

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

**SW GENERAL, INC. D/B/A
SOUTHWEST AMBULANCE**

and

Case 28-CA-177361

**INTERNATIONAL ASSOCIATION OF
FIRE FIGHTERS, LOCAL I-60**

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NATIONAL LABOR RELATIONS BOARD**

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I. INTRODUCTION

SW General Inc., d/b/a Southwest Ambulance (Respondent) and the International Association of Fire Fighters, Local I-60 (the Union) are parties to successive collective-bargaining agreements dating back until at least 2003. Since that time, the parties' collective-bargaining agreements have maintained a defined benefit pension plan for employees represented by the Union. Since about 2004, that defined benefit pension plan has provided represented employees a retirement benefit based, in significant part, on employees' Average Annual Earnings. Until the change alleged in paragraph 6(b)(2) of the Complaint was implemented by Respondent, the defined benefit pension plan defined Average Annual Earnings as the annual average of an employee's compensation over the final 36 months of his or her employment with the Respondent.

After the issuance of an arbitrator's award significantly changed other aspects of the benefit calculation formula, the parties met on February 1st and 2nd, 2016, to bargain for a Memorandum of Understanding regarding freezing the defined benefit pension plan. The Memorandum of Understanding contained numerous recitals relating to the freeze, and clearly, unambiguously and specifically incorporated the parties' entire agreement. Although the parties agreed to significant changes, none of the recitals in the Memorandum of Understanding changed the way that Average Annual Earnings were calculated. Notwithstanding the lack of any such language in the Memorandum of Understanding, Respondent adopted an amendment to the defined benefit pension plan that changed the way that employees' Average Annual Earnings were calculated as follows: no earnings earned after June 30, 2016 will be (i.e. taken into account) in determining an employee's Average Annual Earnings. Respondent notified the Union and Unit employees that the change had been made around May 13, 2016. Respondent no

longer credits an employee's earnings earned after June 30, 2016 in determining his or her Average Annual Earnings.

It is well established that Section 8(d) of the Act prohibits an employer party to an existing agreement from modifying the terms and conditions set forth in that agreement without the consent of the Union. See *Bath Iron Works Corp.*, 345 NLRB 499, 502 (2005), *affd. sub nom. Bath Marine Draftsmen's Assn. v. NLRB*, 475 F.3d 14 (1st Cir. 2007). Accord *Nick Robilotto, Inc.*, 292 NLRB 1279 (1989) (Board found employer's failure to pay pension contributions in accordance with its collective-bargaining agreement constituted an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) and Section 8(d) of the Act). In the instant matter, Respondent has stipulated that changes to the defined benefit plan must be negotiated between the parties, that the parties bargained for and executed a Memorandum of Understanding freezing the defined benefit pension plan, and that thereafter Respondent adopted the amendment to the defined benefit pension plan described above. Respondent has violated Section 8(a)(5) and (1) and Section 8(d) of the Act by adopting the amendment and failing to abide by the terms of the Memorandum of Understanding. See *Nick Robilotto, Inc.*, 292 NLRB at 1279; *General Split Corp.*, 248 NLRB 418 (1987) (Board found employer's failure to pay contractually mandated severance pay to its employees violated Section 8(a)(5) and (1) and Section 8(d) of the Act).

Counsel for the General Counsel (CGC) therefore respectfully requests that the Board issue an Order requiring Respondent rescind its changes to the method for calculating Average Annual Earnings, retroactively restore the status quo, and reimburse Unit employees in the amounts that would have received absent the Respondent's unlawful conduct.

II. STATEMENT OF THE CASE

The Union filed the original charge in Case 28-CA-177361 against Respondent on May 27, 2016. Jt. Mot. ¶ 5(a); Jt. Exhs. 1(a) & 1(b).¹ On August 31, 2016, the Regional Director for Region 28 issued a Complaint and Notice of Hearing (the Complaint) in Case 28-CA-177361. Jt. Mot. ¶ 5(b); Jt. Exh. 2. On September 15, 2016, Respondent filed an answer to the Complaint (the Answer). Jt. Mot. ¶ 5(b); Jt. Exh. 3. On January 18, 2017, the parties filed a Joint Motion and Stipulation of Facts (the Motion) seeking to transfer the charge allegations in this matter to the Board pursuant to Section 102.35(a)(9) of the Board's Rules and Regulations. On September 28, 2017, the Board issued an Order Approving Stipulation, Granting Motion and Transferring Proceeding to the Board. Pursuant to the Board's Order and Section 102.35(a)(9) of the Board's Rules and Regulations, CGC submits this brief.

