

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

**NOAH'S ARK PROCESSORS, LLC d/b/a  
WR RESERVE**

**And**

**Cases 14-CA-217400  
14-CA-224183  
14-CA-226096  
14-CA-231643  
14-CA-235111**

**UNITED FOOD AND COMMERCIAL WORKERS  
UNION LOCAL NO. 293**

**BRIEF IN SUPPORT OF THE COUNSEL  
FOR THE GENERAL COUNSEL'S CROSS-EXCEPTIONS  
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

William F. LeMaster  
Julie M. Covell  
Counsel for the General Counsel  
National Labor Relations Board  
Subregion 17  
8600 Farley Street  
Suite 100  
Overland Park, Kansas 66212

**Table of Contents**

I. Procedural History..... 1

II. General Counsel’s Exceptions..... 1

III. Relevant Facts..... 2

IV. Argument..... 4

V. Conclusion..... 8

**Table of Cases**

*A & L Underground*, 302 NLRB 467, 469 (1991)..... 6

*Broadway Volkswagen*, 342 NLRB 1244 (2004) ..... 6

*Cibao Meat Products*, 349 NLRB 471, 475 (2007), *enforced* 547 F.3d 336 (2nd Cir. 2008)..... 5

*E.I. DuPont De Nemours*, 355 NLRB 1084 (2010)..... 5

*Made 4 Film*, 337 NLRB 1152 (2002)..... 5

*Moeller Bros. Body Shop*, 306 NLRB 191, 192-193 (1991) ..... 6

*NLRB v. Katz*, 369 U.S. 736 (1962)..... 5

*REC Corp.*, 296 NLRB 1293 (1989) ..... 5

Pursuant to Section 10(c) of the National Labor Relations Act (Act) and Section 102.46 of the National Labor Relations Board's (Board) Rules and Regulations, Counsel for the General Counsel (General Counsel) respectfully submits this Brief in Support of the Counsel for the General Counsel's Cross-Exceptions to Administrative Law Judge Andrew S. Gollin's (ALJ) decision<sup>1</sup> in the above-captioned cases, issued on October 11, 2019.

## **I. Procedural History**

On February 22, 2019, Region 14 Regional Director Leonard Perez issued a Second Consolidated Complaint and Notice of Hearing (Complaint) alleging that Respondent committed numerous violations of Sections 8(a)(1), (5), and 8(d) of the Act. The administrative hearing in this matter took place March 18, 2019 to March 22, 2019. On October 11, 2019, the ALJ issued his decision finding in significant part that Respondent violated the Act as set forth in the Complaint.

## **II. General Counsel's Exceptions (1-4)**

The ALJ found that Respondent violated the Act in three distinct ways with respect to unilateral changes it made to bargaining unit employees' wage rates. First, the ALJ found that Respondent violated Section 8(a)(1) and (5) when it unilaterally continued to pay \$0.15/hour wage increases in January and July 2018. JD 18:1-2. The ALJ also found that Respondent's failure to obtain the Union's consent before modifying the contract to pay the \$0.15/hour wage increases while the parties' collective-bargaining agreement was in effect during the Section 10(b) period between January 23, 2018 and January 28, 2018, violated Sections 8(a)(1) and (5)

---

<sup>1</sup> References will be denoted using the following abbreviations followed by page numbers and line numbers where applicable: Administrative Law Judge's Decision (JD); Trial Transcript (T); General Counsel's Exhibits (GC); Respondent's Exhibits (R); and Joint Exhibits (JT).

within the meaning of Section 8(d) of the Act. JD 18:4-6. Lastly, following the expiration of the parties' collective-bargaining agreement on January 28, 2018, the ALJ found that Respondent violated Section 8(a)(1) and (5) when it created and implemented a new wage system/rates on August 23, 2018, without providing the Union with notice or an opportunity to bargain over the decision or its effects. JD 18:1-4. Although the General Counsel agrees with the ALJ that Respondent violated the Act in these ways, exception is taken to the ALJ's decision to exclude Respondent's payment of wage rates that were inconsistent with the parties' collective-bargaining agreement from January 23, 2018 until Respondent implemented additional unilateral wage changes on August 23, 2018, in violation of Section 8(a)(1), (5), and 8(d) of the Act.

### **III. Relevant Facts**

In or about 2011, Respondent's predecessor, Nebraska Prime Group, voluntarily recognized United Food and Commercial Workers Union Local 293 (Union) as the collective-bargaining representative of all production, maintenance, shag drivers and distribution employees, herein called the Unit, at the facility located at 1009 West M Street, Hastings, Nebraska. Nebraska Prime Group and the Union negotiated a collective-bargaining agreement effective January 28, 2013 to January 28, 2018. Effective January 1, 2015, Respondent acquired Nebraska Prime Group's operation in Hastings and since that date has continued to operate the business of Nebraska Prime Group in basically unchanged form, has employed as a majority of its employees who were previously employees of Nebraska Prime Group, and adopted the collective-bargaining agreement between Nebraska Prime Group and the Union. Since approximately January 1, 2015, Respondent has acted as a successor to Nebraska Prime Group. GC 1-EEE, p. 3, 7-8; GC 1-GGG, p. 4, 5; JT 26.

