

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

WAYRON, LLC

and

Case 19-CA-032983

INTERNATIONAL BROTHERHOOD OF
BOILERMAKERS, IRON SHIP BUILDERS,
BLACKSMITHS, FORGERS AND HELPERS
OF AMERICA, LOCAL 104; THE
INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS,
AFL-CIO, DISTRICT LODGE 160, LOCAL
LODGE 1350; AND THE INTERNATIONAL
UNION OF PAINTERS AND ALLIED
TRADES, DISTRICT COUNCIL 5

**GENERAL COUNSEL'S OPPOSITION TO
RESPONDENT'S MOTION FOR RECONSIDERATION**

Counsel for the General Counsel respectfully submits this opposition to the August 29, 2016, Motion for Reconsideration filed by Respondent Wayron, LLC ("Respondent"). Although styled as a Motion for Reconsideration ("Motion"), Respondent essentially is seeking to reopen the record and have the Board modify its August 2, 2016, Order. Specifically, relying on extra-record evidence that it has been aware, and in possession, of for years, Respondent's Motion seeks to have the Board modify its Order as to the requirements regarding bargaining, providing information, making payments under the collective bargaining agreements it unlawfully terminated, and rescinding unilateral changes it implemented in 2011.

While the Board recognizes that there is “a strong policy favoring an end to litigation,” *R.L. Polk & Co.*, 313 NLRB 1069, 1071 and n.11 (1994), the Board’s Rules and Regulations permit motions for reconsideration only under extraordinary circumstances. As set forth below, Respondent’s Motion, even if it were styled correctly, should be rejected, as Respondent has not demonstrated any extraordinary circumstances or identified any material error in the Board’s decision as required by § 102.48(d)(1) of the Board’s Rules and Regulations. Moreover, even if Respondent had met its procedural burden, Respondent has failed to establish how, given the fact that the Board considered and addressed the factual possibility Respondent now relies upon (and proffers extra-record evidence in support of), a Motion for Reconsideration is warranted or appropriate in the circumstances of this case. See *Kahn’s and Co.*, 256 NLRB 930 (1981).

Rather, the General Counsel would have the Board do exactly as it anticipated when first advised of the possibility of disclaimer Respondent now asserts, and leave those matters for the compliance stage of this matter. Alternatively, should the Board choose to treat Respondent’s Motion as more of a motion to reopen the record and make modified findings and revise its order accordingly, the General Counsel posits that the revisions Respondent seeks do not remedy its numerous violations.

I. Facts

Respondent, a metal fabrication shop, employs metalworkers, mechanics, and painters. Its employees, as of when all the conduct at issue in this matter arose in 2010 and 2011, were represented by the: (1) International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers of America, Local 104

("Boilermakers"); (2) International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge 160 ("Machinists"); and (3) International Union of Painters and Allied Trades, District Council 5 ("Painters") (collectively, the "Unions"). The Unions separately represented their classifications, but bargained jointly as a group for one contract. (ALJD at 24).

A. Procedural History

Complaint issued against Respondent alleging violations of §§ 8(a)(1), (3), and (5) of the National Labor Relations Act ("Act"), 29 U.S.C. § 160 *et seq.*, by engaging in bad faith bargaining in various ways (including making unilateral changes), refusing to provide information, withdrawing recognition, and discharging employees. The matter was heard by Administrative Law Judge Wacknov ("ALJ") during the fall of 2011. On March 29, 2012, the ALJ issued his Recommended Decision and Order finding that Respondent had violated the Act by: discharging its employees and making them reapply for work; causing employees to believe the Unions no longer represented them; failing to notify the Unions of its intent to discharge its employees; delaying bargaining and providing information; and withdrawing recognition from the Boilermakers. (ALJD 33-34).

The matter then came before the Board on exceptions. On August 2, 2016, the Board issued its Decision and Order (the "Board's Order"), affirming those violations found by the ALJ, as well as finding that Respondent had also violated the Act by: refusing the involved Unions' requests for a financial audit; and unilaterally implementing terms and conditions of employment that did not reasonably fall within its final offer to the Unions. 364 NLRB No. 60 (August 2, 2016). Among the unilaterally

implemented terms and conditions was a cut to Respondent's employees' wages and benefits by an average of \$6.51 per hour as of February 8, 2011.

B. The Boilermakers' Disclaimer of Interest and the Board's Delegation of that Issue to Compliance

On February 6, 2012, almost two full months prior to the issuance of the ALJ's decision, one of the three Unions, the Boilermakers, apparently disclaimed interested in representing its bargaining unit employees at Respondent's facility. Instead of presenting evidence of the disclaimer to the ALJ, and seeking to reopen the record or proceed in some way while the case was still before him as the trier of fact, Respondent waited until it filed its Answering Brief to the General Counsel's exceptions to the ALJ's decision to bother even mentioning the disclaimer.

