

**BEFORE THE
NATIONAL LABOR RELATIONS BOARD**

In the Matter of:

MSR INDUSTRIAL SERVICES, LLC,

Respondent,

Case Nos. 07-CA-106627
07-CA-106032

and

LOCAL 25, INTERNATIONAL ASSOCIATION
OF BRIDGE, STRUCTURAL, ORNAMENTAL
AND REINFORCING IRON WORKERS,
AFL-CIO,

Charging Union.

CHARGING PARTY'S BRIEF
IN SUPPORT OF EXCEPTIONS TO THE
DECISION OF THE ADMINISTRATIVE LAW JUDGE

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I. INTRODUCTION

On April 9, 2014, the Administrative Law Judge issued a Decision which properly found that MSR Industrial Services, LLC (“MSR” or “Employer”) unlawfully dealt directly with bargaining unit employees on May 31, 2013 instead of Local 25, International Association of Bridge, Structural & Ornamental and Reinforcing Iron Workers, AFL-CIO (hereinafter “Union” or “Local 25”); failed to provide the Union with documents specified in the Complaint ¶28(a); failed to provide information specified in the Complaint ¶28(b) in a timely manner; and failed to adhere to the terms of the 2010 collective bargaining agreement (“2010 Riggers' Agreement”) between the parties beginning on June 1, 2013.

The ALJ’s Decision also contains a number of significant errors and misapplications of the law. These errors are summarized below:

- (1) that MSR was not bound by the 2013 Riggers' Agreement, even though MSR did not properly terminate the 2010 Riggers' Agreement;
- (2) that MSR did not unlawfully lock out its bargaining unit employees on May 31, 2013;
- (3) failing to find the employees were not constructively discharged, if they were not locked out;
- (4) failing to consider the undisputed fact that MSR has never notified the Michigan state mediation agency and therefore its massive unilateral changes in wages, terms and conditions of employment in June 2013 continue to be in violation of §§8(d)(3) and 8(a)(5);
- (5) the conclusion MSR’s unilateral implementation without impasse and with unremedied unfair labor practices was lawful as of July 30, 2013;
- (6) the finding the unlawful implementation by MSR was waived by Local 25; and

(7) that MSR is not required to restore the terms and conditions of employment to the terms and conditions that were in the 2010 Riggers' Agreement, if it is not bound by the 2013 Riggers' Agreement.

These are serious errors that not only impact this case, but represent a fundamental break from well-established Board law. The ALJ's improper conclusions must be reversed and remedied.

II. RELEVANT FACTS

Local 25 is a labor organization that represents iron workers performing rigging work in the eastern half of lower Michigan. (Tr. 237; GC Ex. 2 Section III p. 2) In 2010, Local 25 entered into a collective bargaining agreement with the Great Lakes Fabricators and Erectors Association (GLFEA) for rigging work ("2010 Riggers' Agreement"). (GC Ex. 2) The 2010 Riggers' Agreement is a Section 9(a) contract. (GC Ex. 2 p. 1, Recognition Clause).

On June 1, 2011, MSR Industrial Services became signatory to the Riggers' Agreement. (GC Ex. 4) MSR was not a member of the GLFEA and signed the "me too" agreement on page 31 of the 2010 Riggers' Agreement. (Tr. 27-28; GC Ex. 4) The "me too" agreement provides:

We, the undersigned, hereby agree to be ***bound by all the terms and conditions set forth in the foregoing Agreement and to become a party hereto.*** It is also agreed by the undersigned Employer that any notice given by the Union to the Association pursuant to Section XXVI of the Agreement shall be notice to the Employer and shall have the same legal force and effect as though it were served upon the Employer personally. Finally, the Employer agrees that, ***unless he notifies the Union to the contrary at least 90 days prior to the termination date of this Agreement or any subsequent agreement, the Employer will be bound by and adopt any agreement reached by the Union and the Association during negotiations following the notice by the Union referred to in the preceding sentence.*** (GC Ex. 4) (Emphasis provided.)

