

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

SW GENERAL, INC. d/b/a SOUTHWEST
AMBULANCE,

Respondent,

and

INTERNATIONAL ASSOCIATION OF
FIRE FIGHTERS, LOCAL I-60,

Charging Party.

Case No. 28-CA-177361

**ANSWERING BRIEF OF RESPONDENT
SW GENERAL, INC. d/b/a SOUTHWEST AMBULANCE**

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I. INTRODUCTION

In its initial brief, the General Counsel concedes that the MOU at issue in this case “froze the SAPP [pension plan] for all participants,” but then, applying the wrong legal standard, argues that the pension plan freeze for all participants means something other than what the MOU says. As explained in Respondent’s initial brief, such semantic gymnastics read the “freeze” requirement provision out of the MOU, conflict with the plain English meaning of the word “freeze,” and ignore the bargaining tradeoffs readily apparent from the MOU that the Union agreed to freeze the entire Plan (except for vesting service) in exchange for a significant benefit enhancement to the 401(k) plan.

First, the General Counsel contends that it can prevail in this case even if the Board finds that Respondent did not modify the MOU in violation of Section 8(d), because, alternatively, this case can be analyzed as an alleged unilateral change in violation of Section 8(a)(5). The General Counsel is wrong. When the General Counsel pleads a violation of Section 8(a)(5), but the case is really based on an alleged modification to a contract, there is no unfair labor practice and the complaint should be dismissed as long as the employer had a sound arguable or reasonable basis for its interpretation of the contract.

In its complaint, the General Counsel alleges Respondent violated the Act when it failed to continue in effect all of the terms and conditions of the MOU by implementing recitals that changed the eligibility language of the MOU. Based on its own allegations, the General Counsel’s theory of this case is that Respondent unlawfully modified the terms of the MOU. Thus, the case should be dismissed, without examining the standard applied in cases alleging unilateral changes to non-contractual terms and conditions of employment, so long as Respondent had a sound arguable or reasonable basis for its interpretation of the MOU. But

even if that other standard were applied, for the reasons explained in Respondent’s initial brief, no unlawful unilateral changes were made.

Second, the General Counsel concludes—with almost no analysis of the terms of the MOU or basic principles of contract interpretation—that Respondent’s interpretation of the MOU is not plausible. However, analysis of the MOU as a whole, the plain meaning of the term “frozen,” the rule disfavoring interpretations that render contract terms meaningless, and the inclusion of a generous 401(k) matching benefit in exchange for the freeze all support Respondent’s position that the parties agreed to a complete freeze of the Plan (except for vesting).

Respondent had a sound arguable and reasonable basis for believing its amendments complied with the MOU. Thus, it did not violate the Act, and the Complaint should be dismissed.

II. THE COMPLAINT SHOULD BE DISMISSED IF THE BOARD FINDS THAT RESPONDENT HAD A SOUND ARGUABLE BASIS FOR ITS INTERPRETATION OF THE MOU

Where the General Counsel pleads a violation of Section 8(a)(5), but the theory of the case is that the employer modified a collectively-bargained contract, not that the employer changed a non-contractual term or condition of employment, the allegation is properly analyzed as an alleged violation of Section 8(d) of the Act. In such cases, the entire complaint turns on whether the employer had a sound arguable basis for its interpretation of the contract.

In *American Elect. Power*, 362 NLRB No. 92 (2015), the General Counsel alleged the employer violated Sections 8(a)(5) and (1) of the Act when it “failed to continue in effect all the terms and conditions of the Master Agreement . . . by eliminating retiree medical benefits for all

employees hired after January 1, 2014.”¹ The administrative law judge found that, although the complaint did not specifically cite Section 8(d) of the Act, the pleadings established that the General Counsel was alleging that the Respondent unlawfully modified the contract during its term, as opposed to unilaterally changing a noncontractual term or condition of employment.” The Board agreed with the ALJ that “the complaint alleged a claim of unlawful contract modification.”

