Faro Screen Process, Inc. *and* Local 591, Sign and Display Union, International Union of Painters and Allied Trades of The United States and Canada (IUPAT), AFL–CIO/CLC.[1] Case 07–CA–102899

April 30, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND HIROZAWA

On March 27, 2014, Administrative Law Judge David I. Goldman issued the attached decision. The General Counsel filed exceptions, a supporting brief, and a reply brief. The Respondent filed a brief in support of the judge's decision.

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, and conclusions only to the extent consistent with this Decision and Order.[2]

The judge concluded that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally implementing a wage increase on January 1, 2013, and by rescinding that increase on January 23, 2013.[3] No party excepted to those findings. For the reasons stated by the judge, we agree that the appropriate remedy is to restore the unilateral wage increase for the period of January 23 to January 31.[4] The judge also concluded that the Respondent did not violate Section 8(a)(1) by a letter it posted announcing rescission of the unilateral wage increase. For the reasons that follow, we disagree and reverse.

The Respondent contacted its payroll service regarding the unilateral increase on January 2, even though it was engaged in ongoing bargaining with the Union. On January 3, the Respondent posted a letter stating that "Union negotiations are underway," but announcing that the Respondent was implementing its proposed 2-percent wage increase effective January 1. On January 10, the Respondent and the Union reached a tentative agreement on a 3-year collective-bargaining agreement, which included a 2-percent increase for the first year. However, on January 10, the Respondent never mentioned at the bargaining table that it had already implemented the first-year 2-percent increase. Instead, Union Business Agent/ Secretary Treasurer Robert Gonzales learned about the wage increase 2 days before the January 17 contract ratification vote, which unanimously favored ratification. On January 18, Respondent's president, Edward Brown, told Gonzales that the implemented increase was "per the contract" that had been tentatively agreed upon. Gonzales disagreed and stated in a letter that the increase "was done strictly on your own and outside the current CBA and was never part of the negotiations that culminated in a tentative agreement that was then ratified." The judge found that Faro's president, Brown, "understood that Gonzalez was contending that Faro should add an additional 2 percent to employee pay on February 1, in addition to the 'early raise' Brown had given employees in January."

On January 23, Brown posted a letter to employees announcing rescission of the unilateral wage increase. He stated:

> Dear employees:
>
> The union has informed me that they object to implementing the 2 percent raise early. I will rescind early implementation. The 2 percent wage increase will be implemented on the first February payroll as per the contract.

The judge concluded that the Respondent's letter was lawful under Section 8(a)(1). We disagree. As set forth above, the letter referred to the Respondent's unilateral January increase and its subsequent rescission, both of which violated Section 8(a)(5). Moreover, the Respondent's letter misrepresented the Union's position in two ways. First, the Union did not agree that the unilateral January wage increase was an "early implementation" of the 2-percent contractual increase that was to be effective February 1. Second, although the Union objected to the unilateral January increase, it did not request to have the increase rescinded. Indeed, the Union argued that employees—having already received the unilateral January increase—should, in addition, receive the contractual increase due on February 1. For these reasons, contrary to the judge,[5] we find that the Respondent's letter consti-

[1] In his decision, the judge inadvertently refers to the Charging Party as Local 592. This caption corrects the error.

[2] We have amended the judge's conclusions of law and remedy consistent with our findings herein.

We shall modify the judge's recommended Order to conform to our findings and in accordance with our recent decision in *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014). We shall also substitute a new notice to conform to the Order as modified and in accordance with *Durham School Services*, 360 NLRB 694 (2014).

[3] All dates refer to 2013, unless otherwise indicated.

[4] In doing so, however, we do not rely on the judge's statement that the General Counsel's position is "profoundly hostile to collective bargaining."

[5] We agree that the Respondent's letter did not involve the "kind of vitriol" that has prompted the Board to find violations in the cases cited by the judge, but those cases involved a different type of misconduct where employer statements or communications repeatedly denigrated the union or contained vituperative speech. The Respondent's letter

tuted interference, restraint, and coercion that unlawfully tended to undermine the Union in violation of Section 8(a)(1). See *RTP Co.*, 334 NLRB 466, 468, 470, 471 (2001) (employer violated Sec. 8(a)(1) by blaming the union for preventing a wage increase), enfd. sub nom. *NLRB v. Miller Waste Mills*, 315 F.3d 951 (8th Cir. 2003), cert. denied 540 U.S. 811 (2003); accord: *Lafayette Grinding Corp.*, 337 NLRB 832, 839 (2002) ("An employer violates the Act by representing to employees that the [u]nion stands as an impediment to increases in wages or benefits.").

AMENDED CONCLUSIONS OF LAW

Insert the following after the judge's Conclusion of Law 2(b) and reletter the subsequent paragraph.

"(c) The Respondent violated Section 8(a)(1) by informing employees that it was rescinding the January 1, 2013 wage increase because of the Union's objections."

AMENDED REMEDY

In addition to the remedies provided in the judge's decision, we shall order the Respondent to cease and desist from misrepresenting to employees positions taken by the Union and blaming the Union for the Respondent's unlawful rescission of a wage increase.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Faro Screen Process, Inc., Canton, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 1(c) and reletter the subsequent paragraph.

"(c) Misrepresenting to employees positions taken by the Union and blaming the Union for the Respondent's unlawful rescission of a wage increase."

2. Insert the following as paragraph 2(c) and reletter the subsequent paragraphs.

"(c) Compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee."

3. Substitute the attached notice for that of the administrative law judge.

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here not only attempted to justify its own unlawful actions, it mischaracterized the Union's position in a manner that was essentially opposite of what the Union actually contended.

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 implement wage increases without providing the Union notice and an opportunity to bargain.

WE WILL NOT rescind wage increases without providing the Union notice and an opportunity to bargain.

WE WILL NOT misrepresent to you positions taken by the Union or blame the Union for our unlawful rescission of a wage increase.

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 wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following bargaining unit:

> those production and maintenance of employees employed by the Employer as indicated within [the collective-bargaining] Agreement and as per Appendix "A" consisting of preparatory layout by the use of photographic, mechanical and electronic means, screen printing and work operations pertaining thereto at the company plant, excluding office clerical employees and salesmen, within the meaning of the National Labor Relations Act as amended.

WE WILL make unit employees whole for any loss of earnings and other benefits suffered as a result of the unilateral rescinding of wage increases, in the manner set forth in the remedy section of this decision.

