

United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: January 21, 2016

TO: Terry A. Morgan, Regional Director
Region 7

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Alternative Community Living, Inc. d/b/a New 530-6067-4001-5000
Passages Behavioral Health 530-6067-4033-5000
Case 07-CA-158059 530-8074
625-5546
625-6601-5000
625-8883-4268

This case was submitted for advice as to whether the Employer, Alternative Community Living, Inc. d/b/a New Passages Behavioral Health, violated a Board Order restoring the status quo ante by refusing to pay a scheduled installment of an unlawfully implemented ratification bonus. The Board Order required the Employer to rescind its unilaterally implemented contract offer and restore the pre-existing terms and conditions with the exception of any ratification bonus or other benefits granted as part of the unilaterally implemented offer. We conclude that the scheduled installment was part of a “benefit granted” and that the Employer’s failure to pay that installment was not privileged by the Board’s rescission order and was a unilateral change in violation of Section 8(a)(5).

FACTS

Background: Case 07-CA-099976

The Union, Local 517M SEIU, has represented approximately 315 “rehabilitation assistants” at the Employer’s southeast Michigan facility since 2006. The parties began negotiating their second collective-bargaining agreement in late 2011. During the pendency of those negotiations, Michigan’s legislature enacted a “right-to-work” law that was to go into effect on March 28, 2013 and that outlawed union-security provisions in any union agreements signed after that date.

In mid-March, the parties tentatively agreed to a new contract including a union-security provision, subject to ratification by the Union membership and the Employer’s board of directors. The Union membership ratified the tentative agreement. The Employer’s board, however, balked at the agreement, concerned that the State would target its funding in retaliation for its having signed a union-security

agreement at the eleventh hour. On May 5, 2013, the Employer declared impasse and implemented its last, best, and final offer, which in essence constituted the parties' tentative agreement without the union-security provision.

In March 2015, the Board adopted an ALJ finding that the Employer had violated Section 8(a)(5) and (1) by unilaterally implementing its final offer at a time when the parties were not at valid impasse.¹ Paragraph 2(b) of the Board's Order required the Employer to restore the status quo ante, with one exception: "Nothing herein shall require the rescission of any ratification bonus or other benefits granted after May 5, 2013."²

The ratification bonus

The Employer's unilaterally implemented agreement provided for a "ONE TIME MONETARY PAYMENT" ratification bonus that, despite its "one-time" moniker, was to be paid in three installments. Employees were to receive between \$315 and \$355 depending on years of service; the first payment was due within two pay periods of ratification, with the second due on July 1, 2014 and the third on July 1, 2015. Although the employees did not ratify the agreement, the Employer implemented the ratification bonus and issued the first scheduled payment on July 1, 2013. Likewise, the Employer issued the second installment payment on July 1, 2014. But the Employer refused to issue the third and final installment on July 1, 2015, relying on the Board's March 2015 Order rescinding the unlawfully implemented offer and restoring the status quo ante.

ACTION

We conclude that the Employer's failure to pay the July 1, 2015 installment of its ratification bonus was a unilateral change in violation of Section 8(a)(5).

The Board's standard remedy for an employer's unlawful unilateral change is restoration of the status quo ante with regard to employee's terms and conditions of employment, "conditioned upon the affirmative desire of the affected employees for such, as expressed through their collective-bargaining representative."³ When a

¹ *New Passages Behavioral Health & Rehab*, 362 NLRB No. 55, slip op. (March 31, 2015). The Board also adopted findings related to additional 8(a)(5) and (1) violations not at issue in this subsequent matter.

² *New Passages*, 362 NLRB No. 55, slip op. at 3.

³ *Herman Sausage Co.*, 122 NLRB 168, 173 (1958), *enforced* 275 F.2d 229 (5th Cir. 1960).

unilateral change benefits employees, the Board does not require rescission except at the request of the bargaining representative.⁴

Moreover, the Board has held that an employer commits an additional Section 8(a)(5) violation when it unilaterally rescinds a benefit in reaction to a Board order restoring the status quo. Thus, in *Mining Specialists*, the Board held that an employer violated Section 8(a)(5) by unilaterally discontinuing a bonus plan, rejecting the employer's affirmative defense that a Board order in an underlying unfair labor practice proceeding obligated it to discontinue the extracontractual bonus.⁵ In the underlying proceeding, the Board found, inter alia, that the employer violated Section 8(a)(5) by abrogating its collective-bargaining agreement with the union.⁶ During the pendency of the underlying litigation, the employer established a production bonus plan, but unilaterally discontinued it a few months later after the Board ordered the employer to comply with the parties' agreement and make the employees whole for its failure to apply the contractual terms and conditions.⁷ In the subsequent unfair labor practice proceeding, the employer argued that the Board's order required it to discontinue the bonus plan because it had not followed contractual procedures in establishing the plan.⁸ The Board, however, held that, under the terms of the original Board order, the employer was obligated to make employees whole for the discontinued bonuses.⁹

