

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

STRATEGIC RESOURCES, INC.

and

INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE
WORKERS, AFL-CIO, DISTRICT LODGE W-24

Cases 19-CA-070217
19-CA-070224
19-CA-072173
19-CA-072184
19-CA-077901
19-CA-088406
19-CA-103576
19-CA-104377
19-CA-111874

**COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF
TO RESPONDENT'S EXCEPTIONS TO
ADMINISTRATIVE LAW JUDGE'S DECISION**

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I. OVERVIEW

Pursuant to § 102.46 of the Rules and Regulations of the National Labor Relations Board (“Board”), Counsel for the General Counsel (“General Counsel”) submits this Answering Brief to the Exceptions filed by Strategic Resources, Inc. (“Respondent” or “SRI”), to the February 4, 2015, decision of Administrative Law Judge John J. McCarrick (“ALJ”) in the above-captioned case¹ [JD(SF)-55-13] (“ALJD” or “Decision”).

Respondent concedes, by its lack of Exceptions on the overwhelming majority of the ALJ’s findings, that it committed numerous violations of §§ 8(a)(1) and (5) and 8(d) of the National Labor Relations Act (the “Act”). The few Exceptions that Respondent did file lack merit, as they are unsupported by the record evidence and/or ignore the extensive procedural history of this case. As discussed in detail below, it is respectfully submitted that the ALJ’s factual findings and legal conclusions are appropriate, proper, and fully supported by the record evidence and established precedent. Accordingly, the Board should sustain the ALJ’s decision and recommended order.

II. THE ALJ’S FACTS AND FINDINGS DISPUTED BY RESPONDENT SHOULD BE AFFIRMED

A. The ALJ Appropriately Found that Respondent Unilaterally Changed Unit Employees’ Holiday Pay (Exception 1)

1. *The ALJ Properly Concluded that Respondent Initially Paid Employees Eight Hours’ Pay, But Later Prorated, Employees’ Holiday Pay*

The ALJ found, and Respondent does not dispute, that Respondent’s Unit

¹ Respondent’s Brief in Support of its Exceptions will be referred to as (R. Br.), with citations to specific page numbers. References to the ALJD will be designated as (ALJD __:__), including appropriate page and line citations. References to the official transcript will be designated as (Tr. __:__), including appropriate page and line citations. References to the General Counsel’s Respondent’s, and Joint exhibits will be referred to as (GC Exh), (R Exh), and (JX), respectively.

employees were paid holiday pay for the ten recognized federal holidays: New Year's Day, Martin Luther King, Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day and Christmas Day (ALJD 7:32-25).

Relying on both testimony and Respondent's payroll records, the ALJ correctly found that when Respondent commenced operations in April 2011, it began the practice of paying the Unit employees eight hours' pay for each holiday, regardless of how many hours they had worked the previous week (ALJD 7:39-43; Tr. 268, 33-35, 77; GC Exh 57(a), 58). It was not until Columbus Day (October 10) in 2011, around six months after Respondent commenced its operations at Joint Base Lewis McCord ("JBLM"), that Respondent began "pro-rating" Unit employees' holiday pay (ALJD 8:1-2; Tr. 269, 34, 77; GC Exh 64-66).

There is no evidence that the Union was ever given notice of this change or an opportunity to bargain over it, nor does Respondent contend that it did so (ALJD 8:5-6; Tr. 77-78).

2. *The ALJ Correctly Determined that Respondent's Payment of Eight Hours for Holiday Pay Did Not Constitute Error, and that Respondent's Conduct Violated the Act*

Respondent, through its lack of specific Exceptions contesting these findings, admits that holiday pay is a mandatory subject of bargaining, that it did not give the Union notice and an opportunity to bargain, and that its records show that Unit employees received eight hours of holiday pay prior to October 2011. However, Respondent does contend that its initial payment of eight hours per holiday was in error and that it did not veer from its established policy; therefore, it contends it did not violate

the Act. As discussed herein, the ALJ appropriately disregarded Respondent's claims of error and established policy in the ALJD, and the Board should uphold the ALJ's reasoning and conclusions with regard to holiday pay.

