

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

**NORTHSTAR MEMORIAL GROUP, LLC DBA
SKYLAWN FUNERAL HOME, CREMATORY
AND MEMORIAL PARK**

And

**Cases 20-CA-227245
20-CA-229015**

**CEMETERY WORKERS, GOLF COURSES AND
GREEN ATTENDANTS, SEIU LOCAL 265**

**GENERAL COUNSEL’S ANSWERING BRIEF TO RESPONDENT’S
EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE’S DECISION**

I. INTRODUCTION

This case is before the Board on exceptions to Administrative Law Judge Sharon Steckler’s (ALJ) August 23, 2019 Decision and Order filed by Northstar Memorial Group, LLC dba Skylawn Funeral Home, Crematory and Memorial Park (Respondent). The ALJ correctly found that Respondent violated the Act by unilaterally changing the work schedules of bargaining unit employees without affording Cemetery Workers, Golf Courses and Green Attendants, SEIU Local 265 (Union) an opportunity to bargain about those changes in violation of Section 8(a)(5) of the Act, and by telling or requesting a unit employee to remove a pro-union sign from his personal vehicle and blocking the view of that sign while the vehicle was parked at Respondent’s facility in violation of Section 8(a)(1) of the Act. Simply put, Respondent’s exceptions do not withstand scrutiny.

II. **RESPONDENT UNILATERALLY CHANGED WORK SCHEDULES TWICE
IN VIOLATION OF SECTION 8(a)(5) OF THE ACT
(Respondent Exceptions 6-21)**

The essential facts are not in dispute with respect to this allegation. The employees had been scheduled for a Monday through Friday straight-time work week since at least 2011, including the last twenty months after the Collective-Bargaining Agreement expired on December 31, 2017.(ALJD p. 17) On August 16, 2018,¹after it implemented the change directly with the caretakers, Respondent notified the Union that it was changing the weekly schedule of six of the nine caretakers, i.e., unit employees, to either Sunday through Thursday or Tuesday through Saturday. (ALJD p. 19)² Respondent implemented this change effective Sunday, September 9. By making this change, Respondent not only changed the work schedules of the unit caretakers but also deprived them of premium pay for working Saturday or Sunday. Under the Agreement, work performed outside of the employee’s regular work week is paid at time-and-one-half and work performed on Sunday is performed at double time.

A. Respondent Unilaterally Changed a Well-Established Past Practice of Seven Years That Had Become a Term and Condition of Employment

An important pillar of the law of collective bargaining is that an employer violates Section 8(a)(5) of the Act if it makes a unilateral change in a term and condition of employment involving a mandatory subject of bargaining without first bargaining to impasse. See, e.g., *NLRB v. Katz*, 369 U.S. 736 (1962). The Board has uniformly held that an employer violates the Act if it unilaterally changes work schedules. See, e.g., *Green Apple Supermarket of*

¹ All dates, unless otherwise noted, are in 2018.

² References to the Administrative Law Judge’s Decision will be designated as (ALJD p. ____); references to the transcript record will be designated as (Tr.____); references to Respondent’s exceptions will be designated as (R. Exc.____); and references to Respondent’s brief in support exceptions will be designated as (R. Br. ____).

Jamaica, Inc., 366 NLRB No. 124 (2018); *Sunrise Mountainview Hospital, Inc.*, 357 NLRB 1406 (2011); *Bloomfield Health Care Center*, 352 NLRB 252 (2008), *enfd.* 372 Fed. Appx 118 (2nd Cir. 2010) (“With respect to the requirement that two employees begin working on weekends, precedent holds that an employer’s established past practice can become an implied term and condition of employment.”) This applies to terms and conditions of employment established by past practice. *Katz, supra* at 746; see, e.g., *Finch, Pruyn & Co.*, 349 NLRB 271, 277 n. 31 (2007); *Post Tribune Co.*, 337 NLRB 1279, 1280 (2002).