III. STATEMENT OF THE ISSUE PRESENTED

Whether the Respondent unilaterally implemented a method for calculating Unit employees' Average Annual Earnings without bargaining with the Union to an overall good-faith impasse and without the Union's consent, thus failing and refusing to bargain collectively with the exclusive bargaining representatives of its employees in violation of Section 8(a)(5) and (1) of the Act and Section 8(d) of the Act.

IV. STATEMENT OF THE FACTS

A. Background

Respondent is a corporation with an office and place of business in Mesa, Arizona, where it is engaged in providing emergency medical transportation in the Phoenix and Tucson metropolitan areas. Jt. Exh. 2 ¶2(a); Jt. Exh. 3 ¶2. Respondent is an employer engaged in

¹ The Joint Motion and Stipulation of Facts shall be designated herein by (Jt. Mot.) followed by the identifying paragraph of the Motion, where applicable, and Joint Exhibits shall be designated herein by (Jt. Exh.) along with the identifying number of the exhibit followed by the paragraph or page of the exhibit, where applicable.

commerce within the meaning of Sections 2(2), (6), and (7) of the Act. Jt. Exh. 2 ¶2(d); Jt. Exh. 3 ¶2. The Union is a labor organization within the meaning of Section 2(5) of the Act. Jt. Exh. 2 ¶3; Jt. Exh. 3 ¶3.

Since about 1992, and at all material times, Respondent has recognized the Union as the exclusive collective-bargaining representative of the following Unit (the Unit), which is an appropriate unit for purposes of collective bargaining:

All full time and regular part-time EMT, EMT-I, Paramedics and Registered Nurses, excluding any on-call part-time employees, office clerical employees, guards, watchmen and supervisors as defined in the Act.

The recognition has been embodied in successive collective-bargaining agreements, the most recent of which is effective from May 28, 2016 through June 30, 2019 (the 2016-2019 CBA). Jt. Mot. ¶5(d); Jt. Exh. 4.

B. The Southwest Ambulance Pension Plan

Since at least 2003, Unit employees have been provided with a retirement benefit in the form of a defined benefit pension plan. The defined benefit pension plan was included in the parties' collective-bargaining agreements effective June 1, 2003 through June 1, 2006 (the 2003-2006 CBA);² August 5, 2006 through July 1, 2009 (the 2006-2009 CBA);³ and July 1, 2009 through July 1, 2012 (the 2009-2012 CBA).⁴ Jt. Mot. ¶5(e).

The 2003-2006 CBA references the creation and implementation of the defined benefit pension plan in Article 38, Retirement Funding, which reads in relevant part:

38.2 On or before July 1, 2004, the company shall implement a defined benefit retirement plan that will generate retirement funding based upon years of service which shall provide a 20 year retirement funding of no less than 50% of average earnings as identified in the plan at the time of retirement.

² Jt. Exh. 5.

³ Jt. Exh. 6.

⁴ Jt. Exh. 7.

38.3 Both parties prior to February 1, 2004 shall agree upon the plan.

Jt. Exh. 5 at 52.

Following execution of the 2003-2006 CBA, since about 2004, and at all material times, Respondent has maintained a defined benefit pension plan called the Southwest Ambulance Pension Plan (2004 SAPP). Jt. Mot. ¶5(g); Jt. Exh. 8. Despite the language in the 2003-2006 collective-bargaining agreement cited above, the 2004 SAPP initially provided for the following benefit calculations upon normal retirement:

(a) **Benefit Formula:** Each Participant's monthly Accrued Benefit will be an amount equal to 1/12th of his or her Percentage of Pay Benefit plus his or her Flat Dollar Benefit:

- (1) Percentage of Pay Benefit: 0.45% of the Participants Average Compensation multiplied by the sum of his or her Years of Benefit Service since July 1, 2004 at Normal Retirement Date or earlier Termination of Employment and (subject to Section 3.5) his or her Years of Purchased Benefit Service for PPB.
- (2) Flat Dollar Benefit: \$325.00 multiplied by the sum of the Participant's Years of Benefit Service since July 1, 2004 at Normal Retirement Date or earlier Termination of employment and (subject to Section 3.5) his or her Years of Purchased Benefit Service for FDB, up to a combined total maximum of 20 years.

