

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19**

ADVANCED LIFE SYSTEMS, INC.,

and

INTERNATIONAL ASSOCIATION OF
EMT'S AND PARAMEDICS

Case Nos: 19-CA-096464
19-CA-096899

REPLY BRIEF OF RESPONDENT ADVANCED LIFE SYSTEMS, INC.

July 25, 2014

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I. WAGE INCREASES

a. The Legal Framework

An employer violates Section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* (the “Act”), by making a unilateral change to represented employees’ established terms and conditions of employment during bargaining. *NLRB v. Katz*, 369 U.S. 736, 743 (1962). Put differently, an employer has a duty to maintain the status quo (i.e. refrain from making a unilateral change) during the bargaining period. However, “the Board has recognized that an employer’s obligation to maintain the status quo sometimes entails an obligation *to make* changes in terms and conditions of employment, when those changes are an established part of the status quo.” *Alan Ritchey*, 359 NLRB No. 40, p. 5 (2012) (emphasis in original). To use the *Alan Ritchey* Board’s example:

[I]f an employer has an established practice of granting employees a 1-percent increase in wages on the anniversary of their hire date, an employer not only does not violate its duty to bargain by making that change unilaterally, it violates its duty if it *fails* to do so. *Id.*

Thus, a “past practice” that has been sufficiently regular to become a part of the status quo must be maintained. Nonetheless, that past practice must be proven:

The party asserting that the status quo consists of a past practice bears the burden of proof on the issue and the evidence must show that the practice occurred with such regularity and frequency that employees could expect the practice to continue or reoccur on a regular and consistent basis.

Eugene Iovine, Inc. 353 NLRB No. 36, p. 1 (2008).

b. ALS did not have a “past practice” of periodic wage increases.

It appears from the General Counsel’s brief that this overall framework is not in dispute: the General Counsel has the initial burden of proving that the status quo

consists of a “past practice.” If the General Counsel can prove that ALS deviated from the status quo, such a unilateral change can equate to a refusal to bargain in violation of Section 8(a)(5). The principal disagreement centers not on this analytical framework, but on the substance of ALS’s “status quo” during the bargaining period – did the General Counsel meet its burden of proving that ALS’s wage increases “occurred with such regularity and frequency that employees could expect the practice to continue or reoccur on a regular or consistent” basis? After analyzing the facts underlying the Board decisions cited by the General Counsel, the answer to that question must be “no.”

There are numerous Board decisions finding, that an employer’s wage increase practice was so regular that it matured into a “past practice.” Notably, the General Counsel does not set forth the facts of any of these cases. Instead, the General Counsel relies on general legal standards quoted from the decisions without context or factual analysis. An overview of the facts underlying the Board decisions cited in the General Counsel’s answering brief is instructive, as the decisions show what kind of regular and consistent practice the General Counsel bears the burden of proving to establish it is part of the status quo:

- In *Coventa Energy*, the employer maintained a “corporate bonus program” consisting of two bonuses. Employees received an annual bonus at the same time each year based on financial performance or productivity. Employees also received a “safety, health, and environmental bonus” paid twice a year at the same times each year. Both bonuses were based on a complicated formula. 356 NLRB No. 98, p. 4 (2011). Employees also received an annual wage increase at the same time every year, and the parties did not dispute that the program was a term and condition of employment. *Id.* at 15.
- In *Jenson Enterprises*, the employer had “a practice of granting predetermined wage increases during the first year of employment.” It also had a practice of granting merit increases that were discretionary as to amount. “The [employer’s]

merit increase program consisted of appraising every employee annually on the employee's anniversary date, considering each employee for a merit increase, and granting an increase to employees who received a satisfactory performance appraisal." 339 NLRB No. 105, p. 1 (2003).