The parties' collective-bargaining agreement sets forth negotiated wage rates for all

bargaining unit employees. JT 1, p. 7-8, 13-16. The parties negotiated base wage rates for employees by groups. Job classifications were negotiated into one of several groups. Groups 1-5 had hourly base rates of \$9.00, \$9.50, \$10.00, \$10.50, and \$11.00. JT 1, p. 13-16. Maintenance crew and electricians had separate base rates. JT 1, p. 16. Under Article 1 – Rates of Pay Provision, the parties negotiated wage increases that went into effect on the effective date of the collective-bargaining agreement (January 28, 2013). JT 1, p. 7. Employees who had passed their probationary period<sup>2</sup> as of the effective date of the collective-bargaining agreement received an additional 30 cents on that date. JT 1, p. 7. Going forward, approximately every six months at the end of July and January, eligible bargaining unit employees received a 15 cent increase to their hourly wages. JT 1, p. 7-8. The only exception to the gradual increases were a group of approximately 28 job classifications identified on page 8 of the collective-bargaining agreement. JT 1, p. 8. In lieu of gradual increases every six months, the parties negotiated a \$2.00/hour increase for each job classification effective January 28, 2013. JT, 1, p. 8. The last wage increase negotiated by the parties was a 15 cent increase for all bargaining unit employees who had passed their probationary period as of July 31, 2017. JT 1, p. 8.

During the hearing, Respondent’s Human Resources Manager Lidia Acosta identified Joint Exhibit 21 as the base wage scale that Respondent used from at least January 25, 2017 until August 23, 2018. T. 583, 587, 592-593; JT 21. The wage scale set forth in Joint Exhibit 21 breaks down each hourly job classification into six groups with hourly base wage rates of \$9.00, \$9.50, \$10.00, \$10.50, \$12.00, and \$13.00. JT 21, p. 1-2. Acosta testified that during the time period that Joint Exhibit 21 was used all employees were hired on at \$9/hour and they remained at that wage rate until their supervisor determined that they had become proficient enough in

---

<sup>2</sup> Article 17 – Seniority defines probationary period as sixty (60) days. JT 1, p. 9.

their position to be deemed qualified. At that time, the supervisor submitted a written request to human resources for the employee to receive the base rate for their job classification. Approval of the pay increase then rested with CEO Fischel Ziegelheim. T. 583-587, 838-839; GC 6, p. 2, 4, 6, 8, 10, 13, 15.

Joint Exhibit 21 establishes that during the relevant time period, Respondent paid bargaining unit employees wages that were inconsistent with the negotiated rates in the contract. The wage scale set forth in Joint Exhibit 21 differs from those wage rates set forth in the collective-bargaining agreement for several job classifications. The following table identifies examples of job classifications for which Respondent unilaterally paid rates different than the collective-bargaining agreement (JT 21):

| Job Classification | CBA Rate | Rate effective 1/25/17 |
|--------------------|----------|------------------------|
| Janitor            | \$9.50   | \$9.00                 |
| Pallet Jack        | \$9.50   | \$9.00                 |
| Trim Conveyor      | \$10.00  | \$9.50                 |
| Circle Pen         | \$11.00  | \$10.50                |
| Forklift           | \$10.50  | \$10.00                |
| Grinder Operator   | \$10.50  | \$10.00                |
| Dehorner           | \$11.00  | \$10.50                |

#### **IV. Argument**

In his decision, the ALJ acknowledged that the wages Respondent paid bargaining unit employees between January 23, 2018 and August 23, 2018, were wages that it unilaterally implemented without notification to the Union.. The ALJ wrote, “In around late January 2017,

Respondent unilaterally instituted a new wage scale, set forth in Joint Exhibit 21. Respondent did not notify or discuss with the Union before implementing these different wage rates.” JD 16: fn. 18. Yet, without explanation or support, the ALJ concluded that the “unfair labor practice charges at issue do not encompass the implementation of these changes because they occurred outside the Section 10(b) period...” JD 16: fn. 18. The ALJ erred in reaching this conclusion. Wages are a mandatory subject of bargaining. *NLRB v. Katz*, 369 U.S. 736 (1962). Unilateral changes to a mandatory subject is a per se breach of the Section 8(a)(5) duty to bargain and no showing of a bad-faith motive is required. *Id.* at 743. The parties’ 2013-2018 collective-bargaining agreement contained wage rates and designated dates for all wage increases for bargaining unit employees. JT 1, p. 7-8, 13-16. Although the contract expired on January 28, 2018, it is well-settled that, even though a collective bargaining agreement has expired, an employer is obligated to adhere to the terms and conditions of employment of its employees established by the contract and may not make any changes in these terms, absent a new agreement or good faith bargaining to an impasse. *Cibao Meat Products*, 349 NLRB 471, 475 (2007), *enforced* 547 F.3d 336 (2nd Cir. 2008); *Made 4 Film*, 337 NLRB 1152 (2002); *REC Corp.*, 296 NLRB 1293 (1989). The record established that between January 23, 2018 and August 23, 2018, Respondent paid wages that were inconsistent with the wages negotiated with the Union and set forth in the parties’ collective-bargaining agreement. Respondent offered no evidence in the record that it negotiated the terms identified in Joint Exhibit 21 or that the Union agreed to those wages. In fact, Respondent stipulated that it adopted the terms of the 2013-2018 collective-bargaining agreement and it “will not present a defense that it had no legal obligation to abide by the terms of the collective-bargaining agreement...” JT 1, 26. The ALJ acknowledged Respondent “unilaterally instituting” the wages set forth in Joint Exhibit 21