WE WILL compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

FARO SCREEN PROCESS, INC.

The Board's decision can be found at www.nlrb.gov/case/07-CA-102899 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.

Eric S. Cockrell, Esq., for the General Counsel.
Robert E. Day, Esq. (Robert E. Day, P.C.), of Detroit, Michigan, for the Respondent.

DECISION

DAVID I. GOLDMAN, Administrative Law Judge. This case involves a union-represented printer that, effective January 1, 2013, while in negotiations for a new labor agreement, unilaterally gave its employees an early wage increase before the new contract was effective.

Anticipating there would be a 2-percent wage increase in the new collective-bargaining agreement, the employer implemented a 2-percent raise before the new contract was agreed to in an effort to offset an increase in Federal payroll taxes levied on employees as of January 1. In subsequent days, as anticipated, a new labor agreement containing an initial wage increase was agreed to by the Union and the Employer, ratified by the employees January 17, and went into effect February 1, 2013.

The Union's business agent learned for the first time of the January 1, 2013 unilateral wage increase at the ratification vote. The business agent contacted the employer's representative and told him that he expected the employer to provide the wage increase in the contract on February 1, 2013, in addition to the January 1, 2013 unilateral increase recently provided. The employer refused, and wrote the union a letter on January 23 "apologiz[ing] for implementing the raises early" and stating that "[i]t had been a long time since my employees had gotten a raise. With the impending federal tax increases I did not want my people to take a cut in pay." The employer then rescinded the early raise on January 23, and returned to the old wage rate for the final week of January. On February 1, 2013, the employer implemented the 2-percent raise called for by the newly effective labor agreement. The Government alleges that the Employer's unilateral January wage increase, and its subsequent rescission, constitutes unlawful unilateral changes in derogation of the Employer's bargaining obligation under the National Labor Relations Act (Act). Of that there can be little doubt. As discussed herein, the employer's contention that the matter should be deferred to the union-employer contractual grievance-arbitration procedure is unavailing.

Less compelling is the remedy sought by the Government. As a remedy for this failure to bargain, the Government contends that the Employer owes backpay calculated on the premise that it was required to pay the January 1st wage increase *in addition to and on top of* the 2-percent contractually-mandated wage increase implemented February 1, 2013. However, I reject the Government's assertion that, as of February 1, 2013, the 2-percent early raise was required to be continued *in addition to and on top of* the newly implemented and contractually-agreed to wage rates.

This is for two reasons. First, while I agree with the Government that the remedy for the unilateral wage increase is to maintain it in effect until a different agreement is reached, the new labor agreement, effective February 1, *is* that new agreement. No one claims, with good reason, that the February 1st agreement was an agreement to raise wages more than 2 percent beyond what they lawfully were before the unlawful unilateral "early raise." The claim that the employer must continue to pay a surcharge beyond what the parties agreed to in the new collective-bargaining agreement is unprecedented and a theory profoundly hostile to collective bargaining. Second, in this case, the unilateral change was, by design, a change implemented for just the period until a new agreement was put into effect. That is the change that was implemented, not an open-ended permanent 2-percent increase. This unilateral change, unlawful for sure, cannot be transformed into a permanent independent wage increase any more than an unlawfully implemented one time weekly bonus must be provided every week until the parties bargain otherwise.

Accordingly, while the unilateral change violation alleged is easily found, the Government's proposed remedy is untenable. Rather, the remedy I recommend provides for backpay in the prescribed amounts for the union-represented employees for the period January 23–31, 2013. No backpay is owed for periods after that time. As of February 1, 2013, the employees were paid the amounts agreed to by the Union and the Employer through the collective-bargaining process.

STATEMENT OF THE CASE

On April 16, 2013, Local 591, Sign and Display Union, International Union of Painters and Allied Trades of the United States and Canada (IUPAT), AFL–CIO/CLC (the Union) filed an unfair labor practice charge alleging violations of the National Labor Relations Act (the Act) by Faro Screen Process, Inc. (Faro), docketed by Region 7 of the National Labor Relations Board (the Board) as Case 07–CA–102899. The Union amended the charge on June 11, 2013. Based on an investigation into the charge, on August 26, 2013, the Board's General

Counsel, by the Regional Director for Region 7 of the Board, issued a complaint alleging violations of the Act by Faro, a compliance specification alleging schedules of reimbursement owed to employees, an order consolidating the complaint and compliance specification for hearing, and a notice of hearing. Faro filed an answer to the complaint and compliance specification denying all alleged violations of the Act and denying all claims for reimbursement.

A trial was conducted in this matter on January 27, 2014, in Detroit, Michigan. Counsel for the General Counsel and counsel for the Respondent filed posttrial briefs in support of their positions by March 3, 2014. On the entire record, I make the following findings, conclusions of law, and recommendations.

Jurisdiction

Faro is and at all material times has been a corporation with an office and place of business in Canton, Michigan, engaged in the manufacture and nonretail sale of signs and displays. In conducting its operations during the calendar year ending December 31, 2012, Faro sold and shipped from its Canton, Michigan facility goods valued in excess of $50,000 directly to points outside the State of Michigan. At all material times, Faro has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act. Based on the foregoing, I find that this dispute affects commerce and that the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.

Unfair Labor Practices

Background

Respondent Faro produces banners, decals, and other graphic products at its Canton, Michigan facility. The Union has represented bargaining unit employees at Faro since at least 1978.[1] As of the time of the hearing there were approximately11 employees in the unit.

Faro is a member of a multiemployer collective-bargaining association currently composed of two employers. The other employer is Sawicki & Sons.

Effective February 1, 2007, the Union and Faro entered into a labor agreement scheduled to terminate no earlier than February 1, 2010. This agreement (the 2007 Agreement) provided by its terms that it would renew from year to year if no party provided a notice to terminate.

For reasons not elaborated on in the record there was no successor agreement to the 2007 Agreement until the parties entered into a new agreement, effective February 1, 2013, as described below. Although the testimonial evidence is less than pellucid, it appears, and I find, that the 2007 Agreement renewed yearly on February 1, 2010, 2011, and 2012. Most significantly, I find that the 2007 Agreement was in effect throughout January 2013.[2]

The 2007 Agreement contained a broad and typical grievance-arbitration procedure that applied to "any grievance, dispute or complaint . . . over the interpretation or application of the contents of this Agreement." It also contained a wage rate provision (art. 20) that established the work classifications and the minimum hourly wage rates for each classification.