- In *Daily News of Los Angeles*, the employer "annually evaluat[ed] the performance of each employee at the time of the employee's anniversary date." 304 NLRB No. 63, p. 7 (1991). The evaluation consisted of performance review forms, and the editor approved any salary increase. The amount of any increase was discretionary. *Id.*
- In *Stone Container*, all employees received the same (by percentage) across-the-board wage increases in April of each year. 313 NLRB No. 22, 340 (1993).
- In *TXU Electric*, the employer had a 22-year history of annually reviewing its salary plan in December based on "current market conditions, company economics, the current retention of employees, and other factors." If warranted, employees all received a wage increase effective the following year. The employer had increased the salary range for each job classification annually for the 22-year period. 343 NLRB No. 132, p. 1 (2004).
- In *Neighborhood House Assn.*, the employer had a 5-year practice of implementing a cost-of-living increase in December of each year for all employees. 347 NLRB No. 52, 3-4 (2006).
- In *Mission Foods*, for four years the employer granted annual "structural scale increases" to employees in the first quarter of each year. Employee eligibility was based solely on a local market survey in first quarter of each year. 350 NLRB No. 36, p. 3 (2007).

Though the facts in these cases are not uniform, they all share common elements: to qualify as a past practice, employees must be able to predict discrete events at predictable times. In those cases where the amount of the increase was discretionary, the employee could still predict an "event" that might or might not trigger a wage increase, such as a wage survey or evaluation. Yet ALS had no predictable "event." The ALJ found that ALS "has no written policy regarding wage schedules" and that "it does not have a formal procedure of evaluating unit employees' performance." (ALJD at 3). Instead, employees were told only to expect "periodic wage increases." (ALJD at

3). Of course, *any* employee of *any* company can expect periodic wage increases – the decisions above indicate that it takes more than an expectation that wages will rise over time to mature into a past practice.

Both the ALJ and the General Counsel relied on the jointly submitted wage data to argue that ALS's practice of granting wage increases became a predictable expectation of employees. The wage data, does not establish the legal conclusion that ALS's periodic wage increases were sufficiently consistent and regular to qualify as a "past practice." Table 1 in the General Counsel's answering brief indicates just how irregular the wage increases were, and how flawed the ALJ's analysis was. (GC Brf. at 3). Based on the same evidence used to generate Table 1, the ALJ found that employees typically received wage increases "every 6 months or sooner." (ALJD 3). Even if that were true, ALS employees could only predict that some of them (approximately half) would get some kind of wage increase (in an amount they could not predict based on factors they could not describe) sometime between 1 and 190 days from their last wage increase. This is not the kind of discrete, predictable event described by the cases above.

Furthermore, the ALJ's description of the wage data was not accurate. Table 1 shows that the timing of wage increases was not at all predictable. 15.7% of raises occurred over 8 months from the previous, and 6.6% occurred over a year from the previous. According to the General Counsel's data, only 38% of unit employees could expect a wage increase between 4 and 8 months after their last increase, and the selection of employees, dates, and the amount of increases was within ALS's

discretion.¹ The General Counsel is forced to describe the data in tables and through statistical analysis because the data, on its own, does not establish a discrete, recurring event which employees could expect. As noted in ALS's opening brief, this was proved at the hearing when the General Counsel's own witnesses could not agree on what the employees' expectations were. (Resp. Br. 3-5). When the ALS scenario is compared to those described in the cases cited in the General Counsel's brief, it becomes clear why the General Counsel did not present the facts of any existing Board cases – to do so would show how factually dissimilar this case is from other “past practice” cases. The General Counsel did not meet its burden of showing that ALS's historic wage increase practices were a “past practice” that it was required to maintain during the bargaining period. As a result, the status quo consisted of the wage rates in place at the time the Union became the ALS employee's bargaining representative. Any increase by ALS would have itself been unilateral action in violation of the Act.

c. The *Stone Container* exception does not apply to this case because there was no “regularly scheduled” discrete event that was to occur during the bargaining period.

ALS agrees with the General Counsel that the *Stone Container* exception does not apply. The typical *Stone Container* situation occurs when a:

discrete event, such as an annual wage adjustment, is regularly scheduled, both parties are well aware of it in advance, and it would not be unduly burdensome to require bargaining to agreement or impasse on the discrete issue prior to unilateral action.

Alan Richey, 359 NLRB No. 40, p. 12 (2012).