First, contrary to Respondent's contentions, the record evidence does not establish that payment of eight hours of holiday pay constituted an error. The ALJ appropriately found that Respondent's managers "claimed that paying employees 8 hours per holiday was an 'error' and inconsistent with Respondent's practices, but neither specified what type of error, how the error was discovered, why the error occurred, or whether they had informed the Union of this error" (ALJD 7:39-41; Tr. 448-49, 268). The record clearly supports the ALJ's conclusion, as there is no testimonial or documentary evidence explaining the purported "error" in any way.

In fact, Respondent cites to no specific testimony in support of its claims of error, only vague statements by its managers that paying employees eight hours per holiday was an error and ran contrary to practice. One such example was Respondent's manager Randall Cox, who, when questioned by Counsel for the General Counsel about holiday pay, became incredibly evasive, insisted that there was an error, and only admitted that employees' holiday hours were initially not prorated after the ALJ repeatedly directed him to answer (Tr. 267:10-269:9). Not one of Respondent's witnesses at hearing demonstrated any foundation or personal knowledge of why they believed this change was a mistake; they merely labeled the holiday pay an "error."

Second, in its Exceptions, Respondent conveniently refers to the approximately six-month time frame during which employees received eight-hour holiday pay as "a period of transition" when it took over operations at JBLM (R. Br. 2), rather than calling it

what it was – Respondent’s period in which to set initial terms and conditions of employment for Unit employees. Any attempted reliance on Respondent’s predecessor, LSG, having pro-rated vacation is irrelevant. Respondent set its own terms and conditions of employment, and paid employees eight hours of holiday pay for the first three holidays after it began operations at JBLM. It is only Respondent’s unlawful conduct at issue in the instant case.

Indeed, to the extent that Respondent now argues, for the first time, that employees erroneously claimed full days’ pay for holidays by entering eight hours into their timesheets (R. Br. 3, 7-9), this contention is completely unsupported by the record. Respondent cites to no specific evidence in support of its unlikely, unfounded theory that, in essence, every single employee who received holiday pay during the period in question input eight hours of pay for holidays against the will and clear policy of Respondent. Given that the record is clear that Respondent’s predecessor, LSG, prorated holidays (ALJD 7:30; Tr. 33:12-18), it is quite a leap for Respondent to baldly assert that all employees would change the way they were accustomed to filling out time cards absent some instruction from Respondent to do so. As such, the Board should reject Respondent’s attempt to blame Unit employees for its own unlawful conduct.

Third, the ALJ appropriately considered and rejected Respondent’s “error” theory based on the fact that Respondent’s orientation materials discuss pro-rating holiday pay. As Respondent’s manager admitted and the payroll records show, this claimed pro-rating policy was simply not followed by Respondent when it set initial terms and conditions of employment. Despite Respondent’s contentions that its policy and

regulations compelled pro-rating holiday pay (R. Br. 4-6), Board law recognizes that high-level policy, in the face of contravening practice, is insufficient to render a change in practice lawful. See, e.g., *LM Waste Service Corp.*, 360 NLRB No. 104, slip op. at 18 (2014) (noting that past practice is shown where the practice occurred “with such regularity and frequency that the employees could reasonably expect the practice to continue or reoccur on a regular and consistent basis,” and finding that employer unlawfully failed to pay holiday pay in contrast with its past practice).

Fourth, as the ALJ properly reasoned, the Board law in which error excused otherwise unlawful unilateral change is clearly distinguishable from the facts currently before the Board (ALJD 8:34-37). Specifically, the ALJ concluded that Respondent’s reliance on *Eagle Transportation Corp.*, 338 NLRB 489 (2002), and *Boeing Co.*, 212 NLRB 116 (1974), were misplaced, as “in each of those cases there was either a computer glitch resulting in a brief wage increase or a clerical error resulting in a simple misclassification of employees who were never in the bargaining unit” (ALJD 8:35-37). Now, in its Exceptions, although Respondent relies upon the very cases already considered and appropriately distinguished by the ALJ, it does not claim that its purported error was the result of a computer glitch or misclassification of employees (R. Br. 7-8). Rather, Respondent asserts that it was even more difficult to uncover the purported error in the instant case, since holidays occur infrequently (R. Br. 8). This argument is half-hearted at best because, as Respondent notes in its Exceptions, its “primary focus” was on payroll and accounting functions during the “transition” period when it took over operations at JBLM (R. Br. 7).