By signing the “me too” agreement on page 31 of the 2010 Riggers’ Agreement, MSR agreed that it would be bound by *all* the terms and conditions set forth in the 2010 Riggers’ Agreement, including Section XXVI, the “Termination Clause,” of the 2010 Riggers’ Agreement. (GC Ex. 2 p. 31) Section XXVI provides:

The Agreement shall remain in force and effect until May 31, 2013 and shall renew itself from year to year unless either party shall notify the other party in *writing by certified mail* at least ninety (90) days prior to the anniversary date of this Agreement of its desire to change the Agreement in any way or to terminate the Agreement. (GC Ex. 2 p. 30)

MSR, as a signatory to the 2010 Riggers’ Agreement, was required by Section XXVI, a term and condition of the 2010 Riggers’ Agreement, to notify Local 25 in writing by certified mail at least 90 days prior to the anniversary date of the agreement (May 31, 2013) or MSR was bound by and adopted the agreement reached by the Union and the GLFEA during the 2013 contract negotiations. (GC Ex. 2 p. 31)

On February 14, 2013, Gerald Webb, the acting CEO of MSR, sent Local 25 an email which stated that pursuant to Section XXVI of the termination clause of the 2010 Riggers’ Agreement, MSR desired to change the Agreement. (R Exs. 1, 2; Tr. 175-176) MSR’s email dated February 13, 2013 specifically references Section XXVI of the 2010 Riggers’ Agreement which requires a *certified letter* to be sent more than 90 days prior to the expiration date of the 2010 Riggers’ Agreement, which was May 31, 2013. (R. Ex. 1; GC Ex. 2)

On February 21, 2013, Webb met with O’Donnell and Gonzalez to discuss some issues that were in dispute between the parties and the use of non-union employees by MSR. (R. 3, GC Ex. 27; Tr. 180-183) This meeting was not a negotiation and no proposals were exchanged. (*Id.*; Tr. 221-223, 238-240, 255) During the February 21, 2013 meeting, O’Donnell told Webb that an

email is not proper notice under the 2010 Riggers' Agreement to start negotiations. (Tr. 187-188, 227)

Later, on March 18, 2013 (74 days prior to the May 31 expiration date of the 2010 Riggers' Agreement), MSR finally sent a certified letter to Local 25 that was dated March 13, 2013, which once again referenced Section XXVI of the Riggers' Agreement, and claimed the Company desired to change the 2010 Riggers' Agreement. (R. Ex. 4) Local 25 received the certified letter on March 20, 2013. (R. Ex. 4)

On March 21, 2013, Local 25 and the GLFEA reached a new Riggers' Agreement ("2013 Riggers' Agreement").¹ (GC Ex. 3) The 2013 Riggers' Agreement expires on May 31, 2019. (GC Ex. 3)

Local 25 members Daryl Karpuk, Erin Early, Tony Pena and Jamie Johnson began working for MSR at the Dexter Wastewater Treatment Plant in mid-May 2013. (Tr. 65, 67, 104) MSR Supervisor Clint Goettl told the Local 25 members that their job was to rig, remove and disassemble the tanks and then erect, weld and install the tanks at the Dexter Wastewater Treatment Plant. (Tr. 32, 38, 40, 66, 69, 102) The work they were doing was covered by the Riggers' Agreement. (See GC Ex. 2 Section IV pp. 3, 6) Beginning on May 15, 2013, the four Local 25 members began working on the Project. (Tr. 69-70, 73, 95, 101, 105, 110) On May 31, 2013, the Local 25 members were disassembling the second tank. (Tr. 95) The project was not complete. (Tr. 73, 105, 110)

That day, Goettl informed all four members of Local 25 that they were to turn in their keys, remove their personal tools from the company gangbox and not to report to work for MSR

¹ The 2013 Riggers' Agreement incorporates all the terms and conditions of the 2010 Riggers' Agreement except those Sections that are specifically referenced in the 2013 Term Sheet. (Tr. 29)

on June 3, 2013. (Tr. 71, 96-97, 105-106) Goettl told the Local 25 members that they could not work until a contract between MSR and Local 25 had been signed. (Tr. 71, 97, 108) The members of Local 25 had no idea that May 31, 2013 was their last day of work. (Tr. 73, 110) The Local 25 members had no intention of striking MSR. (Tr. 33-34, 73)

