6 of 62; p. 1 of 62.)

> Article 36-"Hourly Pay," Section 3.1 of this Agreement provided in relevant part:
>
> 36.1 Beginning with the first full pay period following the signing of this labor agreement, each active/current employee covered under this agreement will receive a 4% increase including retroactive pay for hours worked since July 1, 2009. This retro payment will be based on only hours worked in a position covered in this labor agreement.

tive-bargaining agreements effective from 2001 to 2003 and 2003 to 2006 reveal that annual wage increases were actually capped at 11 years for all Emergency Medical Technicians and Registered nurses, and at 13 years for Paramedics (i.e., caps were dependent upon employees' job classifications). (Jt. Exh. 1 pp. 50–52; Jt. Exh. 2, p. 51 and appendix A.)

[10] See fn. 8, above.

[11] Respondent cited to or referenced these other provisions to support its theories that the Union either agreed to a set number (six) of longevity payments during the specific term of the 2009–2012 Agreement, waiving its right to bargain, or waived its right to bargain by failing to file a grievance or unfair labor practices (ULP) charge when Respondent discontinued pay increases under art. 36 of the 2009 Agreement. These theories will be discussed in the Discussion and Analysis sections of this decision. (R. Br.)

> 36.2 Beginning with the first full pay period in July 2010, each employee covered under this agreement will receive a 2.5% increase.
>
> 36.3 Beginning with the first full pay period in July 2011, each employee covered under this agreement will receive a 3.5 % increase.

(Jt. Exh. 4, p. 53 of 62.)

4. Expiration of 2009 Agreement and discontinuance of longevity pay

The 2009 Agreement expired on September 8, 2012. It initially expired on July 1, 2012, pursuant to the effective dates in the agreement, but the parties entered into three consecutive, temporary agreements to extend the 2009 Agreement through September 8, 2012. (Jt. Exh. 4, p. 6 and Jt. Exhs. 5–7.) However, the parties began negotiations for a successor agreement in about March 2012, and in fact, continue to meet and negotiate for a new agreement. (Tr. 54–55, 92–93; GC Exh. 2.) The parties agree to the most material facts following the expiration of the 2009 Agreement. They agree that Respondent made the last longevity payment to eligible unit employees in June 2012, and refused to continue to make these payments in December 2012 and thereafter. Respondent, through COO Ryals' testimony and stipulations, admits that it did not provide the Union with notice or an opportunity to bargain prior to the decision to discontinue longevity payments.[12] In fact, Ryals did not "believe there was any need for [Respondent] to notify them." He asserted that "[t]he plain language of the CBA that was expired, there was no continuing process that I would notify them about." (Tr. 59–60; 166; Jt. Exh. 8.)

Although questioned at length as to who made the decision to discontinue longevity pay, and with whom he discussed the decision, it is evident from Ryals' undisputed, unwavering testimony that he made the decision to terminate longevity pay after the 2009 Agreement expired, and that Respondent sanctioned this decision. (Tr. 56–60.) Ryals did not, however, inform the Union of his decision until December 3, 2012, when Lizardi contacted Respondent's payroll manager, Cassandra Collins,[13] via email, to ask if the "longevity checks would be in the next check or the one after[.]" Collins initially responded "[t]he one after," but 13 minutes later, emailed the following: "Sorry, but from what I understand we won't be paying any longevity yet." She then clarified that "the company is not planning on paying longevity." Lizardi forwarded these emails to the Union Treasurer, Kevin Burkhart. (GC Exh. 4.) Kevin Burkhart subsequently asked Ryals "to do the right thing," [14] and issue the longevity pay, but Ryals denied the request. (Tr. 57, 60; Jt. Exh. 8.)

> I credit Lizardi's undisputed testimony that he and one or more of his other Union officials contacted Respondent almost immediately after he received word from Collins that the longevity benefit would not be paid. They inquired as to the reason why it was not paid. As previously stated, Respondent admits that it refused to honor this request or give the Union an opportunity to bargain over its decision not to make longevity payments.