The Board also found that the ALJ erred by applying the clear and unmistakable waiver standard, which is the standard used for allegations of 8(a)(5) unilateral changes, rather than the sound arguable basis standard for alleged unlawful contract modifications. After pointing out this error, the Board concluded that “because the Respondent has presented a reasonable interpretation of the applicable contract language, the General Counsel has failed to prove that the Respondent modified the contract with the Union, within the meaning of Section 8(d) of the Act, in violation of Section 8(a)(5) and (1),” and the complaint was dismissed.² The Board’s approach in *American Elect. Power* is consistent with its past decisions in which the General Counsel alleged violations of Section 8(a)(5) and (1) based upon alleged modifications to collectively-bargained contracts.

In *Thermo Electron Corp.*, 287 NLRB 820 (1987), the General Counsel alleged the employer violated Sections 8(a)(5) and (1) of the Act by reducing pension payments, which were provided for under a pension plan established by a collectively-bargained agreement (allegations

¹ This allegation should sound familiar, because it is nearly identical to the General Counsel’s allegation in this case.

² The Board has used the terms “sound arguable basis,” “reasonable,” and “plausible” somewhat interchangeably. In *American Elect. Power*, for example, the Board dismissed the complaint because the employer “had a sound arguable basis for its interpretation of the contract” and “presented a reasonable interpretation of the contract language.”

which are nearly identical to the allegations in the instant case before the Board). Because the case presented the Board with a contract dispute, there was no evidence that the employer acted out of animus, in bad faith, or to undermine the Union, and the employer had presented a plausible interpretation of the contract, the Board found that no unfair labor practice had occurred and dismissed the complaint.

In *Phelps Dodge Magnet Wire Corp.*, 346 NLRB 949 (2006), the Board explained that when the dispute is “essentially one of contract interpretation... the 8(a)(5) allegation turns on whether the employer has a sound arguable basis for its interpretation of the contract,” and found that the employer had not violated Sections 8(a)(5) and (1) because it had a sound arguable basis for its interpretation of the contract. The Board dismissed the complaint even though it recognized that the employer’s interpretation of the contract may have been erroneous. In other words, an employer’s interpretation does not even have to be correct to warrant dismissal; there simply has to be a sound arguable or reasonable basis for it.

Just like *American Elect. Power, Thermo Electron Corp.*, and *Phelps Dodge Magnet Wire Corp.*, the complaint in this case should be dismissed in its entirety as long as Respondent has a sound arguable or reasonable basis for its interpretation of the MOU, because the General Counsel’s own allegation—that “Respondent failed to continue in effect all of the terms and conditions of the MOU by implementing two recitals that changed the eligibility language of the MOU”—reveals that this is really a dispute about an alleged modification to a contract, not a failure to bargain over non-contractual terms and conditions of employment. (Exhibit 2, ¶ 6(b).)

III. THE GENERAL COUNSEL’S ARGUMENT THAT RESPONDENT DID NOT HAVE A SOUND ARGUABLE BASIS FOR ITS INTERPRETATION OF THE MOU SHOULD BE REJECTED

A. The General Counsel’s Minimalist Contract Interpretation Fails

The General Counsel concludes, with minimal analysis, that any argument Respondent puts forth that it had a sound arguable basis for its interpretation of the MOU is implausible. (General Counsel’s Brief, p. 13.) The General Counsel’s conclusory contention is based on only one weak argument in the face of a complete freeze for all participants—namely, that the MOU does not expressly mention the method of calculating an employee’s Average Annual Earnings. This overly restrictive approach to interpreting the MOU ignores key language in the MOU and fails to adequately apply basic principles of contract interpretation.

B. The Plain Meaning in the Context of the Contract as a Whole Supports Respondent’s Interpretation

Properly interpreting a contract requires more than simply looking at the specific term at issue in isolation from the rest of the contract. Rather, the Board must consider the plain meaning of words “in the context of the contract as a whole.” *Grosvenor Holdings, L.C. v. Figueroa*, 218 P.3d 1045, 1050 (Ariz. App. 2d Div. 2009).