Jt. Exh. 8 ¶4.1(a). The 2004 SAPP defined the term Average Compensation as follows:

Article 1.9 Average Compensation: The term Average Compensation means the annual average of a Participant's Compensation averaged over the final 36 calendar months of the Participant's employment with the Employer as an Eligible Employee (or over the actual number of calendar months, if less).

Jt. Exh. 8 ¶1.9.

The 2006-2009 CBA maintained the 2004 SAPP as established pursuant to the 2003-2006 CBA, but moved the reference to the defined benefit retirement plan to Article 37 of the CBA, Retirement Funding, which read, in relevant part:

37.2 The company shall maintain the defined benefit retirement plan established in the 2003 bargaining unit agreement that will generate retirement funding based upon years of full time service which shall provide a 20 year retirement funding of no less than 50% of average earnings as identified in the plan at the time of retirement.

Jt. Exh. 6 at 36.

The 2009-2012 CBA again maintained the SAPP in Article 37, Retirement Funding, which read, in relevant part:

37.2 The company shall maintain the defined benefit retirement plan established in the 2003 bargaining unit agreement that will generate retirement funding based upon years of full time service which shall provide a 20 year retirement funding of no less than 50% of average earnings as identified in the plan at the time of retirement.

Jt. Exh. 7 at 54.

The most recent SAPP plan document is dated January 1, 2012 (2012 SAPP). The 2012 SAPP changed the reference to average compensation to Average Annual Earnings. The 2012 SAPP defines Average Annual Earnings as follows:

Article 1.9 Average Annual Earnings: *The term Average Annual Earnings means a Participant's average annual Earnings received during the 36 Earnings Computation Periods immediately preceding the date the Participant's employment terminates.* In determining a Participant's Average Annual Earnings, the 36 Earnings Computation Periods need not be consecutive if the consecutive 36 Earnings Computation Periods immediately preceding the date the Participant's employment terminates includes one or more disregarded Earnings Computation Periods. In determining a Participant's Average Annual Earnings, the following Earnings Computation Periods will be disregarded: (a) any partial Earnings Compensation Period (i.e., an Earnings Computation Period during which the Participant does not have earnings for the entire Earnings Computation Period or has Earnings which are not taken into account for purposes of determining the Participant's Average Annual Earnings), (b) any Earnings Computation Period during which the Participant is not credited with at least 120 hours of Service, and (c) the Earnings Computation Period during which the Participant's employment terminates. In determining a Participant's Average Annual Earnings, the following Earnings shall be disregarded (a) Earnings earned prior to becoming a Participant in the Plan, and (b) Earnings earned while not a Covered Employee.

Article 1.16 Earnings Computation Period: The term *Earnings Computation Period* means each calendar month.

Jt. Exh. 9. ¶5.2 (emphasis supplied).

From expiration of the 2009-2012 CBA, which was extended three times until about September 2012, until execution of the current collective-bargaining agreement effective from May 28, 2016 through June 30, 2019, no collective-bargaining agreement was in effect between Respondent and the Union, and Respondent continued to provide Unit employees with the defined benefit pension plan. Jt. Mot. ¶5(f).