Later, Goettl stated that if the Local 25 members wanted to work non-union, they could come back to work and be paid the “prevailing wage” but would not be paid benefits and no contributions would be made to the Iron Workers Local 25 Funds. (Tr. 72, 89, 109) By prevailing wage, Goettl meant that the Local 25 members would make approximately \$58 an hour in wages, but would not have any money contributed on their behalf to the various Fringe Benefit Funds, including the Health & Welfare Fund, Pension Fund, Apprenticeship Fund, Vacation Fund, etc., as was required by the 2010 and 2013 Riggers’ Agreements. (Tr. 89; GC Ex. 2 Section XVII pp. 20-25)

On May 29, 2013, James Parks, the attorney for MSR, sent David R. Radtke, the attorney for Local 25, a letter which stated that the 2010 Riggers’ Agreement terminates on May 31, 2013 and that MSR “timely notified the Union of its intent to modify the contract, *yet never heard from them to bargain about possible new terms and conditions.*” (GC Ex. 18) (Emphasis supplied.)

On May 31, 2013, Local 25’s counsel responded to Mr. Parks and informed him that MSR did *not* properly notify Local 25 of its intent to terminate or modify the 2010 Riggers’ Agreement because the only notification received by Local 25 was dated March 31, 2013, which was untimely. Local 25’s attorney stated that the Union expected MSR to comply with the 2013 Riggers’ Agreement. (GC Ex. 19)

Also on May 31, 2013 Parks sent a letter to the Federal Mediation and Conciliation Service (FMCS), claiming that Local 25 was threatening to strike on June 3, 2013. (GC Ex. 20) MSR never notified Michigan's state mediation agency. (Tr. 142, 218)

Shortly after Radtke received Parks' letter to FMCS, he responded to Parks via email, stating that Local 25 had a valid contract with MSR through May 31, 2019 and therefore the Union had no intention of asking its members to go on strike. (GC Ex. 21)

The week of June 3, the four Local 25 members who had been working for MSR received a letter dated May 31, 2013 that stated:

To members of Local 25: The Collective Bargaining Agreement expires on May 31, 2013. We have asked Jack O'Donnell of Local 25 to meet and negotiate, but he refused to do so.

At this time, we will not be adhering to the terms and conditions of that Collective Bargaining Agreement, but we will be paying the prevailing wage at the Dexter project. If you are interested in continuing work with us on this project for prevailing wage, we would welcome your employment. (GC Ex. 7)

During the week of June 3, 2013, Karpuk and Early made numerous phone calls to Clint Goettl to ask whether they could return to work. (Tr. 74-75, 79, 110-111) Those telephone calls were not returned. *Id.* In addition, the Union was notified that MSR had cancelled its surety bond for the Fringe Benefit Funds which was required by the 2013 Riggers' Agreement. (GC Ex. 25)

Subsequently, on June 25, 2013, Parks wrote NLRB Agent Dynn Nick a letter that stated that the offer to Local 25 members to return to work at the prevailing wage was still available. (GC Ex. 23) On June 26, 2013, Local 25's attorney informed Parks that the Union accepted MSR's offer to end the lockout. (GC Ex. 23) The Union did not agree to MSR's unilaterally implemented terms.(GC EX. 23; Case No. 7-CA-106627)

Early returned to work for MSR on June 27, 2013. (Tr. 82; Jt. Ex. 2) On June 28, 2013, Local 25 members Michael Steele and Roger Shultz reported to work at the Dexter Wastewater Treatment Plant. (Tr. 122; Jt. Ex. 2) On July 19, 2013, Shultz was laid off by MSR. (Tr. 84) After Schultz's layoff, Goettl, a supervisor and non-member of Local 25, began assembling, welding and grinding the tanks, working side-by-side with Steele and Early doing the same work. (Tr. 85, 128-129) The work continued until the middle of August 2013, when MSR lost the contract and Early and Steele were laid off. (Tr. 87)

When Early, Steele and Shultz went to work for MSR in June 2013, they were not paid in accordance with the 2010 or the 2013 Riggers' Agreement. (Jt. Ex. 2) Instead, they were paid the "prevailing wage" of \$58.63 per hour. (Tr. 85, 130) No contributions were made to the various Funds as set forth in the 2013 Riggers' Agreement (or the 2010 Riggers' Agreement) on behalf of the members. (Tr. 85, 130; GC Ex. 2 Section XVII pp. 20-25; GC Ex. 3, GC Ex. 5) Because the contributions were not made for the members, they lost health insurance contributions, pension credits, contributions into a defined contribution plan and other negotiated benefits. (Tr. 41-42, 58)

