

**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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## I. INTRODUCTION

Respondent's Initial Brief to the Board<sup>1</sup> (Brief) suggests that the Union is attempting re-write the parties Memorandum of Understanding (MOU) and renege on the parties' agreement relating to the Southwest Ambulance Pension Plan (SAPP) freeze by filing the instant unfair labor practice charge. Respondent further suggests, "regrettably," that Counsel for the General Counsel (CGC) is assisting the Union's attempts to change the parties' MOU. Respondent's suggestions are absurd, lack a sound arguable basis, and are not supported by the record.

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).

Respondent stipulated that changes to the SAPP must be negotiated between the parties, that the parties bargained for and executed the MOU freezing the SAPP, and that thereafter Respondent adopted the amendment to the SAPP alleged in Complaint and Notice of Hearing (Complaint) at paragraph 6(b)(2). Respondent's amendment contained terms not contained in the parties' MOU, and significantly changed the MOU by eliminating future employee earnings from consideration when calculating employee benefits under the SAPP. Respondent violated Section 8(a)(5) and (1) and Section 8(d) of the Act by adopting the amendment and failing to

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<sup>1</sup> Respondent's Initial Brief to the Board shall be designated herein by (R Brf.) along with the identifying page number, where applicable.

abide by the terms of the MOU. Respondent's arguments to the contrary are not supported by the record, nor do they have a sound arguable basis as required by Board law.

As such, CGC therefore respectfully requests that the Board issue an Order requiring that Respondent rescind its changes to the method for calculating average annual earnings under the SAPP, retroactively restore the status quo, and reimburse Unit employees in the amounts that would have received absent the Respondent's unlawful conduct.

## **II. ARGUMENT**

### **A. RESPONDENT MADE A MID-TERM MODIFICATION TO THE PARTIES MOU BY IMPLEMENTING AN AMENDMENT TO THE SAPP**

Paragraph 6(b)(2) of the Complaint alleges that the Respondent failed to continue in effect all the terms and conditions of the parties' MOU by implementing the following amendment to the SAPP that changed the eligibility language of 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. 2 ¶6(b)(2). Respondent initially denied the allegations contained in Paragraph 6(b)(2) of the Complaint. Jt. Exh. 3 ¶6(b)-(d).<sup>2</sup> Respondent has since admitted that it implemented the amendment alleged in the Complaint. Jt. Mot. ¶5(d);<sup>3</sup> R Brf. at 1-2, 3, 6-7, and 11. Given Respondent's concession that the amendment has been implemented, all the Board needs to do in order to decide the instant matter is compare the clear language of the parties' MOU to the clear language of the amendment unilaterally adopted by the Respondent. Looking at the two exhibits side by side, Respondent's amendment contains additional changes to employee retirement benefits under the SAPP that were not included in the

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<sup>2</sup> 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.

<sup>3</sup> The Joint Motion and Stipulation of Facts shall be designated herein by (Jt. Mot.) followed by the identifying paragraph of the Motion, where applicable.

parties' MOU. See Jt. Exh. 12 (MOU); Jt. Exh. 13 (amendment). Respondent asks the Board to assume that the parties meant to incorporate those changes to employee retirement benefits notwithstanding the absence of those changes from the parties' MOU and the undisputed and significant impact of those changes on Unit employees' retirement benefits.<sup>4</sup>

As such, CGC respectfully requests that the Board find Respondent's unilateral implementation of the amendment to the SAPP was a mid-term modification to the parties MOU in violation of Section 8(a)(5) and (1) and 8(d) of the Act.

**B. RESPONDENT HAS NOT PROVIDED A SOUND ARGUABLE BASIS FOR MAKING ITS MID-TERM MODIFICATION OF THE MOU**

Notwithstanding the above, Respondent argues in its Brief that it had a sound arguable basis for implementing its amendment to the SAPP. Respondent has not articulated a sound arguable basis for its actions. The MOU is the parties' written, fully integrated agreement that is valid on its face. It clearly, unambiguously and specifically delineates the terms of the parties' agreement with respect to the SAPP. Rather than abide by the terms of the parties' MOU or bargain with the Union to achieve its aims, Respondent decided that the MOU meant something other than what the parties' had agreed, and implemented a self-serving amendment to the SAPP without bargaining with the Union and without the Union's consent.

**1. Respondent's Argument It Complied With The Parties' MOU Is Not Reasonable**

The first argument in Respondent's brief more or less goes something like this: by incorporating language into the amendment that is found nowhere in the parties' MOU,

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<sup>4</sup> At the time the MOU was executed, the parties had been without a collective-bargaining agreement since the expiration of the 2009-2012 CBA. Employees had been working without a collective-bargaining agreement — or any contractual pay increases—since that time. Respondent's unilateral mid-term modification of the parties' MOU, therefore, had the effect of compounding the impact on employees by locking employees' final average earnings to their rates under the 2009-2012 CBA.