The practice that caretakers were scheduled only on a Monday through Friday straight-time basis commenced no later than February 2011 and continued until September 9 when Respondent changed the practice. The ALJ found that, during the term of the agreement, Section 11.2 of the Agreement allowed Respondent to schedule employees on start days other than Monday. (ALJD p. 27) Section 11.2 provides:

Regular Work Week. The regular work week at straight-time shall consist of any five (5) consecutive eight (8) hour working days, Sunday through Saturday. Employees may volunteer for assignment to a regular work week which includes Saturday or Sunday or both. If an insufficient number of qualified employees volunteer For such assignment, assignment...shall be made by inverse seniority

Respondent, however, never elected to do so for, at least, seven and one-half years. (ALJD, p. 17) A practice seven years long has been found to be established and, therefore, an implied term and condition of employment. See *Intermountain Rural Electric Assn.*, 984 F.2d at 1568 (“the practice has persisted for at least seven years.”).

The ALJ found that Section 11.2 is silent on the issue of its applicability after years of scheduling on a stable basis. (ALJD p. 27) Although it sets forth Respondent’s scheduling rights and restrictions on a clean slate, it does not state or even imply that a seven-year practice

of scheduling only on a Monday through Friday basis could be changed at will by Respondent. Rather, this stable practice became a term and condition of employment subject to the longstanding *Katz* rules regarding unilateral changes. See *Control Services, Inc.*, 303 NLRB 481, 483-85 (1991) (contractual provision that employees are not guaranteed given number of hours is not a waiver of union's right to bargain over changes to number of hours); *KIRO, Inc.*, 317 NLRB 1325 (1995) (contractual right to schedule employees that makes no specific reference to right to increase hours or workload lacks the required specificity to waive union's right to bargain over increased hours).

The ALJ found that this seven year practice "that continued over a year and a half after the collective-bargaining agreement expired" constituted the status quo, and that this status quo must be maintained after the expiration of the contract "in order to avoid running afoul of the unilateral change doctrine." *Prime Healthcare Services-Encino LLC v. NLRB*, 890 F. 3d 286, 293 (DC Cir.2018), citing *Wilkes-Barre Hospital Co., LLC v. NLRB*, 857 F.3d 364, 377 (DC Cir.2017) enfg. 362 NLRB 1212 (2015). (ALJD p. 27) In *Wilkes-Barre*, the Board upheld the judge's conclusion that the practice of giving nurses wage rate increases the year after they reached a milestone work anniversary continued after contract expiration as the status quo as a matter of statute rather than of contract. The ALJ concluded, on the basis of *Wilkes-Barre*, that, after a contract has expired and the parties are negotiating a new one, the status quo controls whether an employer may implement a unilateral change. The practice was the status quo because, as stated by the ALJ, "this uninterrupted and accepted custom had thus become an implied term and condition by mutual consent of the parties." (ALJD p. 29) General Counsel submits that this is fundamental unilateral change law as established in *Katz* and its progeny applying it to past practices after the expiration of the collective-bargaining agreement.

B. Section 11.2 Does Not Survive Contract Expiration

Respondent contends that the Union waived its right to bargain over schedule changes when it agreed to Section 11.2 of the Agreement. In *WKYC-TV*, 359 NLRB 286 (2012), the Board explained why contract provisions that contain negotiated waivers, such as management rights, no-strike, and arbitration provisions do not survive contract expiration:

It is certainly true that a select group of contractually established terms and conditions of employment do not survive contract expiration, even though they are mandatory subjects of bargaining. In agreeing to each of these arrangements, however, parties have waived rights that they otherwise would enjoy in the interest of concluding an agreement, and such waivers are presumed not to survive the contract....The Board has also held that a management-rights clause normally does not survive contract expiration, because “the essence of [a] management-rights clause is the union’s waiver of its right to bargain. Once the clause expires, the waiver expires, and the overriding statutory obligation to bargain controls.”

Id. at 288. See also *Beverly Health & Rehabilitation Services*, 335 NLRB 635, 636 (2001), overruled on other grounds in *Raytheon Network Centric Systems*, 365 NLRB No. 161 (2017).³ See also *Paul Mueller Co.*, 332 NLRB 312, 313 (2000); *Ryder/Ate*, 331 NLRB 889 n. 1 (2000); *Ironton Publications*, 321 NLRB 1048 (1996), *Blue Circle Cement*, 319 NLRB 954 (1995).

