

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

WYMAN GORDON PENNSYLVANIA, LLC

and

**Cases 04-CA-182126
04-CA-186281
04-CA-188990**

**UNITED STEEL, PAPER AND FORESTRY,
RUBBER, MANUFACTURING, ENERGY, ALLIED
INDUSTRIAL AND SERVICE WORKERS
INTERNATIONAL UNION, AFL-CIO**

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

Administrative Law Judge Arthur J. Amchan issued his decision in the above-captioned matter on July 13, 2018. The General Counsel filed limited exceptions and a supporting brief on September 17, 2018, and Wyman Gordon Pennsylvania, LLC (“Respondent”) filed an answering brief to those exceptions on October 26, 2018.

Pursuant to Section 102.46(e) of the Board’s Rules and Regulations, the General Counsel files this reply brief to address some of the matters raised in Respondent’s answering brief. First, Respondent improperly contested determinations by the judge in its answering brief to which no party excepted. In particular, Respondent challenged the judge’s determinations that Respondent violated Sections 8(a)(5) and (1) by unilaterally (1) refusing to implement a recurring annual wage increase around August 1, 2016, thereby changing employees’ established structure of compensation; and (2) in October 2016, discontinuing its practice of assigning injured employees to light duty. No party excepted to either of these determinations. As provided by the Board’s Rules and Regulations, Respondent waived any objection to the determinations and was prohibited from contesting them in its answering brief. In these circumstances, the Board

disregards the improper argument and, on motion, strikes it from the record. The General Counsel requests that the Board disregard Respondent's improper argument and, further, moves the Board to strike it.

Respondent also argued that it had not been shown that individuals whose names and purported signatures appear on pages in Employer Exhibit 2 (on which Respondent relied to withdraw recognition from the Union) actually knew that Respondent had discontinued its light duty practice when they supposedly signed. Without proof of such knowledge, Respondent claimed, the Board could not conclude that a causal relationship existed between the unlawful discontinuance and any disaffection expressed in Employer Exhibit 2. Contrary to Respondent's argument, the Board has specifically held that, under the Board's objective test for assessing a causal relationship, actual knowledge by the employees of the unfair labor practices need not be shown.

Finally, in arguing that the General Counsel's requested bargaining schedule remedy is unnecessary, Respondent understated the extent of its refusal to bargain with the Union before it unlawfully stopped recognizing the Union altogether. As the judge found, Respondent conceded at the hearing that, during the more than 14 months of bargaining between it and the Union prior to the unlawful withdrawal of recognition, Respondent never made proposals on such vital subjects as wages, retirement benefits, health benefits, schedules, vacations, and holidays, among others, and, relatedly, adopted the general approach that it would not bargain matters it considered economic until the parties had reached agreement on all matters it deemed noneconomic. This constituted a severe breach of Respondent's duty to bargain that, when combined with Respondent's years-long (and ongoing) outright refusal to recognize the Union and its other unfair labor practices, necessitates a bargaining schedule remedy.

I. Respondent's belated challenge to the judge's determination that Respondent violated the Act by unilaterally failing to implement a recurring annual wage increase should be disregarded and stricken

In its answering brief, Respondent argued that the judge's determination that Respondent violated Sections 8(a)(5) and (1) by unilaterally failing to implement a recurring annual wage increase around August 1, 2016 was in error (R. Ans. Br. 1-5). However, neither Respondent nor any other party excepted to this determination. The Board's Rules and Regulations prohibit Respondent from challenging the determination in its answering brief. The General Counsel therefore requests that Respondent's belated challenge to the determination be disregarded and moves that it be stricken.

The administrative law judge made the following determinations. "Respondent had a practice of giving unit employees a wage increase on or about August 1 of every year," the amount of which "ranged from about 40 cents to 70 cents per hour" (ALJD 12). In 2016, "Respondent failed to make the wage adjustment or notify the Union before the scheduled date of the recurring increase occurred"; "it violated Section 8(a)(5) and (1) as a result" (ALJD 13). In other words, the judge determined that part of employees' established structure of compensation was to get a raise around August 1 each year, but Respondent did not give a raise at that time in 2016. In this way, Respondent changed employees' compensation. Respondent withheld the raise on its own; it did not notify the Union that it intended to do so, let alone offer the Union a chance to bargain over the matter. The judge concluded that Respondent's actions constituted a refusal to bargain in violation of the Act.