Bargaining

The parties met in October 2012, and perhaps again early in December 2012. On December 20, 2012, the Union met again with Sawicki & Sons and Faro for negotiations. There is conflicting testimony in the record about whether International Union trustee, Tim Strickler, was present for this meeting. At some point, either in December 2012, or in January 2013, the Union's business agent/secretary treasurer, Robert Gonzalez, replaced Strickler as the lead negotiator for the Union and Strickler stopped attending the meetings. In addition, Faro employee and Steward Jim Fordham and Sawicki & Sons employee and Steward Wayne Cammon were on the union negotiating team. John Sawicki represented Sawicki & Sons, and Edward Brown, president of Faro, represented Faro.

The December meeting focused on healthcare. For the last few years, Faro enjoyed a competitive advantage over Sawicki & Sons because Faro employees, unlike Sawicki & Sons employees, contributed toward the health care insurance premium. Brown, on behalf of Faro offered as a proposal for the new contract that Faro would no longer take out the employee contributions. Brown estimated this as a 3.5-percent savings for the average Faro employee.

The next meeting was held January 2, 2013.[3] At this meeting, the parties discussed wages, insurance, and other proposals, but no agreement was reached. Wages were an intense subject of discussion. At the end of the meeting, the employer proposal was for a 3-year contract effective February 1, 2013, with a 2-percent wage increase in each of the first 2 years and an increase of 2.5 percent the final year of the contract.

On January 10, when the parties met again, a tentative agreement was reached, subject to ratification, for a 3-year agreement, effective February 1. The tentative agreement provided for wage increases as offered by the Employers on January 2, except the final year increase was 3 percent instead of 2.5 percent. Thus, the agreement provided for a 2-percent wage increase the 1st year, a 2 percent increase the 2d year, and a 3-percent wage increase for the final year of the agreement. In addition, the agreement included a 1-year elimination on em-

[1] The current collective-bargaining agreement recognizes the Union as the sole and exclusive collective-bargaining agent for

> those production and maintenance of employees employed by the Employer as indicated within Agreement and as per Appendix "A" consisting of preparatory layout by the use of photographic, mechanical and electronic means, screen printing and work operations pertaining thereto at the company plant, excluding office clerical employees and salesmen, within the meaning of the National Labor Relations Act as amended[.]

[2] In this regard, as the Respondent notes (R. Br. at 16–17), the complaint alleges and the Respondent admits that since about 1979 the Respondent's recognition of the Union "has been embodied in *successive* collective bargaining agreements, the most recent of which is effective from February 1, 2013." (Complaint and answer at par. 8.) (Emphasis added.)

[3] Union representatives testified that the meeting occurred on January 3, but I credit Brown's surer testimony that the meeting was held Wednesday, January 2. The dispute is of no overall significance to the issues in this case.

ployee premium contributions to health care, as Brown had proposed (referred to as a "1 yr cap" on health and welfare), estimated to save employees an additional 3.5 percent.

The January 1, 2013 Unilateral Wage Increase and Elimination of Employee Health Care Contributions

Meanwhile, in the evening after the January 2 bargaining meeting (and over a week before the parties' tentative agreement was reached on January 10), Faro President Brown wrote a letter to employees, which he dated for the next day, January 3, 2013. He posted this letter near the timeclock in the facility on January 3. The letter unilaterally announced, among other items, implementation of a 2-percent wage increase, to be made effective January 1, 2013. Brown's letter stated:

> Dear employees:
>
> RE: wage increases
>
> Union negotiations are underway. I have proposed a 2 percent wage increase for 2013 and resetting all health care employee contributions back to zero for 2013. In light of the recent federal tax increases, length of time without a contract, and the cost savings of dropping the section 125 deductions before the start of the new year, I have implemented the wage increase and discontinued the health care deduction as [of] January 1st payroll.
>
> Please understand that this proposal has not been ratified yet. Additional changes may be needed in the future.

The wage increase was implemented and health care contributions ended effective January 1, 2013. According to Brown he contacted his payroll service on Wednesday, January 2, and had the change implemented.

Brown testified that he implemented the raises because he wanted to provide the early wage increase to offset the elimination of the Social Security tax "holiday" on January 1, 2013, that returned Social Security payroll taxes to 6.2 percent of employee income from the 4.2 percent that had been in effect. More generally, he knew that employees had not received a wage increase in several years, but based on the employer proposal in bargaining he anticipated a 2-percent raise was coming. As to the health care premium portion he paid for legal review of that item on a calendar year basis so January 1 was an appropriate time for him to make the change—a change that he also anticipated from negotiations was likely to be in the final agreement.

Before posting the letter Brown spoke with Faro employee and Union Steward Jim Fordham. The two testified to somewhat different accounts of the conversation. According to Fordham, just after 8 a.m., Brown came out onto the floor where Fordham worked, notice in hand, told Fordham to shut down his press, and stated:

> I know you guys haven't had a raise in over four years and you've been paying it to your insurance and higher deductibles . . . . [W]hat I'm going to do is I'm implementing a two percent raise that has nothing to do [with the] contract, Jim. Listen to me. Listen—listen me out. It has nothing to do with the contract, and I'm also implementing a cap on the insurance . . . [which he explained to mean] no contributions by the employees for a year.

Fordham testified that Brown "told me what he was going to do, and he went to the board and posted it."[4]

Brown agrees that he did not mention at the bargaining table on January 10 that he had already implemented a wage increase and a reduction in employee health care premium contribution.

Ratification of the Contract and Rescission of the Unilateral Wage Increase

The Union's membership met to discuss and vote on the tentative agreement on January 17, 2013. Union Representative Gonzalez had prepared a short summary of the new agreement listing the only changes from the old agreement: the wage in-

[4] Brown's testimonial version of this conversation was different from Fordham's in several respects (but not in any ways that alter the outcome of this case). Brown testified that he discussed the issue with Fordham at the shop late in the morning of January 2, after they returned from the bargaining session (which had been held at the union headquarters in Warren, Michigan). Brown testified that he "wanted to run" the idea of a raise increase by Fordham "to see if it was appropriate to do." Brown testified that he "wanted to get his agreement, and he did agree to it, and I told him I would put a posting on there putting up . . . what we talked about, which I did the following day." Brown recalled nothing else said by Fordham or himself on the matter.

I generally found Brown to be a credible and sympathetic witness. I believe that in implementing the wage increase he was not acting out of malice or with intent to interfere with negotiations, but rather, simply in an effort, as he testified, to provide an early benefit to employees that he anticipated (correctly) would soon be provided through the outcome of the bargaining process.