On April 14, 2014, Arbitrator Ira F. Jaffe issued an arbitration opinion and award sustaining a grievance filed by the Union relating to the defined benefit pension plan.⁵ Jt. Mot. ¶5(j). On June 29, 2015, the Respondent and Union moved for stipulation to confirm Arbitrator Jaffe's Award in United States District Court for the District of Arizona. Jt. Mot. ¶5(k). On July 6, 2015, United States District Judge, Neil V. Wake, granted Respondent and Union's stipulation to confirm Arbitrator Jaffe's Award. Jt. Mot. ¶5(l). On January 13, 2016, Respondent adopted an Amendment to the SAPP (Second Amendment to the SAPP), implementing the terms of Arbitrator Jaffe's Award. Jt. Mot. ¶5(m); Jt. Exh. 11. The Second Amendment to the SAPP modified the benefit formula for Unit employees contained in Section 5.2 of the SAPP, but did not change the definition of Average Annual Earnings. Jt. Exh. 11. The parties stipulate and agree that changes made to the SAPP must be negotiated between the Union and the Employer. Jt. Mot. ¶5(j). Maintenance of the SAPP is also required by each of the parties' successive CBAs.

⁵ The grievance was related to the parties' disagreement regarding the SAPP's benefit formula. See Jt. Exh. 11 ¶C.

C. The February 2, 2016 Memorandum of Understanding

On February 1 and 2, 2016, Respondent and the Union met to bargain over a Memorandum of Understanding regarding the SAPP. Jt. Mot. ¶5(n). On February 2, 2016, the Respondent and Union executed a Memorandum of Understanding freezing the SAPP (MOU). Jt. Mot. ¶5(o); Jt. Exh. 12. The MOU provided, in relevant part:

1. The parties agree that for the purposes of the Memorandum of Understanding a current employee is defined as any individual employed and working in a bargaining unit position prior to March 1, 2016.
2. The parties agree that for the purposes of the Memorandum of Understanding a new employee is defined as any individual employed and working in a bargaining unit position on or after March 1, 2016.
3. The parties agree that any individual employed into a bargaining unit position on or after March 1, 2016 shall not be eligible for participation in the Local 1-60 defined pension plan.
4. The parties agree that effective on June 30, 2016, the Local 1-60 defined pension plan shall be frozen for all participants.
5. The parties agree that effective after June 30, 2016 covered employees service time shall continue to count toward an employee's vesting time but shall not count toward credited service under the plan.
6. The parties agree that covered employees may purchase prior years of employment to be applied toward credited service utilizing the process outlined in the original pension plan document.

The MOU also contained the following clause (the zipper clause):

11. This Memorandum of Understanding constitutes the entire agreement between the parties concerning the matters contained herein and shall not be subject to any claim, grievance or complaint in any forum and supersedes all other agreements and understanding concerning such matters. No modification, amendment or waiver of any of the provisions of this Memorandum of Understanding shall be effective unless approved in writing by both parties.

The MOU does not state that the parties agree that earnings earned after June 30, 2016 would not be credited (i.e., taken into account) in determining a Participant's Average Annual Earnings under the SAPP. Jt. Mot ¶5(o); Jt. Exh. 12. The MOU "sunset" on December 31, 2019. Jt. Exh. 12.

D. Respondent's Third Amendment to the Pension Plan

On April 8, 2016, Respondent adopted another Amendment to the SAPP (Third Amendment to the SAPP). Jt. Mot. ¶5(q); Jt. Exh. 13. Section C of the Third Amendment to the SAPP noted that the parties agreed to freeze the SAPP pursuant to the MOU as follows:

Employer and International Association of Fire Fighters (IAFF), Local I-60 entered into a Memorandum of Understanding dated February 2, 2016 ("MOU") whereby the parties agreed to the freezing of the Plan as follows and Employer intends to amend the Plan to provide for its freezing as follows:

Section C of the Third Amendment to the SAPP contained the following additional recital not contained in the MOU:

C(v) No Earnings earned after June 30, 2016 will be credited (i.e., taken into account) in determining a Participant's Average Annual Earnings under the Plan.

Jt. Exh. 13 at 1.