In Paragraph 4 of the MOU, the Union and Respondent agreed that effective June 30, 2016, the Plan “shall be *frozen for all participants*.” (Exhibit 12, Paragraph 4, emphasis added.) The General Counsel agrees: “the parties entered into a written . . . agreement to freeze the SAPP” (General Counsel’s Brief, p. 12); “the MOU did not end the SAPP, but froze the SAPP for all participants (General Counsel’s Brief, p. 13). There was no reason for the parties to document a “change to the method for calculating an employee’s Average Annual Earnings,” as contended by the General Counsel (General Counsel’s Brief, p. 14), because the entire Plan was frozen!

In fact, under a commonsense view of the Plan, there were only three ways in which the Plan could have been frozen: eligibility (getting into the Plan), vesting (having sufficient service to have a nonforfeitable right to benefits), and benefits (a function of years of services times earnings). Paragraph 3 of MOU froze eligibility. (Exhibit 12, ¶ 3.) Paragraph 4 froze the Plan for all participants. (Exhibit 12, ¶ 4.) And Paragraph 5 carved out an exception to the Plan freeze for service credited toward vesting (not benefits). (Exhibit 12, ¶ 5.)

As noted in Respondent's initial brief, the monthly benefit a participant receives upon retirement is determined from two components: (1) a participant's years of credited service, and (2) a participant's average earnings during the last 36 months of their employment. (Joint Motion and Stipulation, ¶ 5, Exhibit 9, Articles 1.1, 1.8, and 1.16.) Thus, even though the MOU does not specifically mention how a participant's average earnings would be treated going forward, in order to freeze the Plan as required by the MOU, counting of both credited service and earnings had to stop. Otherwise, the Plan would not be frozen because participants would continue accruing benefits after June 30, 2016, based on earnings after June 30, 2016. That would violate Paragraph 4 of the MOU.

Recital C(v) does not add or modify any terms or conditions not already in the MOU. It simply implements the agreement in the MOU in a manner that is consistent with the terms of the Plan by freezing the two variables used to calculate a participant's Accrued Benefit. Thus, the Plan Amendment was based upon a reasonable and correct interpretation of the terms of the MOU.

C. **A Commonsense Understanding and the Dictionary Meaning of "Frozen" Support Respondent's Position that Both Years of Service and Earnings Were Frozen**

"In construing the language of a contract, *it is presumed that the parties intended to give the words employed their ordinary meaning* and that the language used was placed in the

contract for a specific purpose.” *Tucker v. Byler*, 27 Ariz. App. 704, 207, 558 P.2d 732, 735 (Ariz. App. 1st Div. 1976) (emphasis added). Yet the General Counsel’s brief does not even attempt to address the plain or ordinary meaning of the term “frozen” or consider what the parties intended by agreeing that the plan “shall be frozen for all participants.”

As explained in Respondent’s brief, it is commonly understood that when something is “frozen” it does not continue to move or change. Moreover, Merriam-Webster Dictionary defines frozen as: “*incapable of being changed, moved, or undone* : FIXED; specifically : debarred by official action from movement or from change in status”; and “*not available for present use*.” See Merriam-Webster, Frozen, <https://www.merriam-webster.com/dictionary/frozen> (last visited November 16, 2017). The General Counsel’s avoidance of the plain meaning of the term “frozen” is quite understandable – it undermines his case.

The Board should find that when the Union and Respondent agreed that the Plan “shall be frozen for all participants,” they intended to give the word “frozen” its plain and ordinary meaning and agreed to a complete cessation of the Plan and its components, namely years of service and earnings.

D. The Union Mischaracterizes Paragraph 5 of the MOU and Advances an Interpretation of the MOU that Renders Paragraph 4 Meaningless

Paragraph 5 of the MOU, which immediately follows the provision stating the Plan “shall be frozen for all participants,” clarifies that “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.” (Exhibit 12, ¶ 5.) This carve out for vesting time is an exception to the general agreement that the Plan would be completely frozen for all participants. And it is the only exception to the freeze contained in the MOU.

As Respondent anticipated, the General Counsel has tried to flip this vesting exception on its head by suggesting that Paragraph 5 should be interpreted as an implied endorsement for the continuing accrual of earnings, simply because it clarifies that service time shall not count toward credited service under the Plan without any mention of compensation. (General Counsel’s Brief, p. 13.) In doing so, the General Counsel misconstrues the meaning and effect of Paragraph 5 and advances an interpretation of the MOU that would render the agreement to freeze the Plan meaningless.