The additional case cited by Respondent, *Specialty Container Corp.*, 171 NLRB

24 (1968) is also distinguishable. In *Specialty Container*, the employer temporarily promoted an employee to “operator,” for which he received a wage increase, but then after several weeks returned him to his “helper” position without returning his pay to the status quo due to clerical oversight. *Id.* at 29. Only months later, after the employee in question had again been temporarily assigned to work as an “operator,” did the employer appropriately return his pay rate to “helper” at the conclusion of the temporary promotion. *Id.* Here, unlike in *Specialty Container*, Respondent never actually paid Unit employees pro-rated holiday pay prior to paying eight hours of holiday pay. Thus, contrary to *Specialty Container*, it cannot claim that it was returning employees’ holiday pay to the status quo.

Fifth, even assuming *arguendo* that the eight-hour holiday pay was caused by administrative error, Respondent was nevertheless required to notify and bargain with the Union when it decided to rescind the holiday pay. *Atlantis Health Care Group, Inc.*, 356 NLRB No. 26, slip op. at 7 (2010) (employer’s conclusion that it had erroneously implemented increase did not justify decision to unilaterally rescind increase without providing Union with notice and an opportunity to bargain). To the extent that Respondent argues that any bargaining about pro-rating was unnecessary because it never requested reimbursement of payment, and employees were therefore not adversely affected (R. Br. 9), Respondent ignores the role of the Union and its own obligations under the Act. It is for the Union as Respondent’s Unit employees’ designated collective-bargaining representative, not Respondent, to determine whether to bargain after receiving notice of a change. Thus, even if Respondent believed no bargaining was necessary, Respondent nevertheless had an obligation to notify the

Union.

Finally, the Board must reject Respondent's claim that it did not "do anything that would reasonably undermine the Union's status as the employees' exclusive collective-bargaining representative" (R. Br. 10), as this ignores the extensive admitted unfair labor practices in the instant proceeding. Indeed, Respondent's failure to bargain over the change to holiday pay is particularly egregious since, at the time Respondent began pro-rating holiday pay in October 2011, the Union was actively, albeit unsuccessfully, trying to get Respondent to the bargaining table, and Respondent unlawfully failed to meet at reasonable times and places for bargaining (ALJD 34:21-37:2). Had Respondent begun bargaining immediately, Respondent could have raised the purported error with the Union at the table and they could have bargained over a solution. Instead, after having implemented its initial terms and conditions of employment, Respondent chose to demonstrate its independent power to act, ignoring its employees' exclusive collective-bargaining representative, and conveniently reduced holiday pay at the very time the Union should have been at the bargaining table.

In conclusion, Counsel for the General Counsel respectfully requests that the Board uphold the ALJ's finding that Respondent violated the Act when it unilaterally changed the method of calculating Unit employees' holiday pay.

B. The ALJ Correctly Required Respondent to Provide the Requested Information (Exception 2)

The ALJ properly found, and Respondent concedes that it unlawfully failed to provide and/or unreasonably delayed in providing extensive information requested by the Union from January 2012 through April 2013 (ALJD 15:41-34:18). In conformity with this finding, the ALJ appropriately ordered Respondent to provide the Union with the

information it had unlawfully failed to provide (ALJD 50:25-26). Despite this, Respondent seeks to end run its obligation under the Act, contending that, since it no longer employs the Unit employees at JBLM, the requests for information are moot and it has no statutory obligation to furnish the Union with the requested information (R. Br. pp.10-11). This argument should be discarded, as it ignores the facts of the instant case and the law and policy underpinning the Act.