¹ One wonders if the Union would have protested had ALS continued its actual past practice of granting discretionary wage increases to only 66% of employees throughout a 4 month period. Based on past Board precedent, this would have undoubtedly been unilateral action. Instead the General Counsel argues for a rule that would essentially transform ALS's past discretionary practice into the “status quo” just because employees chose to be represented by a union. This is not supported by past Board or court precedent.

This case does not involve a “regularly scheduled” discrete event occurring during the bargaining period. Instead, it involves an unpredictable practice of wage increases that ALS could not continue during the bargaining period without unilaterally changing an existing term or condition of employment. Because that practice did not equate to a “past practice” which ALS was required to maintain as part of the status quo, it was not necessary for ALS to protect itself through the procedure blessed by the Board in *Stone Container*.

d. Because ALS complied with the Act when it refrained from granting discretionary wage increases during the bargaining period, it did not violate Sections 8(a)(1) and 8(a)(3) of the Act.

Because ALS was required to refrain from granting discretionary wage increases during the bargaining period, neither Woodcock’s statements nor ALS’s actions constituted violations of the Act. The ALJ found that, in August 2012, William Woodcock indicated that ALS “would need to negotiate wage increases before the Company could give raises.” (ALJD 4). Similarly, in December 2012, William Woodcock told employees that “he had been advised by counsel to freeze all terms and conditions of employment, including pay raises.” (ALJD 4). The ALJ also found that Woodcock “insisted that pay raises had been discretionary and now needed to be negotiated.” (ALJD 4). These were all accurate statements of ALS’s obligations under the Act, and are not sufficient to establish violations of Sections 8(a)(1) or (a)(3). Furthermore, ALS cannot be penalized for actually maintaining the status quo by refraining from granting discretionary wage increases. Its actions, in compliance with the Act, cannot form the bases for Section 8(a)(1) or (a)(3) violations.

II. CHRISTMAS GIFTS

As with the wage increase analysis, the parties essentially agree on the analysis to be applied to giving ALS employees Christmas gifts. Christmas *bonuses*, like wage increases, become a part of the status quo if they are “tied to other remuneration and paid regularly over an extended period.” *Exxel/Atmos, Inc. v. NLRB*, 147 F.3d 972, 976-77 (D.C. Cir. 1998) (internal citations omitted). However, “it is recognized that gifts do not become wages or terms and conditions of employment simply because they are made in the context of the employment relationship. An employer can make such payments as it pleases.” *North American Pipe*, 347 NLRB 836 (2006). The disagreement concerns whether the facts presented to the ALJ were sufficient to establish that William and Billie Woodcock’s Christmas gifts were 1) attributable to the corporation 2) an established practice and 3) wages rather than gifts.

a. The General Counsel failed to overcome ALS’s “failure of proof” defense.

ALS presented a “failure of proof” defense in its opening brief regarding ALS’s owners past practice of Christmas gift-giving. In the table “Christmas Gifts By Year,” ALS described *all* of the Christmas gift evidence presented to the ALJ, spanning from 2008 to 2012. (ALS Brf. 16). The data did not indicate any predictable practice – of the four years for which data was presented, gifts were only given to all three of the General Counsel’s witnesses in 2011. Yet instead of engaging the failure of proof defense, the General Counsel relied on the ALJ’s finding that there was “extensive record evidence establishing the practice.” (GC Brf. 13). The General Counsel does not dispute that the only evidence in front of the ALJ was the testimony of the three witnesses for the General Counsel, and did not cite to any “extensive record evidence.” This is because

such extensive evidence does not exist. The General Counsel did not present enough consistent evidence to establish that ALS had a past practice of giving Christmas bonuses.