On May 13, 2016, Respondent sent Unit employees and the Union an Employee Retirement Income Security Act (ERISA) 204(h) notice and Summary Plan Description for the SAPP announcing Respondent had frozen the SAPP. Jt. Mot. ¶5(s); Jt. Exh. 14. Prior to receiving the May 13, 2016, ERISA 204(h) notice and Summary Plan Description sent by Respondent, the Union had not received notice that the Third Amendment to the SAPP had been adopted. Jt. Mot. ¶5(t). The ERISA 204(h) Notice reiterated section C(v) of the Third Amendment to the SAPP by explaining, "amounts you earn after the Freeze Date will not be

included determining your Average Compensation and the time you work after the Freeze Date will not be included in determining your Years of Benefit Service.” Jt. Mot. ¶5(s).⁶

Between execution of the February 2, 2016 MOU and execution of the 2016-2019 CBA, Respondent and the Union did not enter into any other agreements concerning the SAPP. Jt. Mot. ¶5(u). After execution of the 2016-2019 CBA, Respondent and the Union have not entered into any other agreements concerning the SAPP that are relevant to the issue to be resolved in this matter. Jt. Mot. ¶5(v). Article 42 of the 2016-2019 CBA references the defined benefit pension plan and repeats paragraphs 3 through 6 of the MOU. Jt. Exh. 4 at 38.

Effective June 30, 2016, Unit employees’ Average Annual Earnings for purposes of calculating their benefit under the SAPP were calculated in the manner set forth above in section C(v) of the Third Amendment to the SAPP (i.e., no earnings earned after June 30, 2016 will be taken into account in determining a Participant’s Average Annual Earnings). Jt. Mot. ¶5(r).

V. ARGUMENT

A. The General Legal Framework

The Board has long held that an employer violates Section 8(a)(5) of the Act by unilaterally imposing new and different wages, hours, and other terms and conditions of employment upon bargaining unit employees without first providing their collective-bargaining representative with notice and a meaningful opportunity to bargain regarding the change.

Graymont PA, Inc., 364 NLRB No. 37, slip op. at 22 (2016), citing *NLRB v. Katz*, 369 U.S. 736, 743 (1962). To be found unlawful, the unilaterally imposed change must be “material,

⁶ Despite Respondent’s change to the method for calculating average annual compensation contained in the Third Amendment to the SAPP and ERISA 204(h) Notice, the Summary Plan Description sent by Respondent with the ERISA 204(h) notice continued to define Average Compensation as follows:

For the purposes of determining your normal retirement benefit, “Average Compensation” means the annual average of your compensation averaged over the final 36 months of your employment as a covered employee. Jt. Exh. 14 at 4.

substantial, and significant” and impact the employees or their working conditions. *Toledo Blade Co.*, 343 NLRB 385, 388 (2004). Thus, changes to pension plans must be bargained with the affected employees’ collective-bargaining representative. *Trojan Yacht*, 319 NLRB 741, 742 fn. 5 (1995) (modification of pension plan, even if done to protect pension plan’s tax-exempt status under 1986 amendments to the Internal Revenue Code, is a mandatory subject of bargaining); *Carrier Corp.*, 319 NLRB 184 (1995) (change in identity of a pension plan is a mandatory subject of bargaining).

Section 8(d) of the Act provides, in relevant part, that “where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such a contract shall terminate or modify such contract.” Section 8(d) of the Act, therefore, provides an additional restriction—it prohibits an employer party to an existing agreement from modifying the terms and conditions of that agreement without the consent of the Union. See *Bath Iron Works Corp.*, 345 NLRB at 502; accord *Nick Robilotto, Inc.*, 292 NLRB 1279 (1989).

Unilateral change cases and contract modification cases are fundamentally different. *Bath Iron Works Corp.*, 345 NLRB at 501. The interlocking legal principles of Sections 8(a)(5) and 8(d), and the consent requirement of Section 8(d) were summarized as follows decades ago:

Sections 8(a)(5) and 8(d) establish an employer’s obligation to bargain in good faith with respect to “wages, hours, and other terms and conditions of employment.” Generally, an employer may not unilaterally institute changes regarding these mandatory subjects before reaching a good-faith impasse in bargaining. Section 8(d) imposes an additional requirement when a collective-bargaining agreement is in effect and an employer seeks to “modif[y] ... the terms and conditions contained in” the contract: the employer must obtain the union’s consent before implementing the change. If the employment conditions the employer seeks to change are not “contained in” the contract, however, the employer’s obligation remains the general one of bargaining in good faith to impasse over the subject before instituting the proposed change.