Be that as it may, I do not accept and I discredit Brown's testimony to the extent he claimed that he sought and obtained Fordham's agreement for the unilateral change to wages (and employee health care contributions). For one, it is inconsistent with Fordham's testimonial account, and I found Fordham a believable and credible witness. Second, Brown's claim does not seem plausible: Brown knew who the Union's chief negotiator was—it was not Fordham—and Brown had been at bargaining that very day. He knew to contact Gonzalez if he wanted to bargain a change in terms and conditions of employment—that process was ongoing. Finally, the record evidence is inconsistent with Brown's claim. Notably, the letter to employees posted by Brown does not mention that the wage increase had been agreed to, acquiesced in, or that it involved the Union in any way. To the contrary, while mentioning that "[u]nion negotiations are underway," Brown's note very plainly takes unilateral credit for the changes and even cautions that the proposal "has not been ratified yet." Moreover, even after Brown was on the defensive, and wrote to Gonzalez on January 23 "apologiz[ing]" for the early raises, he does not claim that Fordham agreed to the raises. His letter does state that he "explained" his intentions to Fordham and "posted" an explanation, but the letter manifestly does not claim that Fordham agreed to Brown's action, or that the matter in any way turned on Fordham's approval.

I have gone to some length to state why I am rejecting this testimony of Brown's. However, I note that, notwithstanding Brown's testimony, at no point in trial, or in its posthearing brief, does the Respondent assert as a defense Fordham's alleged agreement to the wage change. Indeed, the Respondent's brief refers to Brown's solicitation of "a Union Steward under these circumstances" as a "mistake." (R. Br. at 11.) Moreover, as discussed below, even if Fordham had agreed to the wage increase as Brown claims, I would not find it exculpatory under the circumstances.

creases of 2 percent, 2 percent, and finally 3 percent, and the health and welfare cap for the first year of the contract. These were posted in the employers' facilities as of approximately January 11.

Gonzalez learned for the first time of Brown's January 3 wage-increase letter on or about January 15, when Fordham telephoned to tell him about it and told him the unilateral wage increase had been implemented. Gonzalez saw Brown's letter for the first time only at the employee ratification meeting the evening of January 17. The memo and implementation of the wage rate prompted some questions and confusion at the ratification meeting, which was attended by approximately six Faro employees and six Sawicki & Sons employees. Employees wanted to know if the 2-percent increase in the contract would be a 2-percent increase on the new 2-percent unilaterally-increased wage rate just put into effect. According to Fordham, Gonzalez told employees "I don't know much about that yet . . . . Jim, I need you to get me that copy of that letter, and I will talk to Mr. Brown and see what's going on with that two percent." Gonzalez, who testified credibly that he "really had no idea as to what Faro . . . [was] doing," did not know the answer to the employees' question, but testified that he took the position that they would get a 2-percent wage increase "per the contract":

> my answer to them was—well, first, I had no idea that Faro Screen Process had gave them a two percent wage increase at this time, January 1st, and as far as I was concerned, the contract that they were voting on if it was ratified, that yes they would be entitled to any increases per the contract effective February 1st, 2013.

The agreement was ratified unanimously. The next day Gonzalez called Sawicki and Brown to report on the ratification. While speaking to Brown he raised the January wage increase and told Brown that "I wasn't sure what he was doing . . . or what that was about." According to Brown, Gonzalez was upset about it. Brown told Gonzalez that the January increase "was the increase per the contract that we had tentatively agreed [to] on January 10, 2013." Gonzalez told Brown that he disagreed, and "that we were never notified or never had any idea of the increase he had given, and I expected that when the contract went into effect February 1, 2013, that he would abide by the terms of the agreement." Brown understood that Gonzalez was contending that Faro should add an additional 2 percent to employee pay on February 1, in addition to the "early raise" Brown had given employees in January.

Gonzalez wrote to Brown, in a letter dated January 18, pressing his view that the upcoming February 1, 2013 wage increase should add 2 percent to the new higher wage rate unilaterally implemented by Faro effective January 1. Gonzalez wrote:

> I must say I am very disappointed per our discussion this morning. The Union negotiated in good faith resulting in an agreement that is fair to both sides, which was proven per the unanimous ratification voted conducted last evening approving the contract.
>
> Your decision to grant a merit raise during negotiations, was done strictly on your own and outside the current CBA and was never part of the negotiations that culminated in a tentative agreement that was then ratified.
>
> To infer the day after the ratification vote that the merit raise was part of the new CBA is unacceptable.
>
> I hope you will abide by the terms you originally agreed to or the Union will be forced to seek the legal avenues available to see that the contract is enforced.

On January 23, Brown caused Faro to post another letter to employees in the facility. This letter stated:

> Dear employees:
>
> The union has informed me that they object to implementing the 2 percent raise early. I will rescind early implementation. The 2 percent wage increase will be implemented on the first February payroll as per the contract.

Brown also wrote to Gonzalez on January 23. Brown's letter stated:

> I apologize for implementing the raises early. It had been a long time since my employees had gotten a raise. With the impending federal tax increases I did not want my people to take to a cut in pay.
>
> I gave the raise only after we had negotiated the 2 percent/2 percent/2.5% increases.[5] I thought we were done negotiating except for the ratification vote. I did not intend to influence the results of the negotiations in anyway. I was just trying to help my people.
>
> In my defense, I explained to my shop steward [Jim Fordham] that I wanted to eliminate the health care deduction to prevent the legal cost of the Section 125 plan and to help their pay checks. I also told Jim that I would go ahead and throw in the negotiated raise to cover the tax increase. I posted an explanation to everyone that I wanted to give the raise early. I stated that the agreement had not yet been ratified yet and that changes may be needed in the future. I did not get any objections to implementing the raise early. Nor did I get any questions about the raise being *in addition* to the bargained increase.
>
> I will cancel the early raise immediately. I will implement the bargained raises of February 1st payroll as bargained for.
>
> I am truly sorry for any confusion this action may have had.

Brown then contacted his payroll service and had the 2-percent raise he had made effective January 1, rescinded for the final week of the month. It was re-implemented effective February 1, when the new labor agreement went into effect. According to Brown, he understood from Gonzalez that "it was inappropriate to give it early."

[5] Both Brown and Gonzalez testified that this final 2.5 percent referenced in the letter was incorrect. At some point after the January 3 meeting the proposal on the table had been 2.5 percent for the final year, but when the parties reached a final tentative agreement on January 10, the agreement was for a 3-percent raise in the third year of the new contract.