As Respondent had not introduced into the record any "evidence regarding this assertion," the Board appropriately left "to compliance proceedings the determination whether any of the Unions has disclaimed a representational interest." 364 NLRB No. 60, at n.41. The Board further stated in conjunction with this delegation to the compliance proceedings, that if "one or more of the Unions has disclaimed any representational interest, there shall be no obligation to bargain with such Union(s)." 364 NLRB No. 60, at n.44.

It was not until the filing of its current Motion, four and one-half years after receiving the letter disclaiming interest from the Boilermakers, that Respondent deigned to actually produce a copy of it. See Exhibit 1 to Motion.

C. Respondent's Representations Regarding the Machinists' and Painters' Disclaimers

According to Respondent's Motion, it appears Respondent has also been in possession of another disclaimer of interest, this one for three and one-half years. As

set forth in Exhibit 2 to Respondent's Motion, the Machinists disclaimed interest as of January 29, 2013. Respondent proffered no reasons for its delay in producing this evidence or of even raising it as an assertion (as it did with the Boilermakers).

Respondent also represents in its Motion that the Painters issued a letter on January 13, 2014, disclaiming interest. (Motion, p. 2.) That, however, is not what the letter itself states.¹ Rather, the letter states only that the Painters will terminate all agreements with [Respondent] effective January 31, 2014. If for some reason you do not agree with this decision, please notify my office immediately and no later than 10 days from receipt of this letter." See Exhibit 3 to Respondent's Motion.

D. Respondent Seeks to Nullify the Board's Order

Respondent seeks by its Motion to have the Board modify its Order based on the extra-record evidence annexed and its claim that complying with certain parts of the Order is now "impossible" based on facts that it has been aware of for over 4 years. Specifically, Respondent asserts it cannot comply with the Board's Order because: (1) the Unions have disclaimed interest; and (2) it cannot make contractually required contributions to the Unions' benefit funds because it is already obligated to pay withdrawal liability to the various pension funds. Thus, Respondent seeks to remove the remedial provisions mandating that Respondent: recognize, meet, and bargain; enter a contract if reached; permit the Unions to audit its financial records given Respondent's claim of financial hardship; provide the requested information to both the Unions and

¹ Respondent also asserts that it has "entered into agreements and payment plans with each pension fund" over the past three years. (Respondent's Motion, p.2.) While that appears to be true as to the Boilermakers and Machinists, the document produced as to the Painters explicitly states that it is a "review of withdrawal liability assessment" in response to correspondence. Respondent's Motion at Exhibit 6. It is not an agreement; it is part of a back-and-forth discussing their differences in opinion as to amounts owed and states that it constituted advice only. See Exhibit 6, p.5.

their auditor; rescind any or all unilateral changes upon request; make unit employees whole for any loss of earnings and benefits; and, upon request, restore and maintain the terms and conditions going back to early February 2011. (Respondent's Motion, pp.4-5).

II. Respondent's Motion Is Procedurally Flawed

As an initial matter, Respondent's Motion for Reconsideration should be rejected as the requirements warranting reconsideration have not been met. Section 102.48(d)(1) of the Board's Rules and Regulations provides that "[a] party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration, rehearing, or reopening the record after the Board decision or order. A motion for reconsideration shall state with particularity the material error claimed and with respect to any finding of material fact shall specify the page of the record relied on."

As to material error, Respondent has made absolutely no claim of material error by the Board. In fact, it could not do so, given that it was the one that withheld the very documents from the Board's processes that it now seeks to rely upon in support of its Motion.

Further, there are no extraordinary circumstances that have arisen since the Board's decision. As set forth above, Respondent has been in possession of the Boilermakers' disclaimer letter for well over 4 years – in fact, prior to the issuance of the ALJ's decision. The ALJ could have made findings of fact based on this disclaimer had he been presented with such evidence. Similarly, Respondent has been in possession of the Machinists' disclaimer for well over 3 years – a period during which the matter was pending before the Board. Thus, neither event presented in Respondent's Motion constitutes an extraordinary circumstance warranting the Board to reconsider its Order.

Finally, as set forth below, the Board has already addressed the potential of any such disclaimer of interest based on the anecdotal statement Respondent raised in its Answering Brief. That Respondent is now offering documentary evidence to support its statement does not change that or make it some sort of extraordinary circumstance heretofore unknown. Rather, Respondent's decision not to seek to reopen the record at any time in the last four and one-half years to introduce evidence of the putative disclaimers and payments made to the Unions' benefit funds prior to the Board issuing its Order, speak to the contrary.