⁴ See, e.g., *Fresno Bee*, 339 NLRB 1214, 1216 n.6 (ordering rescission of employer's unilateral changes, including changes that were unilateral rescissions of earlier unlawful changes, but noting "[b]ecause some of the Respondent's unilateral changes may be perceived as beneficial to employees, we will order the rescission of these changes only at the request of the Union"); *CJC Holdings*, 320 NLRB 1041, 1047 (1996) (adopting ALJ order requiring employer to restore status quo but maintain unilaterally implemented wage increases unless the union requested rescission), *enforced mem.* 110 F.3d 794 (5th Cir. 1997); *Koenig Iron Works*, 282 NLRB 717, 719 (1987) (Board order "should not be construed as requiring the Respondent to cancel any wage increase or other improvement in benefits without a request from the Union"), *reversed on other grounds*, 856 F.2d 1 (2d Cir 1988).

⁵ *Mining Specialists* ("*Mining Specialists III*"), 335 NLRB 1275 (2001), *enforced*, 326 F.3d 602 (4th Cir. 2003).

⁶ *Mining Specialists* ("*Mining Specialists I*"), 314 NLRB 268 (1994).

⁷ *Mining Specialists III*, 335 NLRB at 1277.

⁸ *Id.*

⁹ *Id.*

Consistent with its longstanding remedial policy, the Board in the underlying unfair labor practice case here ordered the Employer to rescind its unlawfully implemented successor agreement, but noted that the order should not be construed to require the rescission “of any ratification bonus or other benefits granted after May 5, 2013” (emphasis added). The only outstanding issue, then, is whether the third installment of the “ONE TIME MONETARY PAYMENT” ratification bonus was a benefit granted after May 5, 2013. If so, then the Employer’s failure to pay the third installment is an unlawful unilateral change.

We conclude that the ratification bonus was “granted” at the time that it was announced, even though it was not paid. It is well established that a unilateral change is unlawful from the time that it is announced, even if the change is not yet implemented.¹⁰ In such circumstances, the announcement itself conveys the message that the employer is unilaterally altering a term or condition of employment without the union’s input.¹¹ By extension, we conclude that the unilateral bonus here should be deemed “granted” as of the unlawful implementation of the Employer’s last, best, and final offer. The bonus was part and parcel of the Employer’s unlawfully implemented agreement.

Moreover, even accepting, *arguendo*, that the Employer had not “granted” the bonus at the time of implementation, because it was styled as a ratification bonus and the employees did not ratify the agreement, the Employer certainly granted the bonus by paying the first installment in July 2013, and that grant was confirmed by the payment of the second installment in July 2014. The Employer therefore was obligated to pay the final installment of the granted bonus.

¹⁰ See, e.g., *ABC Automotive Products Corp.*, 307 NLRB 248, 249–50 (1992) (employer made unlawful unilateral change where new health benefits were announced even though never implemented because striking employees never returned to work; “such an announcement would cause a reasonable employee to assume that . . . a condition of employment would have changed [T]he unilateral change was effectively implemented when it was announced”), *enforced mem.* 986 F.2d 500 (2d Cir. 1992); *Kurziel Iron of Wauseon*, 327 NLRB 155, 155–56 (1998) (finding 8(a)(5) violation where “[e]ven if the announced reduction [in break time] did not finally result in the actual curtailment of employees’ breaks, the damage to the bargaining relationship was accomplished”), *enforced mem.* 208 F.3d 214 (6th Cir. 2000); *CJC Holdings*, 320 NLRB at 1041 n.2 (finding 8(a)(5) violation where employer announced intent to change employees’ dental insurance; “the promise itself, even if not immediately carried out, changed the terms and conditions of employment”).

¹¹ See *ABC Automotive Products Corp.*, 307 NLRB at 250. Cf. *Eagle Transport Corp.*, 338 NLRB 489, 489 (2002) (no violation where employer’s announced shift change was cancelled after union objected and before implementation; reasonable employee would not have understood that announced change had been “effectively implemented”).

Accordingly, the Region should issue complaint, absent settlement, alleging the Employer's refusal to pay the July 1, 2015 installment of the ratification bonus as a violation of Section 8(a)(5).

/s/
B.J.K.

H: ADV.07-CA-158059.Response.New Passages

(b)(6), (b)(7)(C)