This unilateral change in the wages and benefits was made by MSR without bargaining with Local 25. (Tr. 35, 43) The changes made were never proposed to the Union, only the workers. (Tr. 35, 43, 255) In fact, no negotiations occurred prior to the lockout and unilateral implementation of the new wages and benefits.² (Tr. 238-240, 241, 255; GC Ex. 18)

² This fact is confirmed in MSR's attorney's of May 29, 2013, where he claims that after MSR timely notified the Union of its desire to negotiate a new agreement, MSR never heard back from Local 25. (GC Ex. 18)

III. LEGAL ANALYSIS

A. The ALJ Erred In Concluding That MSR Was Not Bound by the 2013 Riggers' Agreement.

On March 1, 2011, MSR became signatory to the 2010 Riggers' Agreement. (GC Ex. 4) As a signatory to the Riggers' Agreement, MSR agreed to be bound by all terms and conditions set forth in the 2010 Riggers' Agreement and to become a party thereto. (GC Ex. 2, p. 31; GC Ex. 4) Section XXVI, the clause referenced by MSR in its letters to Local 25 and a term and condition of the 2010 Riggers' Agreement, required MSR to notify the Union *by certified mail* at least 90 days prior to the May 31, 2013 anniversary date of the 2010 Riggers' Agreement of its desire to change the agreement or to terminate the agreement. (GC Ex. 2, p. 30; R. Exs. 1, 4)

It is undisputed that MSR *did not* notify Local 25 by certified mail 90 days prior to the May 31, 2013 expiration of the 2010 Riggers' Agreement. (Tr. 175-176; R. Exs. 1, 2) Because MSR failed to properly terminate the 2010 Riggers' Agreement, it was bound by and adopted the agreement reached by Local 25 and the GLFEA on March 21, 2013. The 2013 Riggers' Agreement went into effect on March 21, 2013 and continues until May 31, 2019. (GC Ex. 3)

The ALJ found that MSR was not bound by the terms of the 2013 Riggers' Agreement even though MSR did not properly notify Local 25 of its desire to change or terminate the Agreement. (ALJD p. 6) The Judge applied the contract rule that an ambiguous term will be construed against the drafter of the contract when the non-drafter's interpretation is reasonable. *Id.* The ALJ's use of *contra proferentem* is not proper here, because there is no ambiguity about MSR's requirement to notify the Union by certified mail of its desire to change or terminate the

agreement. (GC Ex. 2, p. 30, 31; GC Ex. 4) Page 31 of the 2010 Riggers' Agreement is a signature page for non-Association employers, like MSR.³ The "me too" agreement provides:

We [MSR], the undersigned, hereby agree to be bound by all terms and conditions set forth in the foregoing Agreement and to become party thereto Finally, the Employer agrees that, unless he notifies the Union to the contrary at least ninety (90) days prior to the termination of the date of this Agreement or any subsequent agreement, the Employer *will be bound by and adopt any agreement reached by the Union and the Association during negotiations following the notice by the Union referred to in the preceding sentence.*

(GC Ex. 2, p. 31) (Emphasis added.)

By agreeing to be bound by all terms and conditions set forth in the 2010 Riggers' Agreement, MSR, unambiguously, agreed to be bound by Section XXVI which provided that the parties must notify the other party in writing by certified mail at least 90 days prior to the anniversary date of the agreement of its desire to change the agreement in any way or to terminate the agreement. MSR acknowledged that it was bound by Section XXVI in its letters to Local 25. (R. Exs. 1, 4) Because the "me too" agreement provided that MSR agreed to be bound by all terms, including that notice of a desire to negotiate be made by certified mail as required in Section XXVI, there is no ambiguity in the contract language. When a contract term is plain and unambiguous on its face, its meaning must be determined from the four corners of the instrument and without resort to extrinsic evidence. Restatement, Second, Contracts §§200-204.

In *Allied Industrial Workers of America, Local 770*, 285 NLRB 651 (1987), the Board held that strict construction is the proper contract interpretation rule in reviewing contract renewal clauses. See also, *Sawyer Stores*, 190 NLRB 651, 652 (1971). Rather than apply strict

³ This is referred to as the "me too" agreement in the ALJ's Decision.

construction to the renewal clause, the ALJ incorrectly applied the disfavored contract interpretation rule that ambiguities should be construed against the drafter.