III. Respondent's Issues Are Properly Left for Compliance, as the Board Has Already Determined

As discussed in detail above, the Board specifically provided in its footnotes 41 and 44 that the Agency's compliance proceedings provide the proper vehicle for addressing any alleged disclaimer of interest. Similarly, if, as Respondent claims, a showing is made during compliance proceedings that any of the Unions have disclaimed their representational interest, the Board has already determined that Respondent will not be obligated to bargain moving forward. Further, absent a representational interest, there is no obligation for Respondent to provide a labor organization with information. *Cedar Rapids Steel Transport, Inc.*, 269 NLRB 400, 405 (1984).

Respondent has proffered no reason why any facts it may use to prove the putative disclaimers, the termination of collective bargaining agreements, or its entry into any agreements to pay Union fund withdrawal liability, cannot be duly considered during the Board's compliance proceedings. In fact, it cannot do so, as long-standing Board policy favors leaving such details involved in the remedy to the compliance

process. See, e.g., *Lear Siegler*, 295 NLRB 857, 861 (1989), citing *Dean General Contractors*, 285 NLRB 573, 574 (1987).

In sum, Respondent raises nothing in its Motion that draws into question the viability of the Board's compliance process being inadequate to deal with its issues; nor does Respondent posit why it cannot appropriately make its "impossibility" argument there. Thus, there is no need for the Board to reconsider its Order at this juncture. *KSM Industries*, 337 NLRB 987 (2002) ("In the interest of finality and administrative economy, motions for reconsideration are disfavored").

IV. Respondent's Proposed Modifications Do Not Remedy Its Violations

In the event the Board may wish to consider Respondent's improperly styled Motion as a *de facto* motion to reopen the record and reexamine the extra-record evidence sought to be introduced, Counsel for the General Counsel posits that Respondent's proposed modifications do not remedy its numerous violations.

First, as discussed earlier, the documents attached to Respondent's Motion as to the Painters do not state what Respondent represents they do. Thus, at most, there are two disclaimers of interest (the Boilermakers' and Machinists'), not three. This means that Respondent still has represented employees with attendant bargaining obligations. That the Painters cancelled their contract does not militate against honoring such obligation.

Second, even if the Board accepts the Boilermakers' and Machinists' disclaimers of interest as fact, the unfair labor practice violations here predate any such putative disclaimers and it is the employees who are protected under § 7 of the Act and must be made whole for any changes to their terms and conditions of employment since early 2011. It is they who are entitled to be made whole, as our mandate requires. *Goya*

Foods of Fla, 356 NLRB 1451, 1462 (2011), citing *NLRB v. Strong*, 393 U.S. 357, 359 (1969) (quoting *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 197 (1941) (“making the workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces”).

Respondent’s unlawful unilateral changes affected those employees’ wages and terms moving into present day (e.g., backpay for the average \$6.51 adverse change in Boilermaker employees’ wages results in higher base wage for a year moving forward; Machinists’ wages would base wages moving forward would have been increased two years). Thus, even if the Board were to decide that the make whole period were to cease at the time of said disclaimers, the remedy must still be enforced. This also includes benefits, regardless of whether Respondent has negotiated any amount to legally withdraw from its relationship with a benefit fund. That goes to its relationship with the funds; it does not make whole *employees* for any harm or additional expenses they may have incurred due to Respondent’s unlawful conduct.

As to the provisions of the Board’s Order providing for “on the Union’s *[sic]* request” or “[o]n the request of the Unions,” even if it is determined that two of the Unions have disclaimed interest, the Painters have not. Thus, the Painters, who have not legally disclaimed interest, would still have the authority to request that Respondent rescind its unlawful unilateral changes made to employees’ terms and conditions of employment on February 8, 2011. Even if the Painters had legally disclaimed interest or choose to do so in the future, the Board can always simply order that the changes be rescinded without any qualification. Again, it is the employees who are to be protected by the Act and to whom the remedy flows. 356 NLRB at 1462.

V. Conclusion

Counsel for the General Counsel respectfully submits that Respondent's August 29, 2016, Motion for Reconsideration be denied in its entirety as it is improperly styled, does not meet the standards of § 102.48(d)(1) of the Board's Rules and Regulations, fails to address the fact that the Board considered and provided a forum for addressing the factual possibility Respondent now relies upon, and fails to provide an adequate remedy for Respondent's numerous violations.

DATED at Seattle, Washington, this 19th day of September, 2016.

Respectfully submitted,



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Certificate of Service

I hereby certify that a copy of the General Counsel's Opposition to Respondent's Motion for Reconsideration was served on the 19th day of September, 2016, on the following parties:

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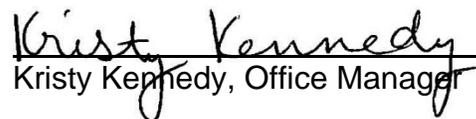
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