Analysis

The General Counsel alleges that the implementation and rescission of the 2-percent increase in wages, effective January 1, and rescinded January 23, constituted unlawful unilateral changes in violation of Section 8(a)(5) of the Act. In addition, the General Counsel alleges that Faro's January 23 announcement to employees that it was rescinding the early wage increase independently violated Section 8(a)(1) of the Act.

After consideration of the Respondent's motion to defer the 8(a)(5) allegations, I will consider the merits of the General Counsel's claims.

The Respondent's Motion for Deferral of the 8(a)(5) Allegations

Before analyzing the General Counsel's claim, it is necessary to consider the Respondent's defense that, in accordance with *Collyer Insulated Wire*, 192 NLRB 837 (1971), the Board should defer resolution of this dispute to the parties' contractual grievance-arbitration procedure.[6]

In *Collyer*, 197 NLRB at 839, the Board held that where a "dispute in its entirety arises from the contract between the parties, and from the parties' relationship under the contract, it ought to be resolved in the manner which that contract prescribes." As the Board has recently stated,

> [T]he Board finds deferral appropriate when the following conditions are met: the parties' dispute arises within the confines of a long and productive collective-bargaining relationship; there is no claim of animosity to employees' exercise of Section 7 rights; the parties' agreement provides for arbitration in a broad range of disputes; the parties' arbitration clause clearly encompasses the dispute at issue; the party seeking deferral has asserted its willingness to utilize arbitration to resolve the dispute; and the dispute is well suited to resolution by arbitration.

Sheet Metal Workers, 359 NLRB 1095, 1095–1096.

Applying the factors cited in *Collyer*, it is clear that the final factor is not met. I will assume that the first two are. However, deferral is inappropriate because the substantive dispute is not well-suited to resolution by arbitration.

As to whether a dispute is well suited to resolution through arbitration, the Board will defer where the dispute "aris[es] over the application or interpretation of an existing collective-bargaining agreement." *United Cerebral Palsy*, 347 NLRB 603, 606 (2006), quoting *Commercial Cartage Co*., 273 NLRB 637, 640 (1984), quoting *Collyer*, 192 NLRB at 840. This does not mean, however, that deferral is appropriate whenever a labor agreement obviously has been ignored by the employer's actions. Rather,

> [a] dispute is well suited to arbitration when the meaning of a contract provision is at the heart of the dispute. Deferral is not appropriate when "no construction of the contract is relevant for evaluating the reasons advanced by Respondent for failing to comply with that contract provision." Moreover, deferral is also not appropriate if the contract provision at issue is unambiguous.

San Juan Bautista Medical Center, 356 NLRB 736, 737 (2011), quoting *Struthers Wells Corp.*, 245 NLRB 1170, 1171 fn. 4 (1979), enfd. mem. 636 F.2d 1210 (3d Cir. 1990), cert. denied 452 U.S. 916 (1981); *Commercial Cartage Co*., 273 NLRB 637, 640 (1984) ("Clearly, deferral is not warranted where contract language is clear and unambiguous and permits no construction which could legitimize the action taken.").

In this case, there is no question that the Respondent's increase in wages by 2 percent across-the-board, effective January 1, 2013, was inconsistent with the explicit wage provisions of the 2007 Agreement. No matter how welcome a wage increase might have been for the employees, it was at odds with the contract then in effect. The Respondent cannot credibly offer, and does not offer, a contractually-based defense to the January wage increase.

Notably, Brown's January 3, 2013 letter explaining the wage hike to the employees does not attempt to justify the wage hike as an interpretation of the 2007 Agreement. To the contrary, Brown forthrightly explained the wage increase as an effort to help employees by offsetting the Federal payroll tax increase with an early implementation of the first year wage hike that Brown was proposing at the bargaining table for the new agreement. Whatever you call this unusual, and unusually generous, approach to labor relations, it is not based on an interpretation of the 2007 Agreement. "Deferral is not appropriate when no construction of the contract is relevant for evaluating the reasons advanced by Respondent for failing to comply with that contract provision." *San Juan Bautista Medical Center*, supra at 737 (internal quotations omitted). The Respondent's defense is not based upon a plausible interpretation of the contract and does not warrant deferral. This is not a case where "the meaning of a contract provision is at the heart of the dispute."[7]

[6] See *Sheet Metal Workers (Everbrite)*, 359 NLRB 1095, 1096 (2013) ("while a deferral defense and the merits may be addressed in the same hearing and the same decision, whether deferral is appropriate is a threshold question which must be decided in the negative before the merits of the unfair labor practice allegations can be considered") (internal quotation omitted).

[7] In addition to the 8(a)(5) unilateral change allegations, the complaint also alleges that the Respondent's January 23 posting stating that it was rescinding the early wage increase independently violated Sec. 8(a)(1) of the Act by "undermining" support for the Union and "denigrating" its representative status. There is no claim by the Respondent that this allegation is appropriate for deferral and indeed, it would be an uphill argument to so claim. The issue does not appear to be cognizable under the grievance-arbitration procedure, which, by its terms, applies to disputes that "arise over the implementation or application of the contents of this Agreement." 2007 Agreement at art. 5. In any event, no such claim is made by the Respondent and the inappropriateness of deferral of this allegation of the complaint provides independent grounds for the conclusion that the dispute over the wage increase should not be deferred, as Board policy disfavors *Collyer* deferral of one issue that is closely related to another nondeferrable issue. *15th Avenue, Iron Works*, 301 NLRB 878, 879 (1991), enfd. 964 F.2d 1336 (2d Cir 1992).