The ALJ cited the *Oakland Press*, 229 NLRB 476 (1977); *Champaign County Contractors Association*, 210 NLRB 467 (1974) for the proposition that notice of intent to modify or terminate a collective bargaining agreement is sufficient, even if it is not technically correct. Both cases cited by the ALJ involved letters from a contracting party that did not use the “magic words” as required in the contract to open negotiations. The Board found that the receiving party was on notice of the other party’s intent, even though the exact language may not have matched the contract provision regarding notices to terminate or negotiate. Here, the issue is not whether MSR used the proper language to request negotiations. Instead, it is MSR’s failure to follow the explicit language requiring notification to the Union by certified mail. It was the *method* that MSR used in providing the notice, not the wording it used in the letter.

In *1199 SEIU United Healthcare Workers East (Oceola Regional Medical Center)*, Case No. 12-CB-075809 Advice Memorandum (August 14, 2012), the General Counsel found that a union could lawfully refuse to honor an employee’s revocation of a dues check off authorization sent by regular mail where the checkoff authorization plainly stated that the employee could only revoke the authorization by sending written notice via certified mail. The General Counsel found that by signing the authorization card, the employee entered into a voluntary agreement with the union authorizing dues checkoff and providing for revocation by certified mail. The General Counsel concluded the union’s adherence to the specific language in the authorization did not violate §8(b)(1)(A) because the certified mail requirement served a legitimate purpose and did not contravene public policy.

Here, the certified mail requirement was just as clear and unequivocal as it was in *1199 SEIU*. The 2010 Riggers' Agreement certified mail requirement is particularly useful because the Agreement, like the checkoff authorization in *Local 1199*, contained a window period in which the notice must take place to be valid. A verifiable date, ascertainable through certified mail, eliminates potential disputes as to whether the notice was timely.⁴ The General Counsel Advice Memorandum in *Local 1199* is more on point than *Oakland Press* or *Champaign County Contractors Association* and Local 25 urges the Board to follow its reasoning.

Also, unlike *Oakland Press*, Local 25's Business Manager O'Donnell specifically told Webb that email notice was not adequate and a certified letter was required. Therefore, the Union did not waive its right to receive notice by certified mail.

Moreover, in *Cowboy Scaffolding, Inc.*, 326 NLRB 1050 (1998), the employer signed a "me too contract" (referred to in the Board decision as a "Contract Stipulation") with the carpenters union. The union had a contract with an employer association governing scaffolding work. (Referred to in the Board decision as "Labor Agreement.") 326 NLRB at 1050. The Contract Stipulation provided that if Cowboy Scaffolding did not give proper notice of an intent to modify or terminate the current agreement, it was bound by the terms and conditions of the Labor Agreement and any subsequent labor agreements. *Id.* The employer failed to give proper notice of its desire to modify or terminate the Contract Stipulation. *Id.* at 1051. The Board found that the employer's failure to give proper notice to the union caused the employer to be bound by the subsequent Labor Agreement negotiated by the employer association and the carpenters union. *Id.* The employer subsequently repudiated the successor Labor Agreement by

⁴ The fact that the letters sent by MSR are a different date than the dates they were mailed and emailed shows the reason the parties to the Riggers' Agreement require certified mail in order to provide the parties' accurate notice of when the termination request was mailed.

failing to make contributions to the various fringe benefit funds and by withdrawing recognition from the union. *Id.* The Board found that such action by the employer was unlawful. *Id.*

In *G.E. Maier Co.*, 349 NLRB 1052 (2007), the employer signed an “Acceptance of Agreements” which required it to recognize the union and abide by the union’s contract with an employer association. The Acceptance of Agreements contained a provision setting forth the method to modify or terminate the bargaining relationship. 349 NLRB at 1054. The employer failed to properly terminate the bargaining relationship as required by the Acceptance of Agreements and therefore, the Board held that the employer was bound by the subsequent contract between the union and the employer association. *Id.* See also, *HCL, Inc.*, 343 NLRB 981 (2004).

Like in *Cowboy Scaffolding*, *G.E. Maier* and *HCL*, MSR is bound by the 2013 Riggers’ Agreement.