Respondent was actually complying with the MOU. Respondent's first argument is absurd. Respondent cites to *Grosvenor Holdings, L.C. v. Figueroa*, 218 P.3d 1045, 1050 (Ariz. App. 2d Div. 2009), in support of its argument that the Board should consider the plain meaning of the words in the context of the MOU as a whole. Respondent then makes an assumption, which is not supported at all by the plain language of the MOU or the record in this case, that the parties must have "agreed to freeze the Plan (except for vesting service) in exchange for new 401(k) plan benefits, which necessarily required freezing both years of service and earnings." R Brf. at 11, 17. If the parties "must have agreed" to freeze earnings, they must have incorporated that understanding in the MOU.

The plain language of the MOU makes clear the MOU is "the entire agreement between the parties concerning the matters contained herein. . . 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." Jt. Exh. 12 ¶11. The MOU contains six (6) paragraphs pertaining to the freeze of the parties' defined benefit pension plan, the SAPP. The first paragraph defines current employees for the purposes of the MOU. Jt. Exh. 12 ¶1. The second paragraph defines new employees for the purposes of the MOU. Jt. Exh. 12 ¶2. The third paragraph states that any individual employed into a bargaining unit position on or after March 1, 2016 shall not be eligible for participation in the SAPP. Jt. Exh. 12 ¶3. The fourth paragraph states that effective June 30, 2016, the SAPP shall be frozen for all participants. Jt. Exh. 12 ¶4. The fifth paragraph states the parties' agreement that "effective 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." Jt. Exh. 12 ¶5. The sixth paragraph states that "effective after June 30, 2016, covered employees may purchase prior years of employment to be

applied toward credited service” by using the process outlined in the original SAPP plan documents. Jt. Exh. 12 ¶6. Although Respondent is correct that the seventh paragraph of the MOU sets forth the Employer’s 401(k) match for employees who choose to participate in its 401(k) plan effective July 1, 2016, there is nothing in the MOU or the record before the Board that supports Respondent’s assumption that the parties must have agreed to freeze the calculation of employees’ Average Annual Earnings under the SAPP in exchange for the 401(k) matching contained in paragraph 7 of the MOU.<sup>5</sup>

Respondent argues that freezing the SAPP *required* it to freeze both credited service and employee earnings. R Brf. at 11. Assuming *arguendo* that Respondent believed freezing the SAPP required it to freeze both credited service and employee earnings, Respondent should have bargained for a freeze to both credited service and employee earnings, and then included the parties’ agreement with respect to both items in writing in the parties’ MOU before signing it. The MOU sets forth how credited service will be frozen and what impact that has on future benefits for Unit employees. The MOU does not mention anything about freezing Unit employees’ average annual earnings, the impact of such a freeze, or what options, if any, employees have to get around such a freeze. The MOU does not mention freezing employees’ average annual earnings at all because the parties did not agree to freeze employees’ average annual earnings. In fact, not one of the following words is found in the parties’ MOU: “average,” “annual,” “compensation,” “salary” or “earnings.”

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<sup>5</sup> Employees represented by the Union have been able to participate in Respondent’s 401(k) Plan and Employee Stock Purchase Plans as set forth in the collective bargaining agreements between the parties. See Article 38 of the 2003-2006 CBA (Jt. Exh. 5 at 52); Article 37 of the 2006-2009 CBA (Jt. Exh. 6 at 33); Article 37 of the 2009-2012 CBA (Jt. Exh. 6 at 54). The record does not reflect to what degree, if any, the MOU modified the Employer’s existing 401(k) Plan, nor does the record reflect that paragraph 7 of the MOU was agreed to by the parties in exchange for freezing employees’ calculation of Average Annual Earnings under the SAPP.

Respondent's attempts to redefine the parties' MOU to its benefit *ex post facto* should be rejected by the Board. Taken as a whole, the MOU clearly defines the parties' agreement with respect to freezing the SAPP, and the Respondent was bound to follow it.

**2. The Plain Language And Dictionary Meaning Of “Frozen” Or “Freeze” Are Not Relevant, Nor Do They Support Respondent’s Argument**

Respondent erroneously relies on the Merriam-Webster Dictionary definition of the word “frozen” in support of its argument that it reasonably interpreted the parties' MOU when it implemented changes to the SAPP that are not contained anywhere within the parties' MOU. Respondent argues the Board should assume that when the Union and Respondent agreed the Plan “shall be frozen for all participants,” that the parties meant a “complete cessation of the plan and the components needed to cease the Plan, namely years of service and earnings.” R Brf. At 13.

There are several problems with this argument. The first problem, of course, is that the MOU does not say the parties agreed to a complete cessation of the plan and the components needed to cease the Plan, namely years of service and earnings.

Second, Respondent's reliance on the Merriam-Webster Dictionary definition of the word “freeze” is utterly unpersuasive in the context of a pension freeze. The word “freeze” when applied to a pension plan can mean any number of things. For example, a quick Google search indicates that “[w]hen a company freezes its pension plan, *some or all* of the employees covered by the plan, stop earning *some or all* the benefits from the point of the freeze moving forward.” See Pension Rights Center, “what does it mean to ‘freeze’ a pension plan?”