The Merits

The 8(a)(5) Allegations

First, the General Counsel alleges that the implementation of the January 2013 wage hike was an unlawful unilateral change violative of Section 8(a)(5) of the Act. There can be no doubt that the granting of an across-the-board wage increase constitutes an unfair labor practice where, as here, it is instituted unilaterally and without advance notice to the Union and without providing an opportunity to bargain.[8]

Board precedent has long been settled that, as a general rule, an employer may not make ***unilateral changes*** in mandatory subjects of bargaining without first bargaining to a valid impasse. *NLRB v. Katz*, 369 U.S. 736 (1962). Indeed, with regard to such unilateral changes, motive is not relevant. A unilateral change in a mandatory subject is a per se breach of the 8(a)(5) duty to bargain, without regard to the employer's subjective bad faith. *Katz*, supra at 743 ("though the employer has every desire to reach agreement with the union upon an over-all collective agreement and earnestly and in all good faith bargains to that end . . . an employer's unilateral change in conditions of employment under negotiation is [ ] a violation of § 8(a)(5)"). "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. at 743. "Unilateral action by an employer without prior discussion with the union does amount to a refusal to negotiate about the affected conditions of employment under negotiation, and must of necessity obstruct bargaining, contrary to the congressional policy." *Katz*, supra at 747. "'The vice involved in [a ***unilateral change***] is that the employer has changed the existing conditions of employment. It is this change which is prohibited and which forms the basis of the unfair labor practice charge.'" *Daily News of Los Angeles*, 315 NLRB 1236, 1237 (1994) (bracketing added) (quoting *NLRB v. Dothan Eagle, Inc.*, 434 F.2d 93, 98 (5th Cir. 1970) (court's emphasis)), enfd. 73 F.3d 406 (D.C. 1996), cert. denied 519 U.S. 1090 (1997). Wages are, of course, a mandatory subject of bargaining. See *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 348 (1958).

The fact that the unilateral changes in wages made were beneficial to employees does not excuse the violation. Whether beneficial or harmful to employees, the unilateral changes offend the employer's statutory bargaining obligation. *Allied Mechanical Services*, 332 NLRB 1600, 1609 (2001); *Randolph Children's Home*, 309 NLRB 341, 343 fn. 3 (1992).

The fact that the parties were engaged in negotiations adds still another layer to the employer's obligation: where, as here, negotiations for a collective-bargaining agreement are ongoing "an employer's obligation to refrain from ***unilateral changes*** extends beyond the mere duty to give notice and an opportunity to bargain; it encompasses a duty to refrain from implementation at all, unless and until an overall impasse has been reached on bargaining for the agreement as a whole." *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991) (footnote omitted), enfd. mem. 15 F.3d 1087 (9th Cir. 1994).[9]

Accordingly, the unilateral implementation of the 2-percent across-the-board wage increase, without notice to the Union, without mention of it in collective-bargaining negotiations, and without bargaining to an overall impasse in negotiations, constitutes a violation of Section 8(a)(5) and (1) of the Act.[10]

Second, as alleged by the General Counsel, the January 23 unilateral rescission of the wage increases also constitutes an unlawful unilateral change, for all the same reasons that the initial unilateral change was unlawful. *Mid-Wilshire Health Care Center*, 337 NLRB 72, 73 (2001). The initial change was not an inadvertent mistaken change made by the Respondent. It was purposely undertaken to cover the employees with the wage increase for the period of time before a negotiated wage rate became effective. Having unlawfully made the change, it cannot be rescinded without providing notice and an opportunity to bargain. *Mid-Wilshire*, supra.

The 8(a)(1) Allegation

The complaint also alleges that the January 23 memo rescinding the wage increases, in which the Respondent (implicitly) announced that it was rescinding the early wage increases due to the Union's objection, independently was violative of Section 8(a)(1) of the Act. Specifically, the complaint alleges that the memo "undermined the Unit's support for Charging Party Union and denigrated its status as the Unit's exclusive collective-bargaining agent" (complaint par. 10(h)), conduct,

[8] I note that the General Counsel alleges only a unilateral change allegation. He does not proceed on an 8(d) contract modification theory.

[9] As noted, above, I do not credit Brown's testimony at trial that he ran the January increase by Fordham before implementing it, and obtained his approval. As explained, above, I do not believe it happened. But even if I did, it would not insulate Faro from liability, for a number of reasons. First, there is no indication in the labor agreement, or otherwise, that as a shop floor union steward, Fordham, had the authority to agree—particularly, by himself with no other union personnel involvement—to changes in the labor agreement, on a subject as central as wages no less. Indeed, Fordham was a member of the Union's bargaining committee, and, consistent with that, there was a process and place to obtain union approval for changes to the labor agreement: the collective-bargaining table. Notably, the raises were not mentioned there by Faro. Consultation with a union steward was not an appropriate method of providing notice to the Union. See *Racetrack Food Services*, 353 NLRB 687, 701 (2008), affd. and adopted 355 NLRB 1258 (2010); *RemGrit Corp.*, 297 NLRB 803, 809 (1990). In any event, the last minute nature of the consultation with Fordham—Fordham testified that Brown had the notice in hand and ready to be posted when Brown approached Fordham—would constitute a classic "fait accompli" were Fordham authorized to negotiate wages with Brown. *Ciba-Geigy Pharmaceuticals Division*, 264 NLRB 1013, 1017 (1982) ("To be timely, the notice must be given sufficiently in advance of the actual implementation of the change to allow a reasonable opportunity to bargain. However, if the notice is too short a time before implementation or because the employer has no intention of changing its mind, then the notice is nothing more than a fait accompli."), enfd. 722 F.2d 1120 (3d Cir. 1983); *Pontiac Osteopathic Hospital*, 336 NLRB 1021, 1023 (2001); *Toma Metals, Inc.*, 342 NLRB 787, 787 fn. 1 (2004).

[10] An employer's violation of Sec. 8(a)(5) of the Act is also a derivative violation of Sec. 8(a)(1) of the Act. *Tennessee Coach Co.*, 115 NLRB 677, 679 (1956), enfd. 237 F.2d 907 (6th Cir. 1956). See *ABF Freight System*, 325 NLRB 546 fn. 3 (1998).

the complaint alleges, interfered with, restrained, and coerced employees in violation of Section 8(a)(1) of the Act. (Complaint at par. 11.)

Quite apart from the from the question—unalleged and unadvanced—of whether attributing the rescission of the wage hike to the union constitutes an independent 8(a)(5) bargaining violation, I do not believe that under the circumstances it violates Section 8(a)(1). The Respondent posted a truthful announcement to employees that the Respondent was rescinding the (unlawful) unilateral and "early" wage increase, and truthfully referenced the Union's objection to that wage increase. The memo would not have a reasonably tendency to interfere with, restrain, or coerce employees in the exercise of their rights.

The General Counsel's theory is that the announcement of the rescission of the wage increase for a 1-week period until the new contract went into effect, and its (implicit) attribution of the rescission to the Union's objection to the wage increase, had a reasonable tendency to undermine employee support for the Union and denigrated its status the employees' collective-bargaining agent. While I have no doubt at all that employees would reasonably have a tendency to dislike returning to their prior pay levels for the week, and might well wish that that the Union had not objected, I do not think this can be equated with the kind of employer undermining and denigration of a collective-bargaining representative that the Board finds unlawful.