Ryals recalled that he verbally communicated his decision to stop longevity pay to his managers and other company executives, and that no one disagreed. (Tr. 57, 139–140.) The only email produced regarding written communication to other managers/officials was dated September 11, 2012, and entitled "Local I-60 Negotiations Update." While it confirmed that the parties were still working together to negotiate a new agreement after the 2009 contract expired, it did not mention longevity pay, or other specific provisions in the 2009 Agreement. It did state in pertinent part:

Managers:

> By now you have all heard that the contract with Local I-60 has expired and the company did not extend the contract. This is true.
>
> . . . .
>
> [W]e agreed to begin negotiations in March, well before the June expiration date of the existing contract.
>
> . . . .
>
> Much to the Company's surprise, during our first negotiation session on March 27th, the Union announced that they wanted to completely scrap all articles in the existing contract, which took literally hundreds of hours to negotiate over the years, and start over.
>
> . . . .
>
> The Company has negotiated in good faith and, as such, extended the existing contract twice. The Company did not feel that continued extension of the contract would result in any improvements in the negotiations process. Thus, the Company declined to take such action. Obviously the process is taking longer than anyone wants, but a lot of progress has been made. We are optimistic that we will be able to reach Agreement in a timely manner on the remaining outstanding articles.
>
> Now what does this all mean to you and how you manage your direct reports? The answer is, pretty much nothing.
>
> Wages benefits and working conditions remain unchanged. The disciplinary process remains unchanged. The disciplinary process remains unchanged at your level. All policies, procedures, and standard operating procedures remain unchanged.
>
> In other words, it is business as usual
>
> . . . .

[12] The parties also stipulated had Respondent issued longevity pay pursuant to the formula set forth in the 2009 Agreement, payment would have totaled $87,150 to 138 bargaining unit employees. (Jt. Exh. 8.)

[13] Collins normally administered the actual payments as directed by Respondent. She did not make decisions as to whether or not payments would be issued. (Tr. 73–77.)

[14] Ryals did not specifically recall this conversation with Burkhart, but admitted that "Kevin says things like that, it wouldn't be out of character for him." (Tr. 60.)

> While there are a few changes that the Law allows, like the ability of the Union to Strike and the ability of the Company to Lock Out the workforce, no one is even contemplating strikes or lockouts that I am aware of. Again, your responsibility is to perform business as usual.[15]

(GC Exh. 2; Tr. 150–151.)

In August 2012, prior to the expiration of the 2009 Agreement, the parties reached a tentative agreement (TA)[16] to retain a longevity pay provision in the new or successor agreement that would remain identical to the in article 44 of the 2009 Agreement. (Tr. 55–56; 95–97.)

Ryals testified that he drafted the longevity language in the collective-bargaining agreements from 2001 through 2009. (Tr. 123, 124.) He explained that his understanding of what Respondent committed to in art. 44 of the 2009 Agreement was that "longevity pay would be paid out on the two dates specified, which were . . . July and December of each year that the agreement [went] into effect. When the agreement was no longer in effect, the company had no obligation, and nor would [he] believe the plain language indicates that payment [would continue]." He asserted that the Company believed it was agreeing to only "a total of six payouts for longevity," and those were the only payments made throughout the course of the 2009–2012 Agreement. (Tr. 165–166.) Clearly, the Union has a different understanding as to what would occur after the expiration of the 2009 Agreement. I find that this is a legal dispute rather than a factual one, and that the 2009 Agreement was silent as to what would happen to the longevity provision in the event it expired. Respondent refused to stipulate that the parties had not discussed with each other their postexpiration expectations for the 2009 Agreement, either during negotiating sessions or otherwise, leading up to the 2009 contract. However, it is uncontested that neither Lizardi nor Ryals could recall any discussions among the parties' negotiating team members regarding what would happen to the biannual longevity payments if the 2009 Agreement expired without a successor agreement in place.[17] (Tr. 109–110, 170.) Thus, I find the parties did not discuss or come to an agreement, nor include in any agreement, what would occur to longevity pay once the 2009 Agreement expired.

III. DISCUSSION AND ANALYSIS

Legal Standards

1. Threshold issue is whether a determination of the merits should be deferred to a Grievance and Arbitration Process

I will first address Respondent's assertion that it may be appropriate to defer my decision in this case to an arbitrator pursuant to the 2009 Agreement's grievance and arbitration procedures. Respondent relies on the holding in *Nolde Bros., Inc. v. Bakery Workers Local 358*, 430 U.S. 243 (1977). (Tr. 22; GC Exh. 1(e); Jt. Exh. 4, pp. 37–41.)[18] Respondent asserted, at the trial and in its answer, that if the Agency alleges that it violated the collective-bargaining agreement, then any right that arises under the contract is arbitral, regardless of whether the contract has expired. (Tr. 22). As the Agency pointed out in its brief,[19] the Board has long recognized the appropriateness of deferring certain unfair labor practice charges in cases where a union and employer have active grievance and arbitration procedures in place. See *University Moving & Storage Co.*, 350 NLRB 6, 20 (2007), citing *Collyer Insulated Wire*, 192 NLRB 837 (1971); *United Technologies Corp.*, 268 NLRB 557 (1984) (the Board reaffirmed and bolstered its doctrine in *Collyer Insulated Wire*, supra).