For the same reason, Section 11.2 does not survive the expiration of the Agreement. The general rule of *Katz* is that employers may not unilaterally change terms and conditions of employment including terms and conditions established by past practice. Here, Respondent defends on the ground that Section 11.2 is a negotiated contractual waiver of the Union’s right to bargain over schedule changes. If Section 11.2 is indeed a negotiated waiver of the Union’s right to bargain, it does not survive contract expiration.

³ *Raytheon* overruled *Beverly I* on the issue of whether past practices survive contract expiration and held that they do. In *Raytheon*, the Board held that there is no unlawful unilateral change if the Employer makes no change to its past practice. Here, Respondent changed its practice of many years without affording the Union the opportunity to bargain over it. Slip Op. at 12.

Further, in addition to the fundamental Board jurisprudence discussed above in *WKYC-TV*, the ALJ found that the waiver contained in Section 11.2 only existed while the contract was in effect. This finding was based on the totality of the collective-bargaining agreement including the zipper clause and her finding that Section 11.2 is not a clear and unmistakable waiver of the Union’s right to bargain about schedule changes post contract expiration.

C. The Cases Cited by Respondent Do Not Support Its Position

The cases cited by Respondent in support of its exceptions do not support its position. In *MV Transportation*, 368 NLRB No. 66 (Sep. 10, 2019), the Board adopted the “contract coverage” test utilized by several Courts of Appeals instead of its longstanding “clear and unmistakable waiver” test to evaluate whether a union waived its right to bargain in a collective-bargaining agreement. This does not help Respondent because (1) the ALJ found that Section 11.2 was a clear and unmistakable waiver during the term of the parties’ contract but not after its expiration, and (2) the contract coverage test, by definition, does not apply to expired contracts.

Respondent argued that Section 11.2 constitutes a clear and unmistakable waiver of the Union’s right to bargain schedule changes. The ALJ agreed with respect to the period when the contract was in existence. Therefore, the same result is reached under the new “contract coverage” test and the prior “clear and unmistakable waiver” test when the contract is in existence. But, here, the contract had expired. In *MV Transportation*, the Board held that the “contract coverage” test applies only when the contract is in effect. Slip op. at 15, n. 36 (“Neither *Raytheon* nor this decision speaks to the status of contract provisions authorizing unilateral employer action after the contract containing the provisions has expired.”) Slip op at 11: “...the Board will assess the merits of [the contract coverage] defense by undertaking the

more limited review necessary to determine whether the parties' collective-bargaining agreement covers the disputed unilateral change (or covered it, if the disputed change was made during the term of an agreement that has since expired.)” (Emphasis added.) Here, of course, the unilateral change was made 20 months after the expiration of the contract.

Respondent contends there is no evidence to establish that the Union only waived its right to bargain over schedule changes during the terms of the agreement. Respondent misconstrues the fundamental meaning of the Board's unilateral change law. Employers are prohibited from making unilateral changes to terms and conditions of employment without giving notice or an opportunity to bargain to the union as a matter of statute, not contract. Certain provisions typically found in collective-bargaining agreements, such as management rights, no strike, and arbitration provisions do not survive contract expiration as a matter of statute, not contract. As explained above, such negotiated waivers are presumed not to survive the contract. Respondent established herein that Section 11.2 is a negotiated waiver; hence, it does not survive contract expiration as a matter of statute, not contract.

Respondent seeks to rely on *Raytheon Network Centric Systems*, 365 NLRB No. 161 (2017). In *Raytheon*, the Board, overruling *E.I. du Pont de Nemours*, 364 NLRB No. 113 (2016) held past practices survive contract expiration and there is no unlawful unilateral change if the employer makes no change to its past practice. Here, Respondent unilaterally changed its practice of many years. *Raytheon* would, therefore, seem to oppose, not support, Respondent's position. Respondent argues that “a logical reading of *Raytheon's* holding would actually suggest that the Respondent continued to maintain past practice post contract expiration.” But the undisputed facts found by the ALJ is that the Monday through Friday work schedule was the status quo established by past practice, not Respondent's never-exercised right to change work

schedules set forth in Section 11.2. Respondent apparently confuses past practice with contractual provision. Its reliance on *Raytheon* is misplaced.