The ALJ’s “alternative” finding that even if MSR did not properly notify Local 25 of its desire to negotiate or terminate the 2010 Riggers’ Agreement, the contract only rolled over for one agreement contradicts the “me too” language that says that if the Employer does not properly provide notice to the Union, the Employer “will be bound by and adopt any agreement reached by the Union and the Association during negotiations following the notice by the Union referred to in the preceding sentence.” (GC Ex. 4) Here, the Union and the Association reached an agreement on March 21, 2013 for a new collective bargaining agreement that expires on May 31, 2019. (GC Ex. 3) Under the plain language of the “me too” clause in the 2010 Riggers’ Agreement, MSR was bound by that agreement reached by the Union and Association. The ALJ’s alternative approach is also incorrect.

Finally, the ALJ found that the “equities” of the contract language were against Local 25. (ALJD p. 6) As stated above, the Board strictly construes contract renewal provisions. It is a well-established contract interpretation rule that if a provision is unambiguous, the tribunal cannot use notions of fairness or equity to alter the contract. *In re New York Skyline, Inc.*, 471 B.R. 69 (S.D.N.Y. 2012); *Morris Saves v. Continental Gas Co.*, 928 F.Supp.2d 816, 821 (D. Del. 2013)

B. MSR Violated §8(d)(3) by Locking Out its Employees on May 31, 2013.

The ALJ found that the bargaining unit employees left work on May 31, 2013 and were told they could continue working at the Dexter Wastewater Treatment Plant for the prevailing wage. (ALJD p. 7) Based on this finding, the ALJ found that MSR did not lock out the employees, but instead they went on strike. (ALJD p. 7) This finding is not supported by the record evidence.

On May 31, 2013, Local 25’s members were disassembling a tank at the Dexter Wastewater Treatment Plant. That day, MSR Supervisor Goettl informed all four members of Local 25 that they were to turn in their keys, remove their personal tools from the company gangbox and not to report to work for MSR on the next work day -- June 3, 2013. (Tr. 71, 96-97, 105-106) Goettl told the Local 25 members that they could not work until the contract between MSR and Local 25 had been signed. (Tr. 71, 97, 108)⁵

The next week, the Local 25 members received a letter from MSR stating, in part:

At this time, we will not be adhering to the terms and conditions of that [Collective Bargaining Agreement], but we will be paying prevailing wage at the Dexter project. If you are interested in

⁵ On May 31, 2013, Local 25’s attorney sent an email to MSR’s attorney stating that Local 25 had a valid contract with MSR through May 31, 2019 and the Union members were not going on strike. (GC Ex. 21)

continuing work with us on this project with prevailing wage, we would welcome your employment.

Local 25 members Karpuk and Early made numerous phone calls to Goettl of MSR to ask whether they could return to work. (Tr. 74-75, 79, 80, 110-111) Those phone calls were not returned. (Tr. 74-75, 79, 110-111)

The ALJ, in reaching the conclusion that Local 25 members went on strike, simply ignored all of the above-referenced evidence. Even MSR did not even believe that Local 25 members were on strike. (GC Ex. 22) There is no evidence in support of the ALJ's conclusion that the bargaining unit went on strike.

C. **In The Alternative, The ALJ Erred in Finding That Karpuk, Early, Pena and Johnson Were Not Constructively Discharged in Violation of the Act.**

If the Local 25 members employed by MSR on May 31, 2013 were not locked out, then they were constructively discharged. As stated above, they were told to pack their belongings and leave the Dexter project. They were also told they could not return to work because MSR did not have a contract with Local 25.

Later, MSR's management unlawfully engaged in direct negotiations with Local 25 members to be paid at the "prevailing wage." Being paid at the prevailing wage meant no health care benefits, no pension benefits, no rights under the union contract and no adherence to any of the other terms of the Riggers' Agreement. In *Cadillac Industrial Maintenance Co. (CIMCO)*, 301 NLRB 342 (1991), the Board found that an employer's termination of 34 employees referred by a local union was inherently destructive of employee rights within the meaning of *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967) in violation of §8(a)(3) of the Act. In *Jack Welsh*, 284 NLRB 378 (1987), the employer's decision to terminate union employees when it decided to "go

non-union” violated §8(a)(3) of the Act. The facts here are virtually identical to the facts as in *Cadillac Industrial Maintenance Co. and Jack Welsh, supra*.