No party excepted to the judge's determination that Respondent violated the Act in this

manner.¹ Nevertheless, Respondent argued in its answering brief that its actions with respect to the wage increase were lawful (R. Ans. Br. 1-5). This argument was improper. A party may not challenge a judge's determination to which no exceptions were filed in its answering brief. E.g., *Capitol Ford*, 343 NLRB 1058, 1059 fn. 5 (2004); *Teddi of California*, 338 NLRB 1032, 1032 (2003); *Manno Electric*, 321 NLRB 278, 278 fn. 10 (1996), enfd. per curiam mem. 127 F.3d 34 (5th Cir. 1997); accord 29 CFR § 102.46(a)(1)(ii) ("Any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged will be deemed to have been waived."); 29 CFR § 102.46(f) ("Matters not included in exceptions or cross-exceptions may not thereafter be urged before the Board, or in any further proceeding."); see also 29 CFR § 102.46(b)(2) ("The answering brief to exceptions must be limited to the questions raised in the exceptions and in the brief in support").

Take, for instance, the Board's decision in *Capitol Ford*. There, the General Counsel and the union excepted to the judge's remedy for certain unfair labor practices the judge found the respondent committed. *Capitol Ford*, above at 1059. However, neither the respondent nor any other party excepted to the judge's conclusion that the respondent engaged in the unfair labor practices in question. *Id.* at 1059 fn. 5. Despite this, in its answering brief, in response to the General Counsel's and union's push for a different remedy, the respondent asserted that it had not in fact committed the underlying unfair labor practices. *Ibid.* The Board found that this was "imprope[r]." *Ibid.* By failing to except to the judge's conclusion that the respondent committed the unfair labor practices, the respondent accepted the conclusion. See *ibid.* The only active

¹ Respondent did allude to this determination in its "Exception 2." However, "Exception 2" is a "bare exception," meaning "Respondent [did] not present any argument in support of" it either in the exceptions document itself or in the supporting brief. *Western Refining*, 366 NLRB No. 83, slip op. at 1 fn. 3 (2018). Therefore, "in accordance with Sec. 102.46(a)(1)(ii) of the Board's Rules and Regulations," this exception "should be disregarded." *Ibid.*

question was whether the unfair labor practices should be remedied in the manner requested by the General Counsel or the union or in the manner directed by the judge; the question of whether and how the unfair labor practices had been committed was settled. See *Capitol Ford*, above at 1059 fn. 5 (citing 29 CFR § 102.46(d)(2)—now 29 CFR § 102.46(b)(2)—which requires that an answering brief “be limited to the questions raised in the exceptions and in the brief in support”).

Similarly, in the present case, “[n]o party filed exceptions to” the judge’s determination that Respondent unlawfully unilaterally failed to grant employees their annual wage increases in 2016. *Id.* at 1059 fn. 5. The General Counsel excepted only to the judge’s conclusion that this violation did not preclude Respondent from withdrawing recognition from the Union (GC Exc. 1-2; GC Exc. Br. 9). Respondent nevertheless “improperly attempted to address [the underlying unfair labor practice] findings in its brief in answer to the exceptions of...the General Counsel.” *Ibid.* Respondent’s “belate[d]” challenge to these findings must be disregarded. *Teddi*, above at 1032. The General Counsel’s question—whether this unfair labor practice had the tendency to cause employees’ to turn against Union representation—is the only one timely raised before the Board.

Consistent with the above analysis, the General Counsel “mo[ves] to strike that portion of Respondent’s answering brief relating to” Respondent’s challenge to the judge’s determination that Respondent violated Sections 8(a)(5) and (1) by unilaterally failing to implement the established annual wage increase around August 1, 2016. *Southwest Security Equipment Corporation*, 262 NLRB 665, 665 fn. 1 (1982), *enfd.* 736 F.2d 1332 (9th Cir. 1984), *cert. denied* 470 U.S. 1087 (1985), *overruled on other grounds J.E. Brown Electric*, 315 NLRB 620, 622-23 (1994). When moved to do so, the Board strikes improper, belated challenges to judge’s determinations in answering briefs. See *ibid.* (citing 29 CFR § 102.46); see also *Wilmington*

Fabricators, Inc., 332 NLRB 57, 57 fn. 1 (2000) (citing 29 CFR § 102.46(d)(1) and (2), now 29 CFR § 102.46(b)(1) and (2)). Respondent’s challenge to the judge’s conclusion that Respondent unlawfully unilaterally failed to implement a customary wage increase and supporting findings is such an improper, belated challenge. See, e.g., *Capitol Ford*, 343 NLRB at 1059 fn. 5.

Accordingly, it should be stricken.² *Southwest*, above at 665 fn. 1; *Wilmington*, above at 57 fn. 1.