In its exception brief, Respondent continues to rely on cases that the ALJ pointed out were inapplicable because they arose before the collective-bargaining agreement: *Continental Telephone Co. of Calif.*, 274 NLRB, 1452 (1985), *Baptist Hospital of East Tennessee*, 351 NLRB 71 (2007); *Good Samaritan Hosp.*, 335 NLRB 901 (2001). Respondent is comparing apples with oranges and, thereby, missing the point. Respondent also misses the point why the ALJ cited *Bottom Line Enterprises*, 302 NLRB 373 (1991). The ALJ cited this case to question the veracity of Respondent's claim that it was severely prejudiced by its insistence that General Counsel changed the theory of its case. Since *Bottom Line Enterprises* deals with post-expiration changes of employment terms and conditions, the ALJ gently chided that Respondent's counsel should have seen the handwriting on the wall.

**D. Respondent's Complaint that General Counsel Changed its Theory
of the Case to its Detriment Has No Merit
(Respondent Exceptions 4-5)**

Respondent complains that Counsel for the General Counsel advised it, after the trial concluded but three weeks before post-hearing briefs were due, that he would argue in the brief that Section 11.2 did not survive the expiration of the contract. Respondent complained that General Counsel's opening statement at the trial only referred to past practice and not the expiration of the contract. The ALJ took Respondent's complaints seriously and gave Respondent the option to re-open the hearing. Respondent did not avail itself of this opportunity to present additional evidence which it claims to have foregone on reliance of General Counsel's pre-hearing statements.

General Counsel submits the ALJ dealt with Respondent's claimed due process issue thoroughly, pointing out the inapplicability of the cases Respondent cited. The ALJ also correctly pointed out that General Counsel complaint theory was that Respondent unilaterally changed a term and condition of employment and that the contract expiration argument was in response to Respondent's anticipated defense of waiver. General Counsel, less charitably, points out that the ALJ called Respondent's bluff by giving it the opportunity to re-open the hearing and that Respondent chose not to do so because it had no other evidence to offer. Here, the facts on the unilateral change issue are undisputed. The issues on this allegation of the Complaint are purely legal. What possible evidence could Respondent have introduced to affect the ALJ's findings and conclusions? Because General Counsel notified Respondent three weeks before the post-hearing briefs were due that it would be raising the implications of the contract's expiration, Respondent was not prejudiced in the slightest. Respondent chose not to re-open the hearing because it had no further evidence to offer. Indeed, as the ALJ noted, Respondent filed a supplemental brief in which it spent 75% on arguing it was still denied due process and about 25% on the actual issue.

III. RESPONDENT RESTRAINED AND COERCED EMPLOYEES WHEN IT ASKED AN EMPLOYEE TO REMOVE A SIGN AND THEREAFTER OBSTRUCTED ITS VIEW (Respondent Exceptions 21-25)

The ALJ found that Respondent violated Section 8(a)(1) of the Act when its agent Molina requested employee Strube to remove a pro-union sign that was displayed on his personal vehicle parked at the designated yard location on three occasions and, when Strube declined to do so, parked his company vehicle so as to obstruct the sign from being seen by the public and Strube's coworkers. (ALJD p. 13-14) General Counsel submits the ALJ dealt with this issue thoroughly and persuasively. Respondent offered no facts and no authority to warrant

overruling the findings and conclusions of the ALJ. Accordingly, General Counsel respectfully submits the Board should overrule Respondent's exceptions on this issue and adopt the ALJ's decision as its own.