Milwaukee Spring Division, 268 NLRB 601, 602 (1984), affd. 765 F.2d 175 (D.C. Cir. 1985) (fn. citations omitted).

As discussed below, application of these standards establishes that Respondent, by cutting off Unit employees' Average Annual Earnings effective June 30, 2016, as set forth above, violated Sections 8(a)(5) and (1) and Section 8(d) of the Act.

B. Respondent Failed to Continue In Effect the Terms of the MOU in Violation of Section 8(d) of the Act.

Where the General Counsel asserts an unlawful contract modification within the meaning of Section 8(d), the Board must determine whether the employer has altered the terms of the contract without the consent of the other party. *Bath Iron Works Corp.*, 345 NLRB at 501. In cases of this type, the Board will not find a violation if “an employer has a ‘sound arguable basis’ for its interpretation of a contract and is not ‘motivated by animus or . . . acting in bad faith.’” *NCR Corp.*, 271 NLRB 1212, 1213 (1984), quoting *Vickers, Inc.*, 153 NLRB 561, 570 (1965) (when “an employer has a sound arguable basis for ascribing a particular meaning to his contract and his action is in accordance with the terms of the contract as he construes it,” the Board will not determine which interpretation is correct). A defense to a contract modification allegation can be that the Union has consented to the change. *Bath Iron Works Corp.*, 345 NLRB at 501.

In the instant matter, the parties entered into a written, fully integrated MOU that clearly, unambiguously and specifically delineates the terms of their agreement to freeze the SAPP. The MOU notes that the parties had been engaged in a dispute over the status of the SAPP, and that the MOU was agreed only after “a complete and exhaustive review and discussion of the topic.” The MOU constitutes “the entire agreement between the parties,” supersedes “all other

agreements and understandings concerning such matters,” and cannot be modified, amended or waived “unless approved in writing by both parties.”

The MOU modifies the SAPP in several significant respects. It defines current and new employees, and cuts off eligibility for participation in the SAPP for any individuals employed after March 1, 2016. Importantly, the MOU did not end the SAPP, but froze the SAPP for all participants. With respect to the freeze, the MOU notes specifically, effective after June 30, 2016, covered employees’ service time continues counting toward their vesting time, but ceases counting toward credited service under the plan. The MOU also incorporates the parties’ agreement that covered employees may purchase prior years of employment to be applied toward credited service, utilizing the process already outlined in the SAPP. These changes, especially those with respect to the continued accrual of credited service after June 30, 2016, were significant because the SAPP calculates each eligible employee’s monthly retirement benefits based on a formula that multiplies years of credited service by an employee’s Average Annual Earnings as set forth *supra*, page 5.

Under the sound arguable basis standard, a contract modification violation does not exist if there is a good faith reliance on a sound and arguable interpretation of the contract. *Bath Iron Works Corp.*, 345 NLRB at 502. Any argument put forth by Respondent that it was relying on a sound and arguable interpretation of the MOU when it implemented the June 30, 2016 cutoff date for determining Unit employees’ Average Annual Earnings is implausible. When assessing whether a party’s contract interpretation has a sound arguable basis, the Board applies traditional principles of contract interpretation. *Conoco, Inc.*, 318 NLRB 60, 62 (1995), enf. denied 91 F.3d 1523 (D.C. Cir. 1996). The parties’ actual intent, as reflected by the underlying contractual language, is paramount and is determined by reviewing the plain language of the agreement.

Mining Specialists, 314 NLRB 268, 269 (1994). Despite detailed and specific recitations relating to how the MOU would affect Unit employees' benefits under the SAPP freeze, the MOU contains no mention of any change to the method for calculating an employee's Average Annual Earnings. The MOU does not mention such a change because the parties did not agree to one. Respondent nonetheless modified the MOU by adopting a cutoff date of June 30, 2016 for calculating Unit employees' Average Annual Earnings under the SAPP. Respondent's modification was significant. As stipulated by the parties, the Union had been without a contract since expiration of the 2009-2012 CBA. Article 36 of the 2009-2012 CBA indicates that the last salary increase provided for Unit employees occurred on the first full pay period in July of 2011, approximately five (5) years prior to Respondent's cutoff date. By freezing Unit employees' Average Annual Earnings effective June 30, 2016; Respondent effectively locked the Unit employees into their 2011 salary rates for the purposes of benefit calculation under the SAPP, dramatically reducing their benefits and the impact of their future earnings on those benefits.⁷