In *Turtle Bay Resorts*, 353 NLRB 1242, 1278–1279 (2009), affd. and adopted 355 NLRB 706 (2010), the Board adopted the administrative law judge's reasoning that:

> It is well settled that the Act countenances a significant degree of vituperative speech in the heat of labor relations. Indeed, "[w]ords of disparagement alone concerning a union or its officials are insufficient for finding a violation of Section 8(a)(1). *Sears, Roebuck & Co.*, 305 NLRB 193 (1991)." *Trailmobile Trailer, LLC*, 343 NLRB 95 (2004).

Brown's memo is, indeed, far from anything that can reasonably be called vituperative or even disparagement. The most that can be made of the January 23 memo is that it alerted employees in a nonprovocative, noninflammatory manner to the fact that the Union objected to the unilateral nature of the early increase.

By way of comparison, the point is well illustrated by the extreme nature of the employer's conduct found unlawful in the sole case cited by the General Counsel in support of its claim. In *Regency House of Wallingford, Inc.*, 356 NLRB 563 (2011), the Board found that an employer violated Section 8(a)(1) of the Act when, in no less than seven examples of correspondence and conversations, the employer

> repeatedly criticized the Union's rescission demand, impugned the Union's representational abilities, and questioned the Union's good faith toward unit members. The Respondent also repeatedly conveyed that the union, by demanding rescission, was 'harming its members and "casting stones" at them, and that it was actually the Respondent who was trying to protect employees' interests.

Based on the "totality of these communications" the Board concluded that

> the Respondent's repeated denigration of the Union conveyed an implicit threat that employees' representation by the Union would be futile (i.e., that the Respondent would not fulfill its statutory obligations) and that employees would have to rely on the Respondent to protect their interests. While paying lip service to its obligation to rescind the unlawful wage increase, the Respondent repeatedly denigrated the Union's acceptance of the Board-ordered remedy as contrary to the interests of the employees and blamed the employees' low level of compensation on their representation by the Union. The Respondent thereby created an atmosphere of hostility toward the Union and interfered with, restrained, and coerced employees in the exercise of rights guaranteed by Section 7. Particularly in the context of the Respondent's other unlawful conduct, we find that its comments were more than a simple statement of its view of the Union.

None of this can be remotely found in Faro's single note to employees attempting to rectify his unilateral change and announcing rescission of the wage increase for the one week until the new contract took effect. I will dismiss the 8(a)(1) allegation.[11]

CONCLUSIONS OF LAW

1. The Respondent, Faro Screening Process, Inc., is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party, Local 591, Sign and Display Union, International Union of Painters and Allied Trades of the United States and Canada (IUPAT), AFL–CIO/CLC, is the recognized collective-bargaining representative of the following appropriate unit of the Respondent's employees:

> All production and maintenance employees employed in the classifications described in appendix "A" of the collective

[11] The General Counsel also cites *National Medical Associates, Inc.*, 318 NLRB 1020, 1030–1031 (1995), enfd. 108 F.3d 342 (11th Cir. 1997), a case where the Board adopted an administrative law judge's finding that an employer violated Sec. 8(a)(5) of the Act—and only derivatively 8(a)(1)—by denigrating the union. The fact that the case involved an 8(a)(5) bargaining violation makes it inapposite, but, in any event, that bargaining violation involved the employer's CEO Morrel writing to employees and telling them "that he had offered them a raise" but stating that "this wage increase was denied by the [Union]." As the ALJ explained,

> Not to miss this opportunity to belittle the Union, Morrel states: "I apologize for their insensitivity." As if this were not enough, Morrel then goes on to tell these "most deserving employees" that thanks to the Union, Respondent will give the money they might have gotten as a raise to "all other . . . employees." Morrel cleverly ends with a cheery "Merry Christmas" to punctuate his slap in the face not only to the Union, but the obvious stupidity of the employees themselves for having this Union to represent them.
>
> The key here is the tendency of this kind of vitriol to drive a wedge between the employees and their bargaining representative, an effort that is inconsistent with the employer's statutory bargaining obligation. In the instant matter, nothing of the sort can be gleaned from Brown's note to employees.

bargaining agreement and as per Appendix "A" of the collective bargaining agreement in effect between Respondent and the Charging Union as described below in paragraph 8.

(a) The Respondent violated Section 8(a)(5) and (1) of the Act, by unilaterally implementing a change in a mandatory subject of bargaining, specifically, an across-the-board "early" wage increase of 2 percent effective January 1, 2013, without providing the Union notice and an opportunity to bargain.

(b) The Respondent further violated Section 8(a)(5) and (1) of the Act by unilaterally rescinding the unilateral implemented wage increase, described above, on January 23, 2013, without providing the Union notice and an opportunity to bargain.

(c) The unfair labor practices committed by Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

The Respondent shall be ordered to cease and desist from its unfair labor practices and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that Respondent violated Section 8(a)(5) and (1) of the Act first by unilaterally implementing the early wage increase effective January 1, 2013, and then by unilaterally rescinding the wage increase on January 23, 2013, prior to the effective date of the new contract, the Respondent shall be ordered to restore the wage increase for the period January 23 through and including January 31, 2013. This is consistent with the Board's traditional remedy for unlawful unilateral changes. Had the Respondent merely made and left in place the January 1 unilateral change, which was beneficial to employees, the "normal remedy for the unlawful changes" would be to "order the rescission of these changes only at the request of the Union." *Fresno Bee*, 339 NLRB 1214, 1216 fn. 6 (2003); *HTH Corp.*, 356 NLRB 1397, 1403 (2011). However, the January 23 rescission was also an unfair labor practice—this time adverse to employees—and the remedy must therefore provide for restoration of that new unlawful unilateral change through January 31, 2013.

However, this affirmative remedy does not mean, as urged by the General Counsel, that as of February 1, 2013, when the parties' newly negotiated and agreed-to wage rates for the 2013 Agreement became effective, the Respondent was required to maintain a 2-percent wage increase *in addition to and on top of* the newly bargained and lawfully-implemented 2-percent wage hike. I reject the General Counsel's contention that the remedy in this case should include, as of February 1, 2013, what would amount to a surcharge on the parties' negotiated contractual wage rate beyond that negotiated by, agreed to, and implemented by the Respondent and the Union on February 1, 2013.