**IV. RESPONDENT'S CLAIM THAT THE COMPLAINT SHOULD BE
THROWN OUT AS A SANCTION FOR THE UNION'S NONCOMPLIANCE
WITH ITS SUBPOENA IS NOT SUPPORTED BY THE LAW
(Respondent Exception 3)**

In its Exceptions Brief, Respondent objects that the ALJ did not strike the testimony of Joel Strube as a sanction for the Union's failure to comply with its Subpoena Duces Tecum issued for the trial. (R. Br. 19-24) The exclusion of Strube's testimony would not impact the unilateral change issue, but it provided the basis for General Counsel's case alleging the Section 8(a)(1) violations.⁴ The ALJ excluded General Counsel Exhibit No. 14, prior consistent statements which General Counsel offered to support Strube's trial testimony, as a sanction. The ALJ concluded that excluding Strube's testimony was too severe.

General Counsel submits the ALJ's rejection of Respondent's request for the exclusion of John Strube's testimony was warranted and should be sustained. First, Respondent contends the ALJ erred by failing to order the General Counsel to seek subpoena enforcement. However, Respondent never requested the ALJ nor the Regional Director for such enforcement. The Board has held that a party seeking sanctions for the failure of another party to comply with a subpoena must first request the Regional Director, and seek a continuance in the trial, to petition for enforcement of the subpoena. *Skyline Builders, Inc.*, 340 NLRB No. 13; *Best Western City View Motor Inn*, 325 NLRB 1186, 1187. Respondent's failure to request either the Regional

⁴ The ALJ credited Strube over Respondent's witnesses on a minor fact of whether the employees "volunteered" for their shifts under the changed schedule. (ALJD p. 24). This testimony is immaterial to the resolution of the legal issues herein.

Director to enforce its subpoena or the Administrative Law Judge for a continuance to seek enforcement of the subpoena, or both, warrant rejection of its request for additional sanctions herein.

Board law provides for certain remedies under certain conditions when a Charging Party fails to produce documents subpoenaed by a respondent. See, generally, National Labor Relations Board, Division of Judges, Bench Book, January 2019 (hereinafter “Bench Book”), at Section 8-720 (pp. 99-102). The Board may impose a range of sanctions for subpoena noncompliance, “including permitting the party seeking production to use secondary evidence, precluding the noncomplying party from rebutting that evidence or cross-examining witnesses about it, and drawing adverse inference against the noncomplying party.” *McAllister Towing & Transportation Co.*, 341 NLRB 394, 396 (2004).

However, the Board must balance the need to protect its processes against its Section 10(c) mandate to remedy unfair labor practices. See *Toll Mfg. Co.*, 341 NLRB 832, 836 (2004). The Board is careful not to impose drastic sanctions disproportionate to the alleged noncompliance. See, e.g., *Teamsters Local 917 (Peerless Importers)*, 345 NLRB 1010, 1011 (2005) (reversing judge’s dismissal of the complaint as sanction for party’s noncompliance with subpoena, due to its harshness and “perhaps unprecedented” nature and the availability of lesser sanctions). The burden of establishing noncompliance lies with the party that directed issuance of the subpoena. See *R.L. Polk & Co.*, 313 NLRB 1069, 1070 (1994).

The Board has also emphasized that “the General Counsel proceeds, not in vindication of private rights, but as the representative of an agency entrusted with the power and duty of enforcing the Act in which the public has an interest.... *Alberci-Fruin-Colnon*, 226 NLRB 1315, 1316 (1976).” *Marquez Brothers Enterprises, Inc.*, Cases 21-CA-039581, 21-CA-

039609, Order dated September 7, 2017, 2017 WL 3953408 (reversing judge’s prohibition of General Counsel from questioning witnesses about interim earnings as discovery sanction). See also *Teamsters Local 917 (Peerless Importers)*, *supra*. In this case, Charging Party Peerless, represented by counsel, failed to furnish subpoenaed records absent a protective order, and the judge dismissed the complaint as a sanction. The Board found the judge abused his discretion by imposing the “harsh sanction” of dismissal for Peerless’ refusal to comply with the subpoena. The Board, citing the Bench Book, noted there were a number of less drastic sanctions available to the judge: “Although the judge had available a wide range of seemingly appropriate sanctions, he took the unusual, and perhaps unprecedented, step of dismissing the complaint. See *Smitty’s Supermarkets*, 310 NLRB 1377, 1380 (1993) (“[T]he Board apparently has never imposed the sanction of dismissal because of subpoena noncompliance.”)”