without notification or discussion with the Union. JD 16: fn, 18. Contrary to the ALJ's conclusion set forth in the same footnote, the unfair labor practice charges at issue do encompass Respondent's use of the wage rates identified in Joint Exhibit 21. It is undisputed that the 10(b) period in this matter dates back to January 23, 2018. "The Board's long-settled rule [is] that the 10(b) period commences only when a party has clear and unequivocal notice of a violation of the Act." *A & L Underground*, 302 NLRB 467, 469 (1991). "[T]he burden of showing that the charging party was on clear and unequivocal notice of the violation rests on the respondent." *Id.* The record is devoid of any evidence to establish the Union had knowledge of Respondent's use of wages that contradicted the parties' collective-bargaining agreement. Respondent offered no evidence or testimony to support its burden. As the ALJ acknowledged in his decision, Respondent offered no defense to the General Counsel's allegations related to changes to wage rates. Respondent did not even raise the subject of wages in its post-hearing brief. JD 17:33-35.

The record also fails to set forth any evidence that the Union could be charged with constructive knowledge because it should have known bargaining unit employees' statutory rights were being violated. See, e.g., *Broadway Volkswagen*, 342 NLRB 1244, 1246-1247 (2004)(constructive knowledge of wage increases not found where the union remained in contact with employees who did not disclose the changes); *c.f. Moeller Bros. Body Shop*, 306 NLRB 191, 192-193 (1991)(union charged with constructive knowledge of wage increases due to its failure to exercise due diligence where the employer did not deny the union access and the employer did not attempt to hide its misconduct). Contrary to *Moeller Bros.*, the record established that Respondent took steps to prevent the Union from obtaining information about its bargaining unit employees. Respondent admittedly banned the Union from its facility starting in late June 2017 and the ban was current as of the NLRB hearing March 18-22, 2019. T. 331-332,

335, 590, 734, 749-750. For almost two years, Respondent did not permit the Union access to Respondent's facility and bargaining unit employees. Not only did Respondent interfere with the Union's ability to communicate with bargaining unit employees, it refused to provide the Union with documents regarding employees' wages. Beginning on November 6, 2017, the Union requested basic presumptively relevant information related to bargaining unit employees, including documents identifying their wages. T. 657; JT 2. Human Resources Manager Lidia Acosta confirmed in her testimony that around the same time Respondent banned the Union from the facility in late June 2017, CEO Fischel Ziegelheim and his business partner Michael Koenig prohibited Acosta from giving the Union any information about employees going forward. T. 591. As of the March 18-22, 2019 hearing, Respondent had maintained this position and refused to provide the Union with information showing bargaining unit employees' wage rates. T. 666. In doing so, as the ALJ found, Respondent violated Section 8(a)(1) and (5) by its continued refusal to provide the Union with that information. As such, the record contains no evidence that the Union had actual or constructive knowledge that Respondent had changed employees' wage rates and paid wages inconsistent with the collective-bargaining agreement during the relevant time period.

The record supports the finding that Respondent's payment of wage rates contrary to the parties' collective-bargaining agreement between January 23, 2018 and August 23, 2018 violated Section 8(a)(1) and (5) of the Act. As Respondent paid these unilaterally determined wages while the contract remained in effect between January 23, 2018 and January 28, 2018, Respondent unilaterally modified terms of the collective-bargaining agreement in violation of Section 8(d) of the Act. These violations are not barred by Section 10(b) of the Act.

## V. Conclusion

To allow the ALJ's finding to stand allows the Respondent to benefit from committing unfair labor practices that (1) completely disregard its basic bargaining obligations under the Act and (2) served as a mechanism to mask Respondent's failure to compensate bargaining unit employees with the wages that were collectively bargained with the Union. Respondent took advantage of its employees and those employees should be made whole. The General Counsel respectfully requests the Board overturn the ALJ's finding and conclusion that Respondent's payment of wages inconsistent with the parties' collective-bargaining agreement between January 23, 2018 and August 23, 2018, was time barred under Section 10(b) of the Act. The General Counsel further requests the Board modify the ALJ's Proposed Order, Remedy, and Notice to Employees to include an affirmative obligation that Respondent make whole those affected Unit employees for any loss of wages suffered as a result of Respondent's failure to pay wage rates consistent with the collective-bargaining agreement between January 23, 2018 and August 23, 2018.

Dated: November 22, 2019

Respectfully Submitted,



---

William F. LeMaster  
Julie M. Covell  
Counsel for the General Counsel