<http://www.pensionrights.org/publications/fact-sheet/pension-freezes> (last visited November 28,

2017).<sup>6</sup> There are also different types of pension freezes including, but not necessarily limited to: hard freezes, soft freezes and partial freezes. *Id.* Respondent even acknowledges the existence of different types of pension freezes in its Brief. R Brf. at 13 (arguing that if the Union wanted a “partial freeze” the Union should have negotiated for one before signing the MOU). Applying Respondent’s rationale, the MOU authorized it to “freeze” any number of aspects of the pension plan not mentioned in the MOU in any manner.

Third, the Board need not look to the plain language or definition of the words “frozen” or “freeze” in this matter because the parties explicitly defined the parameters of the Plan freeze in their MOU. Where the parties have specified in detail the terms of their agreement, the Board should not assume that the parties meant anything other than what they agreed upon in writing in their MOU. See Restatement (Second) of Contracts §203(c) (1981) (When construing contracts, the Board must give “specific terms and exact terms . . . greater weight than general language.”). Respondent would have the Board find ambiguity where none exists, giving the word “freeze” in paragraph 4 of the MOU more weight than the specific parameters of the freeze that the parties bargained for and incorporated throughout the remainder of the MOU.

**3. If the Parties Intended to Freeze Employees’ Compensation, They Would Have Included Their Agreement In The MOU (Just As They Did With Credited Service)**

Respondent argues, relying on principle of contract interpretation *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of another), that if the Union wanted the pension freeze to be a partial freeze it should have negotiated that term before signing the MOU. R Brf. at 13. Specifically, Respondent argues “if the Union wanted earnings not to be frozen, it should have included an express exception indicating that, despite paragraph 4, future

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<sup>6</sup> The Pension Rights Center is a Washington D.C.-based non-profit consumer group.

increases in earnings would continue to count for purposes of calculating a participant's Accrued Benefit." R Brf. at 13. Respondent's argument is again without merit and borders on the absurd.

As set forth *supra*, Respondent and the Union bargained for an MOU that explicitly delineates how the pension freeze would impact employees. The MOU does not contain any language relating to the freezing of future employee earnings. Contrary to Respondent's assertion, the Board should not assume the Union agreed that future earnings would freeze effective June 30, 2016 where no such agreement can be found in the plain language of the MOU. The Board should doubly not assume so based on the principle of *expressio unius est exclusio alterius* alone since, if Respondent wanted to freeze future earnings with respect to calculating a participant's benefits under the SAPP, *Respondent should have included express language clearly indicating that agreement in writing in the MOU before signing it.* The principle of *expressio unius est exclusio alterius* is equally persuasive, if not more so, when applied to the parties' inclusion in the MOU of a specific recitals defining the pension freeze, but exclusion of any language regarding a freeze to employees' earnings.

#### **4. Paragraph 4 Of The MOU Means Exactly What It Says**

The CGC's arguments do not render paragraph 4 of the MOU meaningless. Paragraph 4 of the MOU clearly defines the employees who will be impacted by the MOU's terms—the Plan “shall be frozen for all participants.” As stated *supra*, pages 6-7, there are many types of pension freezes. Pension freezes can impact some or all employees. Paragraph 4 of the MOU contains the parties' agreement that the freeze applied to all participants, just as the remainder of the MOU contains the parties' agreement with respect to the specific details of the freeze and how it will impact all participants.

**5. The MOU's Inclusion Of A 401(k) Matching Plan Does Not Support Respondent's Position**

Contrary to Respondent's assertions, the MOU does not equate the parties' agreement to freeze the SAPP to an exchange for the Employer's 401(k) matching program. Neither the MOU, nor anything else in the record, suggests such an exchange. Indeed, as explained *supra*, the Union already had access to the Employer's 401(k) program pursuant to the 2003-2006 CBA, the 2006-2009 CBA and the 2009-2012 CBA. To the extent Respondent now suggests the parties had some other agreement outside the MOU where they negotiated access or increases to the Employer's 401(k) Plan, there is no evidence in the record to support that argument. Even if there were evidence to suggest there was such an exchange, there still would not be anything to support Respondent's argument that the Union bargained away or made "tradeoffs" of employees' future earnings in order to obtain access or increases to the Employer's 401(k) Plan. To the contrary, the parties' incorporation of paragraphs explicitly detailing the parameters of the 401(k) match further undercuts the Employer's arguments that the Board should read the MOU as freezing employees' future earnings. Where the parties reached agreement in the MOU, whether it was agreement with respect to the SAPP freeze or with respect to the 401(k) match, the specific and detailed terms of the parties' agreement are contained in writing in the MOU.

The MOU does not contain language freezing future earnings in determining an employee's Average Annual Earnings under the SAPP, and the Board should not read such language into the MOU in these circumstances.

**III. 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 30<sup>th</sup> 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 30<sup>th</sup> day of November 2017, on the following:

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