This is for two related, but distinct reasons. There is, as I have found, no question but that the Respondent violated the Act by failing to bargain before increasing wages effective January 1, 2013. And so, consistent with longstanding Board precedent, it is stuck with this unilateral change on the subject of wages, beneficial to the employees—but not forever. It is stuck with the unilateral wage change until the Union and the Respondent bargain to impasse or reach agreement on something different as to wages—and the 2013 Agreement is that new agreement. It is the agreed-to-fruit of collective bargaining, to be in effect as of February 1, 2013, and it reflects the parties' agreement that as of February 1, 2013, and for 1 year hence, the wage rates will be 2 percent above the previous negotiated rate. There is no basis for the Board to add a wage surcharge that the parties did not bargain, as a remedy for the Respondent's failure to bargain over a unilateral change it made during the term of a predecessor and now expired and defunct contract.[12]

The gist of the General Counsel's argument is that the unilateral wage increase was "outside" of bargaining for a new contract. Therefore, the logic seems to go, the unilateral wage increase can be remedied only by bargaining that is separate from the bargaining for the wages in the new contract. This is a specious argument. A new agreement on wages is a new agreement on wages. Faro violated the Act because it implemented new wages in January 2013 without providing notice and an opportunity to bargain. Its "sin" in the eyes of the Act, was not raising wages, but failing to bargain. The backpay that began accruing when Faro rescinded the wage increase on January 23, 2013, stopped accruing on February 1, 2013, when it successfully bargained and lawfully implemented—with the Union's agreement—a new agreement on wages.[13]

Second, on a related note, I agree with the Respondent that the evidence demonstrates, and I find, that the January 1, 2013 unilateral change was implemented as an "early" wage increase to be effective until the implementation of a wage increase in the new agreement. The evidence is clear that this was not an open-ended permanent 2-percent increase. Rather, Brown's announcement to employees about the wage increase links the 2-percent increase to a pending proposal in negotiations but cautions that this implemented increase "has not been ratified yet" and therefore "additional changes may be needed in the future." In other words, if something other than a 2-percent increase ended up being in the new contract the wage increase would have to be changed. Thus, this "early" raise, as Brown called it in his January 23 note to employees and to Gonzalez, was change—unlawful for sure—that by its terms was a bridge to whatever was to be negotiated. While a respondent is not free to unilaterally rescind an unlawfully implemented wage increase, the life span of *this* unilateral increase, by all evi-

[12] I stress that the General Counsel disavows any claim that the parties' new agreement—the 2013 Agreement—should be *interpreted* to require a 2-percent increase above and beyond the wage rate unilaterally imposed effective January 1, 2013. (See Tr. at 32.)

[13] It would be one thing for the Union (and the General Counsel) to challenge the existence of the 2013 Agreement on some theory that the Respondent's January extra-contractual unilateral wage changes precluded formation of the contract or queered the ratification process. In that case, the argument that the January unilaterally implemented wage rate must remain in place until a later impasse or later agreement was reached would have traction. But that is decidedly not the theory advanced. Rather, beginning on February 1, the General Counsel and the Union want the wage changes the Union agreed to in collective bargaining *and on top of that* the previous unilateral changes in wages to which it did not agree. The Union cannot have it both ways. It cannot get its new negotiated bargain on wage rates *and in addition and on top of that* a preexisting wage rate it did not bargain for. The Board cannot give it both.

dence, was until the parties adopted the new contract, at which time the January 1, 2013 wage increase was superseded. The General Counsel makes much of the (credited) testimony of both Fordham and Brown that the early raises had "nothing to do with the contract." But this is not compelling. Of course, the early raises were not contractual—that's why they are clearly unlawful and nondeferable. But that is not to say that they were unrelated to the negotiations. Brown's notices leave no doubt that the (unlawful) raises were a bridge for employees to the new contract.

Finally, and tellingly, I note that the General Counsel cites not a single case in which the Board has required an employer to maintain a unilateral change unlawfully implemented during bargaining even *after* the parties adopt a new contract with different terms. Such a remedy would be as antithetical to collective bargaining as was the Respondent's original violation.

Accordingly, the backpay owed to employees is for the period January 23, 2013, to and including January 31, 2013, the period of time in which the Respondent—without reaching agreement or even offering to bargain with the Union—unilaterally rescinded its unlawfully implemented pay raise.[14]

The make-whole remedy shall be computed in accordance with *Ogle Protective Services*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance with *Latino Express, Inc.*, 359 NLRB 518 (2012), the Respondent shall compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

The Respondent shall post an appropriate informational notice, as described in the attached appendix. This notice shall be posted at the Respondent's facility wherever the notices to employees are regularly posted for 60 days without anything covering it up or defacing its contents. 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. In the event that, during the pendency of these proceedings 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 January 3, 2013. When the notice is issued to the Respondent, it shall sign it or otherwise notify Region 7 of the Board what action it will take with respect to this decision.

ORDER

The Respondent, Faro Screen Process, Inc., Canton, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Implementing wage increases for unit employees without providing the Union notice and an opportunity to bargain.

(b) Rescinding wage increases for unit employees without providing the Union with notice and 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 of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

> those production and maintenance of employees employed by the Employer as indicated within [the collective-bargaining] Agreement and as per Appendix "A" consisting of preparatory layout by the use of photographic, mechanical and electronic means, screen printing and work operations pertaining thereto at the company plant, excluding office clerical employees and salesmen, within the meaning of the National Labor Relations Act as amended.

(b) Make employees whole for any loss of earnings and other benefits suffered as a result of the unilateral rescission of its wage increase on January 23, 2013, by making the following backpay payments in the amounts set forth, plus interest computed in the manner set forth in the remedy section of this decision:

Terry Moers	$13.20.
Michael Chalifour	16.40
Jim Fordham	13.20
Frank Greenhalgh	15.60
Denise Linton	13.60
Jason Swartz	13.60
TOTAL NET BACKPAY	$ 85.60

(c) 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 backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facility in Canton, Michigan, copies of the attached notice marked "Appendix."[16] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the

[14] The specific net amounts owing are set forth in the Order. The amounts are calculated based on schedule A of par. 1(b) of the compliance specification in this matter. As stipulated by the parties at the hearing, the Respondent does not question these calculations beyond its challenge to the underlying theories of liability.

[16] 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."

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. In the event that, during the pendency of these proceedings, 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 January 3, 2013.

(e) Within 21 days after service by the Region, file with the Regional Director for Region 7 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.