Where the issue is the Charging Party’s failure to comply with a respondent’s subpoena, the Charging Party must be found to have willfully or intentionally failed to comply. In *Sisters Camelot*, *supra*, the respondent subpoenaed the alleged discriminatee to produce at the hearing essentially personnel and work records. After producing only two minor documents, he acknowledged under cross-examination that he had forwarded emails concerning the employer to the General Counsel but had not produced those documents. The respondent asked the judge to draw an adverse inference from this failure to produce, believing that the emails might contain information prejudicial to his claim. The judge deferred ruling and invited the parties to brief the issue. The Board stated: “In this context, it would not have been unreasonable for Allison, *who was unrepresented by counsel*, to conclude the emails he forwarded to the General Counsel were not among the ‘documents’ sought by the Respondent. Certainly, there was no evidence that he intentionally withheld responsive information.” (Emphasis added.) See also

Marquez Brothers, supra, where the Board emphasized that the discriminatees were unrepresented by counsel.

Here, Rodriguez, unrepresented by counsel, was served with Respondent's subpoena and sought to comply with it. Most of the responsive documents in his possession had been submitted to the Board as exhibits either to his affidavit or Stube's affidavit. Respondent's subpoena specifically excluded affidavits furnished to the Board. Whether Respondent's exclusion of Board affidavits also excluded exhibits attached to affidavits is an issue that experienced labor lawyers, Administrative Law Judges, Board Members and the judiciary could reasonably debate, but the existence of this debate means at the very least that the subpoena was ambiguous on this point. General Counsel respectfully submits that sanctioning Rodriguez and, for that matter, the General Counsel and the public interest because Rodriguez could not divine Respondent's intent in excluding Board Affidavits would not be appropriate. Rodriguez did not intentionally or willfully fail to comply with Respondent's subpoena. See *Sisters Camelot, supra* (not unreasonable for Allison to conclude documents submitted to Board were not documents sought in subpoena).

Here, Respondent has not shown it was prejudiced by Charging Party's failure to turn over subpoenaed documents at the start of the hearing. All the documents requested in the subpoena, with one exception, were turned over in mid-morning of the first day of hearing after Strube's testimony on direct and before his cross-examination. In *Sisters Camelot, supra* n. 20, the Board specifically addressed the issue of lack of prejudice from an alleged noncompliance with a subpoena and concluded that not only was the "extreme and unusual sanction of denying reinstatement and backpay" not warranted but also the respondent's request for an adverse inference:

Second, the Respondent has not shown any prejudice resulting from Allison's alleged noncompliance. At the hearing and in its exceptions brief, the Respondent, without explanation, merely asserted that it had been prejudiced. It made no offer of proof, noting in its brief only that Allison "is known to frequently blog and make posts on social media websites." [Footnote omitted.] It in no way described the arguments or defenses that it had been unable to raise. Thus, we cannot determine what effects the emails might have had on Allison's right to reinstatement and backpay. See, e.g., *CPS Chemical Co.*, 324 NLRB 1018, 1019 (1997), *enfd.* 160 F.3d 150 (3rd Cir. 1998) (no prejudice from opposing party's arguable noncompliance with subpoena duces tecum because [t]he Respondent identifie[d] no valid point that it was unable to prove for lack of other requested documentation"); *Addressograph-Multigraph Corp.*, 207 NLRB 892, 892 n. 2 (1973) (failure of judge to require opposing party to comply with subpoena duces tecum not prejudicial, as "[t]he record fails to reveal the significance of the additional information sought and how it would affect our conclusions herein").

For the foregoing reasons, General Counsel requests that the Board uphold the ALJ's decision not to impose sanctions other than the sanction she imposed, i.e., the exclusion of General Counsel Exhibit No. 14.

IV. CONCLUSION

Respondent's exceptions, as shown above, lack merit in their entirety. Further, the record evidence and relevant case law support the ALJ's findings herein. Accordingly, based on the foregoing and the record as a whole, General Counsel respectfully requests the Board affirm the ALJ's decision.

Dated at San Francisco, California, this 2nd day of December 2019.

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