II. Respondent’s belated challenge to the judge’s determination that it violated the Act by unilaterally discontinuing its practice of assigning injured employees to light duty should also be disregarded and stricken

Respondent’s challenge to the judge’s determination that Respondent violated Sections 8(a)(5) and (1) by unilaterally discontinuing its light duty practice in October 2016 should be disregarded and stricken for the same reason (R. Ans. Br. 6-9, 10). The judge made the following determinations. Respondent had an established practice “of providing light duty work to employees on worker[s’] compensation.” Beginning on Friday, October 14, 2016, Respondent instructed all five employees assigned to light duty not to report for work. Respondent did not notify the Union in advance that it was going to do so, let alone give the Union an opportunity to bargain over the matter. On Monday, October 17, 2016, the Union filed a charge with the Board alleging that Respondent’s conduct violated the Act. On Wednesday, October 19, 2016, after the five employees had missed three days of work (Friday, Monday, and Tuesday), Respondent permitted them to return and perform light duty tasks as before. This conduct by Respondent constituted a refusal to bargain in violation of Sections 8(a)(5) and (1). Respondent failed to repudiate its violation. (ALJD 13.)

Here again, no party excepted to any of these findings or conclusions. Instead, the General Counsel excepted solely to the judge’s determination that Respondent’s unlawful

² In particular, all of section “I” of Respondent’s answering brief should be stricken (R. Ans. Br. 1-4) as should the first paragraph of section “II” (R. Ans. Br. 4-5).

discontinuance did not preclude it from withdrawing recognition from the Union (GC Exc. 2; GC Exc. Br. 13). Nevertheless, Respondent again “improperly attempted to address [the underlying unfair labor practice findings] in its brief in answer to the exceptions of the...General Counsel.” *Capitol Ford*, 343 NLRB at 1059 fn. 5. Respondent argued in its answering brief that: (1) it effectively repudiated its discontinuance of the established light duty practice and that the judge consequently erred in finding that the discontinuance violated the Act (R. Ans. Br. 6-9); and (2) the discontinuance was not actually a change in employees’ terms and conditions of employment (R. Ans. Br. 10).

Like Respondent’s challenge to the judge’s determination that it unlawfully failed to implement the annual raises, this challenge must be disregarded. See *ibid.* Furthermore, as he did with regard to the improper argument regarding the annual raises, the General Counsel “mo[ves] to strike that portion of Respondent’s answering brief relating to” Respondent’s challenge to the judge’s determination that it unlawfully unilaterally discontinued its light duty practice.³

Southwest, 262 NLRB at 665 fn. 1; *Wilmington*, 332 NLRB at 57 fn. 1.

III. Contrary to Respondent’s assertion, the Board does not require actual knowledge by employees of an unfair labor practice to find that the unfair labor practice precluded a withdrawal of recognition

Respondent also argued that the General Counsel did not prove that some employees knew about Respondent’s discontinuance of the light duty practice when they allegedly signed a page appearing in Employer Exhibit 2. Without proof of such knowledge, Respondent asserts, the Board cannot conclude that the discontinuance contributed to employee disaffection from the Union so as to preclude Respondent from withdrawing recognition. (R. Ans. Br. 9-10.)

³ In particular, all of section “III,” subsections “A” and “B” should be stricken (R. Ans. Br. 6-9), as should the first three sentences of the fourth paragraph of subsection “C” (R. Ans. Br. 10).

Contrary to Respondent’s argument, the Board has squarely held that its objective test for whether an employer’s unfair labor practice contributed to employee opposition to continued union representation “does not require ‘actual knowledge by the employees of the unfair labor practices.’” *Veritas Health Services v. NLRB*, 895 F.3d 69, 82 (D.C. Cir. 2018), enfg. 363 NLRB No. 108 (2016) (quoting *Wire Products Mfg. Corp.*, 326 NLRB 625, 627 fn. 13 (1998)). Instead, an unfair labor practice’s “foreseeable tendency to weaken employee support for the Union” is enough “to infer that [the violation] contributed to the employee disaffection.” *Ibid.* (quoting *Wire Products*, above at 627 fn. 13). Thus, the General Counsel did not have to prove that employees actually knew about Respondent’s unlawful unilateral discontinuance of the light duty practice to establish that the discontinuance contributed to any disaffection from the Union. *Wire Products*, above at 627 fn. 13. He only had to prove that the discontinuance had a “foreseeable tendency to weaken employee support for the Union.” *Ibid.* As detailed in the General Counsel’s brief in support of exceptions, the discontinuance plainly had such a tendency (GC Exc. Br. 13-15).⁴

⁴ In addition, although actual knowledge by employees of the discontinuance is unnecessary, there is compelling evidence that employees did know about it. First, this was a small bargaining unit—only 43 employees—such that employees must have noticed the absence of all five of their light duty coworkers for three consecutive work days (Tr. 69). The employees would have been especially likely to note the absence of their Union Local President Brian Collura, who was one of the light duty employees (ALJD 13).