Under *Collyer Insulated Wire,* supra, and *United Technologies Corp.,* supra at 558, deferral is appropriate when:

> [T]he dispute arose within the confines of a long and productive collective-bargaining relationship; there is no claim of employer animosity [or "enmity"] to the employees' exercise of protected rights; the parties' agreement provides for arbitration of a very broad range of disputes; the arbitration clause clearly encompasses the dispute at issue; the employer has asserted its willingness to utilize arbitration to resolve the dispute; and the dispute is eminently well suited to such resolution [by arbitration].

University Moving & Storage Co., supra at 20. In the instant case, the parties had a long and productive collective-bargaining relationship, with no claim of employer animosity, as evidenced by the successive agreements and on-going negotiating towards a new agreement. However, this case does not pass the *Collyer Insulated Wire* test, in that the 2009 Agreement does not encompass the dispute at issue. In fact, as discussed further here, the 2009 Agreement specifically stated that the arbitration clause would not survive the Agreement.

In *Nolde Bros., Inc. v. Bakery Workers Local 358*, 43, supra

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[15] It appears from this correspondence to managers, that Ryals may not have made his decision to discontinue longevity payments as of September 11, 2012 (3 days after the expiration of the Agreement). His testimony indicates that he probably made his decision in November 2012 or before the time that longevity pay historically being paid out to someone. (Tr. 57.)

[16] Both Ryals and Lizardi explained that a TA occurs when both negotiating parties to a new or successor agreement agree to the language of a particular provision, pending approval of a final collective-bargaining agreement. (Tr. 55–56; 95–97.)

[17] There was a lot of trial discussion as to whether or not Ryals or Tuesday Kramer took and kept bargaining session notes regarding longevity pay discussions. Ryals asserted that he nor Kramer had any such notes. On the other hand, Lizardi observed that in most meetings, Kramer appeared to be taking notes on her laptop, but he could not recall if she took notes during longevity pay discussions. (Tr. 94–95.) I tend to credit Lizardi's observations over Ryals' rather unequivocal, vague testimony that "[s]he's been there, she takes notes some of the time . . . [s]ome of the time, she does not." (Tr. 48.) Since Kramer was not called by either party to settle this dispute, and neither Ryals nor Lizardi could recall specific discussions about longevity pay, other than in sessions for the new contract, this matter is not relevant or critical to the decision in this case.

[18] In its answer, and at trial, Respondent asserted this deferral argument as an affirmative defense, but did not address it in its brief. (R. Br.) However, since Respondent has not officially abandoned this affirmative defense, it is appropriate to address it as a threshold issue before deciding the merits of the unfair labor practice issue.

[19] R. Br. pp. 11–12.

at 243, the Supreme Court held that when the parties have agreed to arbitrate grievances arising under a collective-bargaining contract, that obligation is presumed to continue once the contract has expired. In a subsequent case, the Supreme Court clarified its holding in *Nolde Bros., Inc.,* supra, stating that "*Nolde Bros., Inc.,* supra, 430 U.S. at 255 . . . found a presumption in favor of postexpiration arbitration of disputes unless negated expressly or by clear implication so long as such disputes arose out of the relation governed by the contract." *Litton Financial Printing Div. v. NLRB*, 501 U.S. 190, 191–192 (1991).