First, as the Paragraph 5 vesting service exception to the Plan freeze makes clear, the parties knew how to create an exception to the freeze if they wanted one. If the parties had intended to carve out an exception to the Plan freeze to save earnings from being frozen, they could have done so. Because the parties included an express exception to the Plan freeze only for vesting purposes (while clarifying that credited service was not included in the vesting exception and thus still frozen), the Board should interpret the MOU to find there are no other exceptions or guarantees for components such as earnings. Elkouri & Elkouri, *How Arbitration Works*, 9-40 (8th ed. 2016) (“contracts that specify certain exceptions imply that there are no other exceptions, and those that expressly include some guarantees in an agreement are thought to exclude other guarantees.”). An earnings exception to the Plan freeze certainly should not be implied as the General Counsel wants.

Second, if the General Counsel’s argument—that the parties only intended to freeze credited service time but not compensation—were accepted, Paragraph 4, which unequivocally states the Plan “shall be frozen for all participants,” would be rendered meaningless or superfluous. In other words, under the General Counsel’s view, the scope of the freezing of the Plan was defined by Paragraph 5 (i.e., a freeze on credited service, but no freeze on vesting

service, and thus, no freeze on compensation by implication), so Paragraph 4 would not be necessary.

But, “it is a cardinal rule of contract interpretation that we do not construe one term of a contract to essentially render meaningless another term.” *Aztar Corp. v. U.S. Fire Ins. Co.*, 223 Ariz. 463, 479, 224 P.3d 960, 975 (Ariz. App. 1st Div. 2010). Indeed, “[s]ince an agreement is interpreted as a whole, it is assumed in the first instance that no part of it is superfluous.” *Restatement (Second) of Contracts*, § 203, cmt. b. (1981). Thus, the Board may only treat the term “frozen” as superfluous or meaningless if the Board can say that no reasonable meaning can be given to it.

Because Paragraph 4 states, without limitation or qualification, that the Plan “shall be frozen for all participants,” the best and most reasonable interpretation of the MOU is that the Union and Respondent actually meant what they said: they intended to freeze, stop or cease the Plan, except where they expressly agreed to continue to count years of service toward an employee’s vesting time. Thus, the Board should reject the General Counsel’s improper attempt to rewrite the terms of the MOU through an implied modification in violation of the zipper clause without any direct evidence to support its argument.

E. The General Counsel Completely Ignores the Impact of the New 401(k) Matching Plan

Noticeably absent from the General Counsel’s brief is any discussion of the inclusion of a new, generous 401(k) matching plan bargained in exchange for the pension plan freeze. Had the parties merely agreed in the MOU to a partial freeze of the Plan—whereby future earnings would continue to increase one’s benefit under the plan—would Respondent have agreed to provide generous 401(k) matching benefits? Of course not. Because the agreement to freeze the Plan was not negotiated in a vacuum, and must be analyzed in the context of the MOU as a whole, the

inclusion of the 401(k) matching benefit supports Respondent's position that the parties agreed to a total freeze of the Plan, which is why Recital C(v) was necessary.

IV. CONCLUSION

In a case such as this, where the General Counsel has pled a violation of Section 8(a)(5) based on an alleged modification to a collectively-bargained contract, no unfair labor practice can be found and the complaint should be dismissed as long as the employer had a sound arguable or reasonable basis for its interpretation of the MOU. Respondent not only had a sound arguable and reasonable basis for its interpretation, it correctly determined that the MOU required it to freeze accrual of compensation to comply with Paragraph 4 of the MOU, which provided that effective June 30, 2016, the Plan “**shall be frozen for all participants.**”

Respondent respectfully submits that the Board should find that no unfair labor practice occurred and it should dismiss the complaint in its entirety.

Dated this 30th day of November, 2017.

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CERTIFICATE OF SERVICE

Attorneys for Respondent hereby certify that a copy of Respondent's Answering Brief in the above-referenced matter was electronically filed on November 30, 2017, using the National Labor Relations Board's E-Filing System, and was served via electronic mail on the following counsel and representatives:

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