Respondent made a significant mid-term modification of the MOU, while the MOU was in effect and without the Union's consent. By doing so, Respondent violated Sections 8(a)(5) and (1) and 8(d) of the Act. The Board has consistently found an employer's mid-term modification of a fixed term contract to be unlawful. *See Lenawee Stamping Corp.*, 365 NLRB No. 97, slip op. (2017) (where Board agreed with administrative law judge that the employer did not have a sound arguable basis for granting raises to unit employees without the Union's consent); *Hospital San Carlos Borromeo*, 355 NLRB 153 (2010) (finding employer did not have a sound arguable basis for its interpretation that the contract did not require it pay the full amount

⁷ The SAPP's benefit calculation is significantly impacted by a Unit employee's average annual earnings and their years of credited service since those are the primary factors that are used to determine a Unit employee's monthly benefits at retirement. Section 5.2 of the SAPP, as amended by the Second Amendment to the SAPP implementing Arbitrator Jaffe's award, sets forth the formulae used to determine monthly benefits based on average annual earnings and years of credited service. Jt. Exh. 11 at 2-4.

of a Christmas bonus owed to employees); *Oak Cliff-Golman Baking Co.*, 207 NLRB 1063, 1064 (1973), enfd. 505 F.2d 1302 (5th Cir. 1974), cert. denied 423 U.S. 826 (1975); *C & S Industries*, 158 NLRB 454, 457-58 (1966). This is true even where continued compliance with the contract may cause the employer financial hardship. See *Ross Crane Rental Corp.*, 267 NLRB 415 (1983); *Oak Cliff-Golman Baking*, 207 NLRB at 1064.

C. Assuming *Arguendo* the Board Does Not Find a Mid-Term Modification of the MOU, Respondent Nonetheless Implemented a Unilateral Change in Violation of Section 8(a)(5) of the Act When it Changed the Method for Calculating Average Annual Earnings

It is well-settled law that an employer violates Sections 8(a)(1) and 8(a)(5) of the Act by unilaterally changing the wages, hours, and other terms and conditions of employment of bargaining unit employees without first providing their collective-bargaining representative with notice and a meaningful opportunity to bargain about the change. *NLRB v. Katz*, 369 U.S. 736; *Waxie Sanitary Supply*, 337 NLRB 303 (2001); *Bryant & Stratton Bus. Inst.*, 321 NLRB 1007 (1996); *Mercy Hosp. of Buffalo*, 311 NLRB 869 (1993). The change must be “a material, substantial, and a significant one and must have a real impact on, or be a significant detriment to, the employees or their working conditions. *Waxie*, 337 NLRB at 303 (internal quotations omitted).

As discussed above, the change in the instant matter impacted Unit employees by locking their Average Annual Earnings under the SAPP to their wage rates dating back to the 2009-2012 CBA. This change was a mandatory subject of bargaining. *Carrier Corp.*, 319 NLRB 184; *Trojan Yacht*, 319 NLRB at 742 fn. 5. The change was also substantial, causing a significant detriment to Unit employees by eliminating any impact of their future earnings on their retirement benefit under the SAPP. It is undisputed that the Union was not notified that the Third Amendment to the SAPP incorporating the alleged change had been implemented until the

bargaining Unit employees themselves were notified of the change (via the May 13, 2016 ERISA 204(h) Notice). Respondent did not afford the Union prior notice of this unilateral change, nor did it afford the Union an opportunity to bargain about the change and its effects on Unit employees. As such, even if the Board does not find Respondent made a mid-term modification of the MOU, the Board should nonetheless find that respondent made a unilateral change in the terms and conditions of employment by modifying the SAPP as alleged. See e.g., *Trojan Yacht*, 319 NLRB at 742 fn. 5 (finding respondent made a unilateral change in terms and conditions of employment by amending a pension plan, and that the Union had not clearly and unmistakably waived its right to bargain over the change).