Even though Respondent no longer employs the Unit employees at JBLM, albeit well after it committed the unfair labor practices at issue, it continues operations throughout the country as a large government contractor and has an obligation to provide the previously requested information.² *Shelton Heating and Air Conditioning Co.*, 290 NLRB No. 54, slip op. at *2 (1988) (employer that had ceased operations required to produce requested information, as “it is well settled that mere discontinuance in business does not render moot issues of unfair labor practices alleged against a respondent”). See also *Bolivar-Trees, Inc.*, 349 NLRB 720, 728 (2007); *Redway Carriers, Inc.*, 301 NLRB 1113 (1991). In fact, regardless of whether an employer is still in operation at the time of a Board order, the Board views “a decree of enforcement [as] a vindication of the public policy of the statute.” *W-I Forest Products Co.*, 304 NLRB 957, n.1 (1991) (quoting *Armitage Sand & Gravel*, 203 NLRB 162, 166 (1973)).

Allowing Respondent to prevail on its claim of mootness would undercut the very policies of the Act, as it would give employers like Respondent license to delay so long that its unfair labor practices become moot. This would be particularly problematic

² In fact, as the record demonstrates that transportation contractors pursuant to the Service Contract Act at JBLM change with time, it is entirely possible that Respondent could, at some future point, again become the employer of the Unit employees.

given that Respondent's own conduct throughout these proceedings renders it entirely responsible for the extensive delay in the instant case. First, while Respondent initially agreed to settle the early unfair labor practices, including failure to provide information, its own post-settlement conduct, including additional failure to provide information and withdrawal of recognition, rendered it necessary and appropriate for the Regional Director of Region 19 to revoke the settlement agreement (ALJD 44:1-47:6). Second, at hearing, Respondent failed to produce crucial information subject to the General Counsel's subpoena, forcing the Counsel for the General Counsel to request leave to seek enforcement of the subpoena and to take a four-month recess before resuming proceedings (Tr. 327:1-342:8, 347:2-5). The Board should not reward such dilatory conduct by relieving Respondent of its obligation to provide the requested information. The ALJ recognized this and acted appropriately in ordering Respondent to provide the requested information.

C. The Board Should Require Respondent to Distribute Notices to Employees, and to Request that Its Successor Post Notices to Employees (Exception 3)

The ALJ appropriately found, and Respondent agrees, that Respondent should mail notices to Unit employees who were employed during the period that the unfair labor practices occurred (ALJD 48:15-18; R. Br. p.12). This is in line with Board policy, as the Board has consistently ordered the employer to mail the Notice to Employees both to the Union and to the last known addresses of its former employees where an employer has closed its facility or ceased operations. See, e.g., *Freeland Manufacturing Co.*, 333 NLRB No. 89, slip op. at 3 (2001); *Shelton Heating and Air Conditioning Co.*, 290 NLRB No. 54, slip op. at 4 (1988).

The ALJ also mandated a physical posting at JBLM. This is understandable in light of the pattern, practice, and duration of unfair labor practices at issue and the previously revoked settlement agreement with Respondent. However, Counsel for the General Counsel recognizes that the change in contractors for the Unit employees at JBLM renders this remedy less pragmatic. In light of this, the Board could, in line with standard practice for cases arising under § 8(b) of the Act, require that Respondent mail copies of the signed Notices to the current employer of the Unit employees at issue in this case and request that the Notices be posted in prominent places in the current employer's facility for 60 consecutive days from the date of posting.

III. CONCLUSION

Based on the foregoing, it is respectfully submitted that the Board should deny Respondent's Exceptions and adopt the ALJ's findings of fact and conclusions of law that Respondent violated §§ 8(a)(1) and (5) and 8(d) of the Act.

DATED at Seattle, Washington, this 8th day of April, 2015.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Counsel for the General Counsel's Answering Brief to Respondent's Exceptions to Administrative Law Judge's Decision was served on the 8th day of April, 2015, on the following parties:

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