The General Counsel is also unpersuasive in classifying the Christmas gifts as “wages,” a classification which is seemingly based only on the fact that the gifts sometimes involved “significant cash payments.” (GC Brf. 13). As ALS noted in its opening brief, the value of the gift is irrelevant in the Board’s gift analysis. *See North American Pipe*, at *6 (the Board’s ‘gift analysis’ applies regardless of the amount involved, including when payments in issue are clearly of significant economic value). The Board’s gift analysis considers whether the ostensible gifts are based on work performance, wages, regularity of the payment, hours worked, seniority, and production. *Id.* The General Counsel failed to analyze whether the gifts were actually wages, instead relying on the ALJ’s flawed analysis of the same issue. *See* (GC Brf. 13), (ALJD 9). Neither the ALJ nor the General Counsel tied the Christmas gifts to work performance, wages, hours worked, seniority, or production – as such, the gifts really were only gifts, and the Woodcocks could give them (or not) as they pleased.²

b. Because gift-giving practice of ALS’ owners was not a mandatory subject of bargaining, their decision to forgo gift-giving cannot amount to a violation of Section 8(a)(1) or 8(a)(3) of the Act.

William and Billie Woodcock’s decision to discontinue their tradition of giving Christmas gifts could not form the basis of a Section 8(a)(1) or 8(a)(3) violation because they had no obligation to continue it. The General Counsel has not alleged that ALS or its representatives made any statements to employees regarding the Christmas gifts.

² The gifts were purchased and given by the Woodcocks using personal funds, no corporate funds were used. The Woodcocks were not named in a charge or the complaint. General Counsel seeks to force a party who was not named in the charge to give personal gifts to employees.

Instead, the only basis for 8(a)(1) or (a)(3) violations is William and Billie Woodcock's decision to discontinue their gift giving practice. This was something the Woodcocks were privileged to do, so the violations alleged by the General Counsel should be rejected.

III. REGIONAL DIRECTOR HOOKS LACKED AUTHORITY TO ISSUE THE COMPLAINT

Regional Director Hooks lacked authority to act when the complaint was issued. The General Counsel alleges that Mr. Hooks was appointed on December 22, 2011, yet does not cite to any authority to substantiate the claim. (GC Brf. 18, note 7). The NLRB announced his appointment on January 6, 2012. See "Ronald Hooks Named Regional Director in Seattle" (available at <http://www.nlr.gov/news-outreach/news-story/ronald-hooks-named-regional-director-seattle>, accessed July 24, 2014). At the time of the announcement, the Board did not hold a quorum under *NLRB v. Noel Canning*, 573 U.S. ____ (2014) and could not approve Hooks transfer. Further, *Noel Canning* does not, as the General Counsel alleges resolve the validity of Board member Craig Becker's intra-session recess appointment. See (GC Brf. 18-19). Though *Noel Canning* created a presumption that a recess appointment made during a break of 10 days or less is not valid, see *Noel Canning*, 573 U.S. ____, at *21, it did not establish the opposite presumption. Instead, "the recess" includes an intra-session recess of "substantial length." *Id.* at *9. The 17 day recess during which member Becker was appointed was not a substantial length, and thus invalid.³

Furthermore, the authority of Acting General Counsel Lafe Solomon, under whose authority a Regional Director issues complaints, had expired on July 31, 2010 by

³ In any event, *Noel Canning* does not make Becker's recess appointment *per se* valid, as the General Counsel suggests.

the express terms of Section 3(d) of the Act, which limits the term of an Acting General Counsel to only forty days.⁴ As a result, Hooks lacked the authority to issue the complaint.

IV. CONCLUSION

For the reasons set forth above, ALS again requests that the ALJ's decision and recommended order be rejected in their entirety, and the General Counsel's Consolidated Complaint be dismissed.

Dated this 25th day of July, 2014.

Respectfully submitted,



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⁴ For a discussion of Lafe Solomon's authority to act under the Act and under the Federal Vacancies Reform Act, see the Alaska District Court's discussion in *Hooks v. Remington Lodging & Hospitality, LLC*, 3:13-CV-00213-SLG, 2014 WL 1053773 (D. Alaska Mar. 18, 2014).

CERTIFICATE OF SERVICE

I certify that on this day I served the attached Reply Brief to the parties of this proceeding and their attorneys or authorized representatives, as listed below. A true copy thereof was sent via U.S. Mail and facsimile and/or email to the following as stated below:

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Dated at Yakima, Washington this 25th day of July, 2014.


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