D. The Union Did Not Waive Its Right to Bargain over the Change

To the extent Respondent may argue that the Union waived its right to bargain over the change by entering into the MOU, Respondent's argument should be rejected. The Board's waiver principles are well established. Waiver is not lightly inferred and must be "clear and unmistakable." See *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983); *Georgia Power Co.*, 325 NLRB 420, 420-421 (1998), *enfd.* 176 F.3d 494 (11th Cir. 1999), *cert. denied* 528 U.S. 1061 (1999). Thus, the party asserting waiver must establish that the parties "unequivocally and specifically express[ed] their mutual intention to permit unilateral employer action with respect to a particular employment term, notwithstanding the statutory duty to bargain that would otherwise apply." *Provena St. Joseph Medical Center*, 350 NLRB 808, 811 (2007). Such a showing may be based on an express provision in the contract, the conduct of the parties (including past practice, bargaining history, and action or inaction), or a combination of the two. See, e.g., *American Diamond Tool*, 306 NLRB 570, 570 (1992); *Chesapeake & Potomac Telephone Co. v. NLRB*, 687 F.2d 633, 636 (2d Cir. 1982), *enfg.* 259 NLRB 225 (1981).

As the Board has consistently held, the mere fact that a subject is not mentioned in the contract is not enough to establish waiver. A contractual waiver must be clear and unmistakable. *Metropolitan Edison Co. v. NLRB*, at 708; *Georgia Power Co.*, 325 NLRB 420 (1998). An employer that wishes to reserve the right to act unilaterally during the term of the contract regarding a mandatory subject of bargaining must do so by express language. A waiver of a union's bargaining rights will not be inferred from general language such as that included in a management rights or zipper clause. *Georgia Power Co.*, supra; *Public Service Co. of Colorado*, 312 NLRB 459 at 461, fn. 6 (1993); *Gayston Corporation*, 265 NLRB 1 (1982). As has been stated earlier, there is no mention of the (insert what the Employer did) in the MOU.

An employer may also establish a contractual waiver by proving that a union fully discussed and consciously explored the issue in dispute during negotiations and that the union consciously yielded its interest in the matter before agreement on the contract was reached. *Allison Corp.*, 330 NLRB 1363, 1365 (2000). There is no evidence that the subject of freezing the calculation of Average Annual Earnings effective June 30, 2016 was discussed during negotiations for the MOU. The Union could not have "consciously yielded its interest" in a matter that was not discussed. Moreover, as stipulated by the parties, and as discussed above, the Union had been without a contract since expiration of the 2009-2012 CBA. Freezing Unit employees' Average Annual Earnings effective June 30, 2016, therefore, effectively locked employees in to the salaries they had received for the last five (5) years, while working without a contract. Given the above and the stipulated record in this case, any suggestion that the Union consciously yielded its interest in this matter—where no such indication is present in the language of the MOU and no facts exist suggesting waiver—is contrary to Board precedent. See *Graymont PA, Inc.*, 364 NLRB No. 37, slip op. at 3-4; *Merillat Industries, Inc.*, 252 NLRB 784,

785 (1980) (union did not waive its right to bargain over new absentee rules where “neither the wording of the clause itself, nor any other evidence, suggest[ed] that by agreeing to the management rights clause . . . the [u]nion waived its right to bargain” about the subject).

VI. CONCLUSION

For the foregoing reasons, CGC respectfully requests that the Board find that Respondent made a mid-term modification to the parties’ MOU by unilaterally implementing a new method for calculating Unit employees’ Average Annual Earnings without bargaining with the Union to an overall good-faith impasse and without the Union’s consent, thus failing and refusing to bargain collectively with the exclusive collective-bargaining representative of its employees in violation of Section 8(a)(5) and (1) and Section 8(d) of the Act.

Dated at Phoenix, Arizona this 16th day of November 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of Counsel for the General Counsel's Brief to the National Labor Relations Board in *SW General Inc. d/b/a Southwest Ambulance*, Case 28-CA-177361 was served by E-Gov, E-Filing, and E-mail on this 16th day of November 2017, on the following:

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