The ALJ found that the Local 25 members were not faced with a choice of relinquishing their right to bargain collectively or quit. But, that is exactly what the Local 25 members were faced with here. They could work under the unlawfully unilaterally implemented terms that MSR illegally directly offered the employees, or they could quit.

The ALJ’s claim that the employees could have gone on strike, continued working with the Union’s permission or worked after resigning from the Union, left the employees with one choice -- giving up their rights under the Act, including their right to be in a union, in order to remain employed. The right to be in a union and not give up your rights to have your terms and conditions collectively bargained, is the touchstone of the Act. The ALJ’s *blase’* dismissal of these fundamental rights cannot be allowed to stand.

Moreover, the ALJ’s claim that the employees *could have gone on strike* is directly contradicted by his finding in the next paragraph that the employees *did* go on strike. The ALJ’s conclusion is contradictory and unsupported.

D. The June 2013 Unilateral Changes Continue to Be in Violation of the Act .

On June 1, 2013, MSR instituted massive unilateral changes in the wages, benefits and terms and conditions of employment. This action violated the Act in two ways. First, the implementation violated the requirements of Section 8(d), and second, the parties were not at lawful impasse when the changes were imposed.

1. MSR is Still in Violation of §8(d)(3).

The Administrative Law Judge correctly found that MSR’s failure to timely notify FMCS before making unilateral changes in terms and conditions for bargaining unit employees violated

§8(d) of the Act which is, by definition, a violation of §8(a)(5) of the Act. (ALJD p. 8) The ALJ also found, and it is undisputed, that MSR never notified the Michigan Employment Relations Commission (“MERC”), which is the state mediation agency that must be notified of the labor dispute in §8(d)(3). See *Bi-County Wholesale Beverage Distributors*, 291 NLRB 466, 468 (1988) (MERC is Michigan’s state mediation agency under Section 8(d)(3).) Despite the undisputed fact that MSR has never contacted the MERC, the ALJ found that MSR was only required to maintain the terms and conditions of employment for 60 days following its May 31, 2013 notification to FMCS. This finding completely ignores the fact that MSR failed to notify the state mediation agency.

In *Weathercraft Company of Topeka, Inc.*, 276 NLRB 452, 453 (1985), the employer failed to send notice to the FMCS and to the Kansas state mediation agency as required in §8(d)(3) of the Act. As a result of the failure, the Board found the employer violated §8(d)(3) and §8(a)(5) and ordered the employer to restore all terms and conditions of the expired collective bargaining agreement to which the employer and the union were parties as part of the remedy. In *Mar-Len Cabinets*, 243 NLRB 523, 534 (1979), the Board held that an employer that terminates or modifies an existing CBA without serving the requisite §8(d)(3) notices on the proper state agency violates §8(a)(5). The Board held that by failing to notify the California state agency, the employer was obligated to refrain from changing any term or condition until after the state agency was notified. *Id.* at 535. In *Geo. C. Christopher & Sons*, 290 NLRB 472 (1988), the Board held that the employer’s failure to give FMCS and the state mediation agency notice prior to the implementation of unilateral changes violated the Act. The Board ordered the employer to restore all terms and conditions until 30 days after giving notice to FMCS and the Kansas state agency. *Id.* at 481.

By ignoring MSR's failure to notify MERC, the ALJ erred in finding that MSR's violation of §8(d)(3) and §8(a)(5) could be cured after a 60 day waiting period.

In addition, the ALJ failed to consider MSR's unremedied ULP that on May 31, 2013, the Employer illegally directly dealt with unit employees instead of Local 25. Despite direct dealing unfair labor practice, the ALJ held that MSR could implement the proposal it illegally made to the employees after a 60 day waiting period. That finding is wrong.

2. MSR's Unilateral Implementation Without Impasse Violates §8(a)(5).

It is well-established Board law that failing to maintain existing conditions of employment of employees at the expiration of the contract is a violation of the Act. *Regency Heritage Nursing & Rehabilitation Center*, 360 NLRB No. 98 slip op. 12-13 (2014). An employer's "obligation to maintain the status quo reflected black letter labor law, which has been established in Board and court precedent for decades." *Id.* at slip op. 13. (Citations omitted.) An employer may not implement any changes unilaterally without having bargained to impasse as a whole. *Id.* at slip op. 18; *RBE Electronics*, 320 NLRB 80, 81 (1995); *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991).

