

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

HARLEY-DAVIDSON MOTOR COMPANY

And

Case 05-CA-183791

INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS,
TYSON LODGE NO. 175

**GENERAL COUNSEL'S REPLY BRIEF
TO RESPONDENT'S ANSWERING BRIEF**

I. INTRODUCTION

Respondent's answering brief reveals its misunderstanding of its duty to bargain under the Act. This misunderstanding is rooted in two equally-flawed premises: first, the erroneous conflation of the voluntary separation incentive plan with a "layoff;" and second, the mistaken belief that because Respondent was not *required* to offer a voluntary separation incentive plan, it was somehow free to unilaterally implement this incentive plan without providing the Union a meaningful opportunity to bargain.

Regarding the first premise, Respondent's implementation of the voluntary separation incentive plan was not a layoff, but a unilaterally-imposed new term and condition of employment. As for the second premise, in its answering brief, Respondent acknowledges the facts in the record which establish the incentive plan was presented as a *fait accompli*: that Respondent notified the Union of the incentive plan just two days before implementing it, and that Respondent was unwilling to bargain over the plan's details. Finally, Respondent erroneously claims that it offered to remedy its unlawful actions by simply rescinding the already-announced incentive plan, ignoring well-established Board precedent to the contrary.

As explained below, and at greater length in the General Counsel's exceptions and supporting brief, these premises and arguments are inconsistent with Respondent's statutory duty to bargain over employees' terms and conditions of employment, and demonstrate why its unilateral implementation of the voluntary separation incentive plan violated Section 8(a)(5) and (1) of the Act.

II. ARGUMENT

A. Respondent Continues to Erroneously Conflate its Unilateral Creation of the Voluntary Separation Incentive Plan with the Layoff Procedure Described in the Collective-Bargaining Agreement.

In its answering brief, Respondent makes much of how much advance notice the Union had of the upcoming relocation of Softail assembly from York to Kansas City, anticipated layoffs in the Fall of 2016, and lower-than-expected motorcycle sales, to show that when Respondent announced in late August 2016 that it needed to eliminate 102 jobs at the York facility, it should have come as no surprise to the Union. While the parties disagree about whether the August layoffs were anticipated, the critical turning point is what happened next: Respondent circumvented the layoff procedure outlined in the parties' collective-bargaining agreement (CBA), and instead devised and implemented an entirely new procedure – the voluntary separation incentive plan – to reduce its workforce.

It is undisputed that under the terms of the parties' CBA, Respondent was empowered to unilaterally lay off 102 employees, but for reasons not entirely explained in the record, it chose not to. Perhaps it was because the contractual layoff procedure required it to eliminate the least-expensive employees first, or because Respondent desired to permanently sever its relationship with employees who would have retained recall rights under the CBA. Whatever Respondent's

motive, what is clear is that Respondent devised the voluntary separation incentive plan to minimize, if not outright obviate, the need to use the contractual layoff procedure.

Respondent erroneously relies on *Electrical Workers Local 47 v. NLRB* to support its argument that because it “made an offer *on a topic* on which it had no obligation to bargain,” its actions “cannot be viewed as bad faith bargaining.” 927 F.2d 635, 640 (D.C. Cir. 1991); Resp. Ans. Brief at 30 (emphasis supplied). In that case, the union argued that the employer unlawfully refused to bargain during a wage re-opener about the retroactivity period applicable to a wage increase. The D.C. Circuit affirmed the Board’s finding that the union waived its right to bargain over retroactivity by explicitly agreeing to a sixty-day retroactivity clause in its CBA.

However, this case is easily distinguishable from *Electrical Workers Local 47*. The voluntary separation incentive plan is not *on the topic* of layoffs; it is a separate and independent employment policy. Respondent tries to obfuscate this distinction by using the word “layoff” only in its generic definition – a workforce reduction for economic reasons – and untethered from its specific definitional moorings established in the parties’ CBA. Unlike *Electrical Workers Local 47*, this case does not involve the applicability or enforcement of a contract provision. To the contrary, the record shows that the very purpose of the voluntary separation incentive plan was to *avoid* the contractual layoff process.¹ Rather, the purpose of the plan was to induce permanent resignations, exclusive of layoffs.

¹ The D.C. Circuit applied a “contract coverage” analysis to find a bargaining waiver. Recently, the Board reaffirmed its adherence to the “clear and unmistakable” waiver standard. *Tramont Mfg., LLC*, 365 NLRB No. 59, slip op. at 2 (April 7, 2017). Under either standard, a waiver argument in this case fails because there is no provision in the CBA regarding Respondent’s right to unilaterally offer voluntary separation incentive plans in lieu of layoffs.