The facts in *Nolde Bros., Inc.,* are easily distinguished from this case. First, the case involved a suit to compel arbitration under the arbitration provisions of an expired collective-bargaining agreement, which, unlike the arbitration in the instant case, was silent regarding postexpiration grievances or arbitration. The union alleged the employer was obligated to arbitrate its refusal to provide severance pay, under the expired agreement, to displaced employees who had worked for the company for at least 3 years. The employer argued that its obligation to arbitrate (and pay the displaced employees) died with the contract because the event leading to displacement and giving rise to the dispute—the closing of the plant—occurred after the expiration of the contract. The Court held that "[t]he dispute . . . although arising after the expiration of the collective-bargaining contract, clearly arises under that contract." *Nolde Bros.*, supra at 249. The Court observed that parties had agreed in the expired contract's arbitration clause to attempt to resolve "all grievances," but that the contract was silent as to postexpiration grievances. It held that "in the absence of some contrary indication, there are strong reasons to conclude the parties did not intend their arbitration duties to terminate automatically with the contract." *Nolde Bros.*, at 253. The Court concluded "[i]n short, where the dispute is over a provision of the expired agreement, the presumptions favoring arbitrability must be negated expressly or by clear implication." *Nolde Bros.*, supra at 255.

In *S & W Motor Lines*, 236 NLRB 938 (1978), the Board adopted the position that the arbitration provision did not survive contract expiration because the *Nolde* presumption favoring arbitrability of postexpiration disputes had been negated by express language in the contract. Unlike the contract in *Nolde*, but like the contract in *S & W Motor Lines*, supra, the expired 2009 Agreement in this case explicitly states that the parties' grievance and arbitration procedure "does not survive the term of this Agreement." (Jt. Exh. 4, p. 37.)[20] Therefore, I find no basis upon which to defer the merits of this case to arbitration where the parties clearly decided that arbitration would not survive the contract. Furthermore, the parties to this expired 2009 Agreement "have no contractual obligation to adhere to the agreement's arbitration procedure in processing grievances arising after the agreement's arbitration date." See *W. H. Froh, Inc.,* 310 NLRB 384, 386 (1993), citing *Indiana & Michigan Electric Co.*, 284 NLRB 53, 57 (1987), and *Hilton-Davis Chemical Co.*, 185 NLRB 241, 242 (1970).[21]

2. Discontinuance of longevity pay after expiration of the 2009 Agreement

Mandatory Subject of Bargaining

First, I find that longevity pay, as described in article 44 of the 2009 Agreement, as well as the three predecessor agreements, is clearly a mandatory subject of bargaining.[22] The Board has recognized longevity pay as a mandatory subject of bargaining. In *Pine Brook Care Center*, 322 NLRB 740, 748 (1996), the Board adopted the Administrative Law Judge's findings which including a finding that certain benefits, including "longevity pay," constituted terms and conditions of employment which were "clearly" mandatory subjects of bargaining. Additionally, whether described as a "longevity bonus" of "longevity pay," I find article 44 describes a payment to eligible senior employees which constitutes a mandatory subject of bargaining.

Unilateral Change Violation

Section 8(a)(5) of the Act provides that it is an unfair labor practice for an employer to "refuse to bargain collectively with the representatives of his employees;" and has culminated into a longstanding rule that an employer violates Section 8(a)(5) if it "unilateral[ly] change[s] conditions of employment under negotiation, for it is a circumvention of the duty to negotiate which frustrates the objectives of § 8(a)(5) much as does a flat refusal." *NLRB v. Katz,* 369 U.S. 736, 743 (1962). Furthermore, it is well settled that the unilateral change doctrine set forth in *NLRB v. Katz,* supra, whereby an employer violates the NLRA if it effects a unilateral change of an existing term or condition of employment, without bargaining to impasse, extends to cases in which an existing agreement has expired and negotiations on a new one are pending. See, e.g., *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.,* 484 U.S. 539, 544 fn. 6 (1988), *Litton Financial Printing Div. v. NLRB.*, supra, 191–192. Therefore, an employer's duty to maintain the status quo remains the same, during negotiations, when both the Union and employer have agreed to a particular term or condition of

[20] The Board has consistently recognized that the parties generally do not have an obligation to adhere to the terms of an expired arbitration agreement. See *Indiana & Michigan Electric Co.*, 284 NLRB 53, 57 (1987) (the Board reaffirmed its view that "the arbitration commitment arises solely from mutual consent. . . . Congress did not intend the [NLRA] to . . . create a statutory duty to arbitrate," and recognized deferral of charge to be inappropriate where grievances were triggered by events occurring after the expiration of contacts").

[21] The Board in *W. H. Froh, Inc.*, supra at 386 fn. 5, noted that *Hilton-Davis* has been cited with approval by the Supreme Court in *Litton Financial Printing Div. v. NLRB.*, 501 U.S. 190 (1991).