Here, it is undisputed that MSR never made a proposal to the Union to change any of the wages, benefits or other terms and conditions of employment. There was also no evidence presented at the hearing that the parties were at impasse on *any* items, let alone a radically different wage package. Therefore, the ALJ's conclusion that MSR could unilaterally implement changes in wages, supervisors doing bargaining unit work, the elimination of contributions to the Funds and cancellation of the surety bond that were never presented to the Union, never negotiated with the Union and that were only made illegally directly to the employees cannot be

allowed to stand. The ALJ's decision wipes out decades of "black letter labor law" without explanation.

In *Lou's Produce*, 308 NLRB 1194 (1992), the employer's discontinuance of health care contributions and pension contributions without ever having presented those changes to the union was unlawful, even where the union told the employer it was automatically bound by the CBA for an additional year.

In *United Refinery Co.*, 327 NLRB 795 (1999), the Board found that changes in wage rates, health plans and other terms and conditions of employment by the employer violated the Act.

A unilateral change is unlawful even where the employer claims the union has not been negotiating in good faith. *Stone Boat Yard*, 264 NLRB 981 (1982), aff'd 715 F.2d 441 (9th Cir. 1983), cert denied 466 U.S. 937 (1984). In *Stone Boat Yard*, the Board held that an employer's letter desiring negotiations (even if properly sent and timely) does not license the employer to unilaterally implement changes never presented to the union, even if the union does not respond to the request to bargain. 264 NLRB at 981.

The unilateral changes by MSR were made without ever being proposed to the Union. Clearly, MSR and Local 25 were not at impasse when no proposals had been exchanged. Therefore, MSR's unilateral implementation of changes in terms and conditions of employment on June 1, 2013, violated §8(a)(5).

The ALJ found that by allowing unit employees to return to work on June 27, 2013, under conditions different than those specified in the 2010 Riggers' Agreement, the Union waived any objections it had to the changes after that date. There is no basis for the ALJ finding the Union waived objections to the unilateral changes that the ALJ, himself, found were

unlawfully implemented. The Employer offered to have the unit employees return to work under its unilaterally implemented conditions, the Union's agreement that the employees could return to work was not a waiver of its rights under the Act. (See GC Exs. 22, 23) As a general matter, the waiver of statutory rights requires evidence of a "clear and unmistakable waiver." *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). To meet the "clear and unmistakable" standard, it must be shown that the matter claimed to have been waived was fully discussed by the parties and that the party alleged to have waived its rights consciously yielded its interest in the matter. *Allison Corporation*, 330 NLRB 1363, 1365 (2000). The clear and unmistakable waiver rule protects statutory rights from inadvertent or disputed claims of waiver by the union.

Here, the Union was attempting to get its members back to work at MSR so that the parties could attempt to resolve their differences. The Union did not make a clear and unmistakable waiver of MSR's unlawful unilateral implementation. The Union *did not* withdraw the unfair labor practice charge it had filed contesting the unilateral changes. That is precisely the charge that is being litigated in this case. There was no full discussion by the parties or a conscious yielding to the Employer's unilateral changes by the Union. In short, the ALJ's conclusion that the Union waived its rights to challenge the unilateral changes is without any factual support.

Therefore, even if MSR properly terminated the 2010 Riggers' Agreement, its unilateral change in the wages, benefits and terms and conditions of employment without bargaining to lawful impasse violated Section 8(a)(5) of the Act.

As in *Regency Heritage Nursing & Rehabilitation Center, supra*, MSR must be required to rescind its unlawful unilateral changes and restore the past practices that were encompassed in the 2010 Riggers' Agreement. Slip op. at p. 20.

IV. CONCLUSION

WHEREFORE, for the reasons stated herein and the reasons set forth in Local 25's Exceptions to the Decision of the Administrative Law Judge, the Union respectfully requests that the Board reverse the above-referenced findings and conclusions of the ALJ and order a remedy in accordance with the Complaint issued in this matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on June 4, 2014, I electronically served the foregoing paper on the following parties:

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