B. The Fact that Respondent Had No Obligation to Offer an Incentive Program Has No Bearing on this Case.

Respondent's other major error is its belief that because it "**had no obligation, contractually or otherwise, to offer any incentive whatsoever in conjunction with the planned Fall 2016 layoffs,**" it had a license to unilaterally offer whatever incentives it wished and without any requirement to offer the Union a meaningful opportunity to bargain. Resp. Ans. Brief at 28 (emphasis in original). In its conceit that the voluntary separation incentive plan was a beneficent act of grace toward its employees, Respondent ignores that *all* changes concerning mandatory subjects of bargaining – good or ill – must be negotiated in good faith with the Union prior to implementation, and that its failure to do so in this case establishes a violation of the Act. *See Lincoln Lutheran of Racine*, 362 NLRB No. 188, slip. op at 2 (2015) ("It has long been established that an employer violates Section 8(a)(5) when it unilaterally changes represented employees' wages, hours, and other terms and conditions of employment without providing their bargaining representative prior notice and a meaningful opportunity to bargain about the changes.") (citing *NLRB v. Katz*, 369 U.S. 736, 742-743 (1962)); *Philadelphia Coca-Cola Bottling Co.*, 340 NLRB 349 (2003) (employer violated Section 8(a)(5) and (1) when it unilaterally instituted a bonus incentive program and granted bonuses to employees).

C. The Record is Clear that Respondent Introduced the Voluntary Separation Incentive Plan as a *Fait Accompli*, Both Because of Its Timing, and Respondent's Unwillingness to Bargain over Its Terms.

Respondent created the voluntary separation incentive plan in secret, and without any input from the Union. In fact, Respondent concedes in its answering brief that Respondent itself had not decided to offer this plan, which it referred to as a "new benefit" until the Friday before it unveiled the plan to the Union and employees. Resp. Ans. Brief at 25; 30 ("It was not until Friday, August 26, 2016 that the Company determined that it would offer any type of separation

incentive.”). Respondent further concedes that it then implemented that plan with unit members just two days later, on August 31. *Id.* at 5. Based on timing alone, the Board has found similar actions to be a *fait accompli*. See, e.g., *Comau, Inc.* 364 NLRB No. 48, slip op. at 3 (2016) (employer failed to give meaningful notice and opportunity to bargain where it informed the union of new shop rules, refused to provide the union with a copy of the rules, and six days later distributed the new rules to employees); *Naperville Jeep/Dodge*, 357 NLRB 2252, 2272 (2012) (employer presented terms of the relocation, including the lack of minimum guaranteed hours, and the reduced health insurance and retirement benefits, as a *fait accompli* where it did not give the union “advance notice of its intent to make those changes, but rather presented the changes as final and gave no indication that it was willing to bargain in good faith on the subject.”).

Further, Respondent was unwilling to bargain over the terms of the incentive plan. Respondent repeatedly acknowledges in its answering brief that once it implemented the incentive plan, it refused to waiver on the plan’s details. Respondent consistently and repeatedly presented the Union with a Hobson’s choice: either take the incentive plan as offered and implemented, or Respondent would proceed with layoffs as outlined in the CBA – that is, without any incentive plan at all. A take-it-or-leave-it offer is not a demonstration of “flexibility;” it is a strong-arm negotiation tactic that undermines the employees’ bargaining representative and evidences an employer’s bad faith bargaining. *NLRB v. McClatchy Newspapers*, 964 F.2d 1153, 1162 (D.C. Cir. 1992) (“It is well settled that the real harm in an employer’s unilateral implementation of terms and conditions of employment is to the Union’s status as bargaining representative, in effect undermining the Union in the eyes of the employees.”) (quoting *Page Litho, Inc.*, 311 NLRB 881 (1993)); *88 Transit Lines*, 300 NLRB 177, 178 (1990), *enfd.* 937 F.2d 598 (3d Cir. 1991) (“[W]e may properly find bad faith evinced

by [a party's] "take-it-or-leave-it" approach to bargaining."); *see also Graphic Arts Union Local 280*, 235 NLRB 1084, 1096 (1978), *enfd.* 596 F.2d 904 (4th Cir. 1979); *Teamsters Local 418*, 254 NLRB 953, 957 (1981).

On pages 29-30 of its Answering Brief, Respondent argues that a *fait accompli* analysis generally applies when there is a change to an existing term and condition of employment, not when a union is requesting a new benefit. While both of the cases cited by Respondent concern changes to preexisting terms and conditions of employment, neither of those cases support the proposition advanced by Respondent. In many cases, the Board has found the unilateral implementation of a new term and condition of employment violates the Act. *See, e.g., Pepsi Am., Inc.*, 339 NLRB 986 (2003) (finding employer's unilateral introduction of a new benefit in the form of an attendance credit program to violate Section 8(a)(1) and (5)); *Ciba-Geigy Pharm. Div.*, 264 NLRB 1013, 1015 (1982) (employer's introduction of an attendance control procedure was an unlawful unilateral change); *Dodge of Naperville, Inc.*, 357 NLRB 2252, 2252 (2012) (employer's announcement about plant relocation without providing the union an opportunity to bargain was a *fait accompli*); *Tri-Tech Services*, 340 NLRB 894, 902-903 (2003) (employer's announcement of layoffs without providing the union an opportunity to bargain was a *fait accompli*); *Fritz Companies, Inc.*, 330 NLRB 1296, 1297 (2000) (same). Moreover, and even accepting Respondent's premise that the voluntary separation incentive plan was the Union's idea, Respondent's argument still fails. A *fait accompli* analysis applies any time there is an obligation to bargain, whether it is concerning an existing term and condition of employment or a "new benefit" such as the incentive plan.