[22] While Respondent does not assert that longevity pay is not a mandatory subject of bargaining, at trial, it insisted on characterizing longevity pay as a "longevity bonus" or "bonus," rather than agreeing that it is the same as "longevity pay." However, as I found earlier in this decision, art. 44, drafted by Ryals, and approved by the Union, is entitled "Longevity Pay," and both parties have certainly referred to benefit as a "bonus" or "pay" interchangeably throughout these proceedings. Nevertheless, no matter what they call it, it is clearly an economic benefit flowing from the relationship between the employer and unit employees, and a mandatory subject of bargaining as discussed here.

employment in a collective-bargaining agreement which has expired. *Finley Hospital*, 359 NLRB 156, 157 (2012), citing *Litton*, supra at 198; *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, supra.

An employer may escape liability for a unilateral change violation if it proves that a union has expressed or implied a "clear and unmistakable waiver" of its right to bargain. *American Broadcasting Co*., 290 NLRB 86, 88 (1988*); California Pacific Medical Center*, 337 NLRB 910 (2002).

The Board has relied on several factors in assessing whether a clear and unmistakable waiver exists: (1) language in the collective-bargaining agreement, (2) the parties' past dealings, (3) relevant bargaining history, and (4) other bilateral changes that may shed light on the parties' intent. See *Johnson-Bateman*, 295 NLRB 180, 184–187 (1989); *American Diamond Tool*, 306 NLRB 570 (1992). The party asserting the waiver, however, bears the burden of establishing the existence of the waiver. *Pertec Computer*, 284 NLRB 810 fn. 2 (1987).

Respondent, from the offset, does not raise the customary defense that the Union waived its right to bargain. Rather, Respondent asserts that the waiver doctrine is irrelevant in this case because it never changed existing terms and conditions of employment. In fact, Respondent even argues that "longevity bonuses" were not an ongoing practice, "but were limited by both parties in the 2009 Agreement to a fixed number of payments (six) on specified dates which "expired of [their] own accord" once they were made.[23] Respondent contends that this calculated expiration did not constitute a "change," nor create an obligation to bargain, because Respondent made all longevity payments required by the expired 2009 Agreement. Respondent does argue, alternatively, that if I apply the "clear and unmistakable waiver" doctrine, Respondent's obligation would be satisfied much for the same reasons, i.e., that it met its obligation once the sixth payment was made. Respondent also avers, alternatively, that the Union implicitly waived its right to bargain when it failed to grieve or file a charge in connection to Respondent's termination of wage increases under article 36 of the 2009 Agreement. It relies heavily on its interpretation of Union President Adam Lizardi's testimony. (R. Br.)

First, I have considered all of Respondent's arguments as to why its actions did not constitute a "change" or "unilateral change," and find they are unsupported by the case law and merits. Pursuant to *Katz*, supra, and its progeny cited here, Respondent effected a unilateral change of an existing term or condition of employment, without bargaining to impasse. This rule, as set forth above, has been extended to cases such as the instant case, in which an existing agreement has expired and negotiations on a new one are pending. See, e.g., *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.,* supra at 544, fn. 6 (1988); *Litton Financial Printing Div. v. NLRB*, supra at 191–192. There is simply no dispute in this case that Respondent changed a term and condition of employment pending negotiations for a new contract.

Next, I find there is clearly no express waiver encompassed in the 2009 Agreement, and reject Respondent's assertion that the language in the Longevity Pay article 44, i.e., "Every December 1st and June 1st of each year of this Agreement," coupled with effective dates of the contract, represents the Union's express or implied waiver, much less a "clear and unmistakable" waiver of its bargaining rights. The Board rejected similar language in *Finley Hospital*, supra at 1, in which it found the respondent violated Section 8(a)(5) of the Act by unilaterally discontinuing the annual 3-percent pay raises provided in the parties collective-bargaining agreement upon expiration of the agreement. The Board applied the "clear and unmistakable waiver" standard in that case, requiring parties to "unequivocally and specifically express their mutual intention to permit unilateral employer action with respect to a particular employment term, notwithstanding the statutory duty to bargain that would otherwise apply." *Finley Hospital*, supra at 2, citing *Provena St. Joseph Medical Center*, 350 NLRB 808, 810–812 (2007).