Furthermore, Respondent failed to mention that on Sunday, October 16, 2016, the Union issued a bargaining update to most of the bargaining unit members (Tr. 79; GC Exh. 7) stating:

You may have noticed that your colleagues who had been on light duty are not in the facility. The Company unlawfully eliminated its light duty program last week without bargaining with the Union. We are filing unfair labor practice charges to reverse the change and reinstate the light duty program (GC Exh. 6).

The Union did not follow up on this announcement until October 26, 2018, when it notified the same list of unit members that Respondent had reinstated the light duty practice (GC Exh. 6).

IV. Respondent understated the extent of its refusal to bargain with the Union prior to unlawfully ceasing to recognize the Union altogether

The General Counsel excepted to the judge's failure to order Respondent to bargain for a minimum of 24 hours per month and to send monthly progress reports on bargaining to the Regional Director while copying the Union (GC Exc. 2-3; GC Exc. Br. 19-23). In its answering brief, Respondent argued that the General Counsel's requested bargaining schedule remedy was unnecessary here (R. Ans. Br. 19-23). In doing so, Respondent understated the extent of its refusal to bargain with the Union even before Respondent unlawfully stopped recognizing it.

It bears emphasizing that, during the more than 14 months between the parties' first bargaining session and Respondent's withdrawal of recognition, Respondent concededly never took a position regarding employees' wages (Tr. 656); retirement benefits (Tr. 661); health benefits (Tr. 589-90; Er. Exhs. 53, 63); rights with regard to holidays (Tr. 649; Er. Exh. 63); rights with regard to vacations (Tr. 648-49); schedules (Er. Exh. 63); as well as several other subjects. Respondent did so despite receiving the Union's proposals on these subjects at the parties' very first bargaining session (GC Exh. 4). In addition, in an overlapping violation, Respondent conceded that, as a general matter, it refused to bargain with the Union regarding subjects that Respondent considered economic until the parties had reached agreement regarding all non-

Several signatures are dated between the Union's October 16 announcement of the unlawful discontinuance and its October 26 announcement of the reinstatement (Er. Exh. 2)

Finally, Respondent conceded that the General Counsel did prove that some employees knew about the discontinuance at the time they allegedly signed, including light duty employee Bryon Filipkoski and employees who signed after the Union's October 26, 2016 update (GC Exh. 6) (R. Ans. Br. 10). Respondent contended, however, that it was unlikely that the unlawful discontinuance contributed to these signatures because the alleged signers knew Respondent had reinstated the light duty practice when they signed (R. Ans. Br. 10). But in the absence of any repudiation by Respondent of its unlawful discontinuance (ALJD 13), the discontinuance remained likely to "undermine the employees' confidence in the effectiveness of their selected collective-bargaining representative." *Vincent Industrial Plastics, Inc.*, 328 NLRB 300, 302 (1999), enfd. in relevant part 209 F.3d 727, 738 (D.C. Cir. 2000).

economic subjects (Tr. 621-22, 656, 727-28).⁵

As detailed in the General Counsel's brief in support of exceptions, Respondent's serious breach of its duty to bargain with the Union even prior to ceasing recognition outright, when combined with its years-long, continuing refusal to recognize the Union and its other unfair labor practices, necessitates the bargaining schedule remedy requested by the General Counsel (GC Exc. Br. 19-23).

V. Conclusion

For the foregoing reasons, the General Counsel respectfully requests that the Board find merit to his exceptions and reject Respondent's arguments against those exceptions.

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⁵ To be very clear, Respondent's only bargaining with regard to wages was for potentially restoring the recurring annual wage increase of which it unlawfully deprived employees at the beginning of August 2016 (Respondent calls this "interim wages" (R. Ans. Br. 20) or the "annual wage increase" (R. Ans. Br. 21) or the "interim wage increase" (R. Ans. Br. 22)) (ALJD 12-13). It admittedly made no proposal regarding what employees' wages would be under the collective-bargaining agreement (Tr. 656). Similarly, although Respondent claimed to have bargained over health care (R. Ans. Br. 20, 21, 22), it is important to recognize that Respondent only bargained over employee contributions to health insurance premiums for the health insurance plan year that ran from June 2016 through June 2017; Respondent admittedly never made a proposal regarding employee health benefits during the collective-bargaining agreement (Tr. 589-90; Er. Exhs. 53, 63).