Respondent also repeats its mistaken view that because it had no obligation to offer an incentive plan at all, it had no obligation to bargain over the incentive plan after it was offered.

Respondent claims that “[h]ad the Company never made the August 29 offer, there could be no contention of bad faith bargaining under a *fait accompli* theory.” In point of fact, there would be no failure to bargain under *any* theory because absent its August 29 announcement of the incentive plan, there would be no unilateral change at all. Curiously, however, Respondent follows this axiomatic statement with a non-sequitur: “The fact that the Company ultimately did make an offer on a topic on which it had no obligation to bargain also cannot be viewed as bad faith bargaining.” As explained above and in the General Counsel’s brief in support of exceptions, Respondent *did* have an obligation to bargain if it wanted to propose the new benefit of the voluntary separation incentive plan. Contrary to Respondent’s arguments, it is hardly surprising that taking different actions can lead to different results. While it may have had no obligation to offer an incentive plan, once it decided to do so, it did have an obligation to afford the Union with a meaningful opportunity to bargain over that plan prior to its implementation. Respondent’s failure to appreciate the import of these distinct obligations is the very reason for this litigation.

D. Respondent Could Not Have “Remedied the Issue Completely” by Simply Withdrawing the Voluntary Separation Incentive Plan.

Respondent attempts to shift the consequences of its unlawful actions to the Union by claiming that “upon becoming aware of the Union’s disagreement with the offer that had already been made, the Company could have remedied the issue completely by rescinding the offer and offered to do just that.” Resp. Ans. Brief at 28. Once again, however, Respondent merely demonstrates a misunderstanding of its obligations under the Act, and the harm that its actions caused to the Union and bargaining-unit employees. By the time Respondent announced the voluntary separation incentive plan to employees, its violation of the Act was complete – it had unilaterally and materially changed employees’ terms and conditions of employment.

Accordingly, Respondent could not have “remedied the issue completely” by simply withdrawing the incentive plan; it was required to do much more. Under the seminal case *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978), an employer can only remedy its unfair labor practices through specific and prescribed steps to repudiate them, including through a timely, unambiguous notice to employees that Respondent repudiated its earlier unilateral announcement of the voluntary separation incentive plan and that it would not interfere further with employees’ rights under Section 7 of the Act. *Id.* at 138-39. Respondent never offered to take such measures here, and thus its claim to have offered to completely remedy its unilateral announcement of the voluntary separation incentive plan is untenable.

E. Respondent’s Answering Brief Ignores Crucial Facts and Misstates the ALJ’s Findings

Respondent’s answering brief ignores the fact that the Union demanded bargaining over the separation incentive plan multiple times, noting only that the “Union failed and refused to respond to the Company’s offer to return to...the status quo[.]” Resp. Ans. Brief at 31. In doing so, Respondent only acknowledges its own intransigence in offering a take-it-or-leave-it separation incentive. Further, the Union’s failure to answer Respondent’s offer to retract the separation incentive plan is irrelevant to the separate issue of whether Respondent violated the Act by implementing the plan in the first place. Respondent here merely conflates its violation of the Act with the remedy. As discussed above, by the time Respondent offered to retract the plan, its violation of the Act was complete, and its offer to retract the plan was insufficient to remedy the violation.

On page 31 of its Answering Brief, Respondent also misstates one of the ALJ’s findings: the ALJ did not, as Respondent suggests, find that the Union waived its bargaining rights by failing to object to the separation incentive program between August 29 and September 1.

Instead, he found that the introduction of the plan would have been a *fait accompli* had it not been for an earlier waiver at some non-specific point in time.² See ALJD at 6 (noting that if Respondent had an obligation to bargain over the incentive, “its presentation of the \$15,000 incentive would certainly qualify as a *fait accompli*.”). As the General Counsel argued in its Brief, and as the record clearly shows, the Union objected multiple times to Respondent’s separation incentive plan between August 29 and September 1, and continued to demand bargaining after that date. Despite the Union’s demands and Respondent’s clear obligation to bargain over the separation incentive plan, Respondent announced a *fait accompli* by unilaterally implementing the plan and refusing to bargain over its details.

III. CONCLUSION

For the reasons set forth in the General Counsel’s Brief in Support of the General Counsel’s Exceptions and this Reply Brief, the General Counsel respectfully requests that the Board find Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain collectively with the exclusive collective-bargaining representative of its employees, and order Respondent to remedy its unlawful actions.

Dated at Baltimore, Maryland on September 19, 2017.

Respectfully submitted,

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² The General Counsel has also excepted to the ALJ’s finding that the Union waived its bargaining rights at some point before August 29. See General Counsel’s Brief in Support of Exceptions at 20-28.

CERTIFICATE OF SERVICE

I hereby certify that the GENERAL COUNSEL'S REPLY BRIEF TO RESPONDENT'S ANSWERING BRIEF was filed electronically on September 19, 2017, and, on the same day, copies were electronically served on the following individuals by e-mail:

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