The respondent in *Finley Hospital*, as in this case, relied on the multiple references, in the collective-bargaining agreement provision at issue, to the term of the agreement, i.e., "During Term of the Agreement," "For the duration of this Agreement," and "during the term of this Agreement." The Board found that while such references might limit the contractual obligation and right for any period after the contract expiration, "these references fail to 'unequivocally and specifically express [the parties'] mutual intention to permit unilateral employer action with respect to the [annual wage increases]." The Board recognized that neither the wage increase provision, nor the agreement as a whole, provided for any postexpiration action or conduct, much less expressly permit[ted] unilateral employer action" upon the expiration of the agreement. *Finley Hospital*, supra at 3, citing *Provena*, supra at 811.

Prior to Finley Hospital, the Board consistently reached this same result its cases involving postexpiration changes in terms and conditions established by an expired agreement. See *AlliedSignal Aerospace*, 330 NLRB 1216, 1216–1222 (2000), review denied sub nom. *Honeywell International v. NLRB*, 253 F.3d 125 (D.C. Cir. 2001) ("[w]hatever the scope of the [r]espondent's obligation as a matter of contract, there is no basis for finding the [u]nion waived its [statutory] right to continuance of the status quo as to terms and conditions . . . after contract expiration); *General Tire & Rubber Co.,* 274 NLRB 591, 592–593 (1985), enfd. 795 F.2d 585 (6th Cir. 1986) (Board found the contract did not address employer's statutory obligation to pay benefits postexpiration of a contractual benefit continuation period, and therefore did not constitute a waiver of the union's rights). The Board in this case distinguished *Finley Hospital* from Board decisions which found a "clear and unmistakable," because the contracts in those cases included postexpiration language. See *Cauthorne*

[23] Respondent made the last longevity payment in June 2009, prior to the expiration date of the longevity agreement. I must reject, however, this questionable assertion that longevity payments were not an ongoing practice. This belies the undisputed evidence that Respondent and the Union have in fact continued the practice of including longevity pay provisions in its collective-bargaining agreements since 2001. Furthermore, there is no language in the 2009 Agreement to even infer that issuance of biannual longevity payments was a one-time or occasional practice.

Trucking, 256 NLRB 721 (1981), granted in part, denied in part 691 F.2d 1023 (D.C. Cir. 1982); *Oak Harbor Freight Lines*, 358 NLRB 328 (2012).

The contract language in the instant case, like that in *Finley Hospital*,[24] and the other Board cases cited there, *AlliedSignal* and *General Tire*, sets limits on the effective periods of the contractual obligation, but fails to provide for the employer's postexpiration conduct or obligation or authorize unilateral changes by the employer. Respondent contends *Finley Hospital* is factually apposite from this case because the longevity payments provided in this case's 2009 Agreement were "separate, stand-alone [events] timed to occur on specific dates, and were not ongoing [practice] like the wage increases in *Finley Hospital*." This argument is completely unsupported by the evidence, as discussed earlier. The longevity payments in the instant case were not "stand-alone" or "separate" events. Rather, they were consistent payments issued biannually in several successive agreements between Respondent and the Union from 2001 through 2012. In fact, while not at issue here, the parties admitted they agreed to a tentative agreement (TA) to continue to maintain the longevity payments in a successor agreement. Therefore, I find the employer in this case has not shown a clear and unmistakable waiver, of any kind, of its obligation to maintain the status quo created in the expired 2009 Agreement, and has therefore violated Section 8(a)(5) and (1) of the Act.

Respondent also argues that *Finley Hospital* is based on reasoning that has been rejected by the D.C. Circuit, and therefore should not be treated as binding or persuasive "in any sense." See *NLRB v. USPS*, 8 F.3d 832, 838 (D.C. Cir. 1993); *Enloe Medical Ctr. v. NLRB*, 433 F.3d 834, 837 (D. C. Cir. 2005). (R. Br., p. 7, fn. 2.) The D.C. Circuit Court of Appeals rejected the Board's "clear and unmistakable" waiver doctrine in those cases, implementing instead, its own "waiver" vs. "covered by" doctrine.[25] While the Board is not bound by the findings in these cases, as evidenced in its findings in *Finley Hospital*, I find that even applying the D.C. Court of Appeals doctrine here, Respondent's argument is without merit, and my decision remains the same. The Court of Appeals found in both cases that the companies' actions, including implementation of changes and refusal to bargain over the effects of those changes, were sanctioned by agreed-upon, existing collective-bargaining agreements. See *NLRB v. USPS*, supra at 834, 837; *Enloe Medical Ctr.*, supra at 837. The instant case is distinguishable in that the 2009 Agreement was not an existing agreement, and the 2009 Agreement's Management Rights clause or other provisions did not so authorize or "sanction" Respondent to discontinue longevity pay, and refuse to bargain. (Jt. Exh. 4, pp. 8–9 of 62.) Thus, the D.C. Circuit Court's waiver approach is not inapposite to this case, and I still find the Union in the instant case did not waive its bargaining rights.

Likewise, I reject the notion that the Union implicitly waived its right to bargain over the termination of longevity pay because it did not challenge, but rather, accepted limitations on hourly wage increases in article 36 of the agreement. Article 36 of the 2009 Agreement provides for annual percentage increases in hourly pay beginning with the first full pay period following the signing of the agreement, and thereafter, beginning with the first full pay period in July 2010 and July 2011, for each "active/current employee covered under this agreement." Lizardi acknowledged that the Union did not take issue with this provision since it set forth specific dates and years for the increases and termination thereof. I agree, and so find, that the language in this provision is distinguishable from article 44, in that it specifically terminated hourly wage increases 1 year before the contract ended. Notwithstanding my finding, the Board has rejected "waiver-by-inaction defense, finding the Union must have clear notice of the employer's intent to institute a change. *Rappazzo Elec. Co.*, 281 NLRB 471, 482 (1986).

I therefore conclude that Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally discontinuing longevity pay without first having afforded the Union notice and an opportunity to bargain. I further conclude that Respondent violated Section 8(a)(1) of the Act by notifying the Union, after the fact, of its decision that it would not be issuing longevity pay.

CONCLUSIONS OF LAW

1. SW General, Inc. d/b/a Southwest Ambulance (the Company) is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party (the Union) is a labor organization within the meaning of Section 2(5) of the Act and is the recognized collective-bargaining representative of a bargaining unit composed of the production, maintenance, clerical, technical, and office employees employed by the Company at its facility in Mesa, Arizona.

3. On or about December 1, 2012, and thereafter, the Company violated Section 8(a)(5) of the Act by failing to give notice and an opportunity to bargain with the Union prior to unilaterally terminating longevity payments for all eligible unit employees after the most recent expiration of the 2009 collective-bargaining agreement on September 8, 2012.

4. The above-described unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

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[24] I have considered, and dismiss, Respondent's argument that Finley Hospital should not be considered by me because it was decided by an improperly constituted Board, citing *Noel Canning v. NLRB*, supra, and *New Vista Nursing & Rehab.*, 2013 U.S. App. LEXIS 9860 (3d Cir. 2013). As decided earlier on in this decision, I find this argument is without merit, as the Board is not bound by these decisions. It has rejected this argument, as the issue regarding the validity of recess appointments is pending litigation and "definitive resolution." I note, as well, that the Board in Finley did not make decisions of first impression, but relied on well-settled Board and Court decisions.

[25] Held that "questions of 'waiver' normally do not come into play with respect to subjects already covered by a collective bargaining agreement," citing *NLRB v. USPS*, supra at 836–837. Instead, the proper inquiry is "simply whether the subject that is the focus of the dispute is 'covered by' the agreement." Id at 836. Also see *Dept. of Navy v. FLRA,* 962 F.2d 48, 57 (D.C. Cir. 1992). Unlike the subject matter in dispute in the D.C. Circuit Court of Appeals cases cited here, I find termination of longevity pay and the refusal to bargain over the same was not "covered by" the 2009 Agreement.

REMEDY

Having found that Respondent engaged in certain unfair labor practices, I shall order it to cease and desist from such conduct and take certain affirmative action designed to effectuate the policies of the Act. Having found that Respondent unlawfully and unilaterally terminated longevity payments, and failed to distribute them to eligible unit employees as required by the parties' July 1, 2009, through July 1, 2012 contract, as extended to September 8, 2012, I shall order it to make whole for any loss of earnings or benefits suffered as a result of said unilateral change. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily under *Kentucky River Medical Center*, 356 NLRB 6 (2010). Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters, and shall compensate the affected employees for the adverse tax consequences, if any, of receiving one or more lump-sum backpay award award(s) covering periods longer than 1 year. *Latino Express, Inc.*, 359 NLRB 518 (2012).

[Recommended Order omitted from publication.]