

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

ASOCIACION DE EMPLEADOS DEL
ESTADO LIBRE ASOCIADO DE
PUERTO RICO

And

UNION INTERNACIONAL DE
TRABAJADORES DE LA INDUSTRIA
DE AUTOMOVILES, AERESPACIO E
IMPLEMENTOS AGRICOLAS, U.A.W.,
LOCAL 1850

Cases: 12-CA-218502;
12-CA-232704

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12-CA-232704

BRIEF IN SUPPORT OF RESPONDENT'S EXCEPTIONS

PURPOSE OF BRIEF

This Brief in Support of Respondent's Exceptions (Brief) is submitted on behalf of Asociación de Empleados del Estado Libre Asociado de Puerto Rico (hereinafter referred to as AEELA or Respondent) to the Decision and Recommended Order of Administrative Law Judge (ALJD) issued by Administrative Law Judge Sharon Levinson Steckler (ALJ) dated November 6, 2019.

STATEMENT OF CASE

The Charge in Case 12-CA-218502 was filed by the United Auto Workers, Local 1850 (hereinafter referred to as "the Union") on April 16, 2018 and was amended on June 19, 2018. A Complaint and Notice of Hearing was issued in Case 12-CA-218502 on August 31, 2018. The Union subsequently filed Charge 12-CA-232704 on December 13, 2018, and an amended charge on March 4, 2019. General Counsel issued an Order Consolidating Cases, and a

Consolidated Complaint Notice of Hearing (*Complaint*) on February 27, 2019. The *Complaint* contends that Respondent unilaterally changed the terms and conditions of employment of unit employees by paying the 2017 and 2018 Christmas Bonus amounts as provided in Puerto Rico's Law No. 148 of 1969 (a maximum of \$600.00), rather than at a higher rate, in alleged violation of Section 8(a)(1) and (5) of the Act.

On August 9th, 2019 General Counsel, Respondent and the Union entered a Joint Motion and Stipulation of Facts and Documents. Translated Exhibits were submitted on September 11, 2019. General Counsel, Respondent and the Union filed briefs to the ALJ on October 9, 2019 (ALJD, at page 2, line 4-5, mistakenly states that the parties submitted their briefs on October 16, 2019).

On November 6, 2019 the ALJ issued the ALJD in these cases.

STATEMENT OF FACTS

Respondent adopts, and will not repeat, the ALJ's recitation of facts regarding "Jurisdiction" (ALJD page 2, L. 10-25), and "The Parties' History of Labor Relations" (ALJD page 2, L. 26-46, page 3, L. 2-8).

Respondent excepts to the ALJ's recitation of facts regarding "The Christmas Bonuses" (ALJD pages 3-6), as follows:

The first paragraph, under the heading "The Christmas Bonuses" (ALJD page 3, Lines 10-17), is adopted and will not be repeated.

The next paragraph under the heading "The Christmas Bonuses" offers an incomplete and defective quote of Article 41 of the collective bargaining agreement (ALJD page 3, L.19-32), which pursuant to the stipulated facts and exhibits (Joint Exhibit 4(b), page 44-45) should

instead read as follows:

The Association shall grant the Christmas Bonus as provided in Law 148 of June 30, 1969, as amended, with the following modification:

Eight point sixty percent (8.60%) of the salaries earned up to a maximum of \$37,000 in 2013

Eight point sixty percent (8.60%) of the salaries earned up to a maximum of \$38,000 in 2014

Eight point sixty-five percent (8.65%) of the salaries earned up to a maximum of \$39,000 in 2015

Eight point sixty-five percent (8.65%) of the salaries earned up to a maximum of \$40,000 in 2016

Salaries to be considered shall be the ones earned between October 1st of the previous year and September 30th of the year corresponding to the bonus.

These next sections (ALJD page 3, Lines 34 to end of page) (ALJD page 4, up to line 3) under the heading “The Christmas Bonuses”, are adopted and will not be repeated.

The following paragraph (ALJD page 4, L.5-10) is an inaccurate finding of fact, as it pertains to whether Law No. 148 of June 30, 1969, 29 L.P.R.A. 506, applies to employees covered by a collective bargaining agreement, and particularly to Respondent’s Union employees. The blanket statement that the statutory provisions of Law No. 148 do not apply when employees are covered by a collective bargaining agreement, fails to even mention nor recognize that the plain language of said Article 41 states the following “The Association **shall grant the Christmas Bonus as provided in Law 148 of June 30, 1969, as amended,** with the following modification:” (Joint Exhibit 4(b), page 44-45, emphasis added). In other words, that in this case there is plain contractual language by which the parties agreed for the Christmas Bonus to be paid as provided by Law No. 148, regardless of whether the law applies to union employees by its own terms.

ALJD page 4, Lines 12-27, are adopted and will not be repeated, although it is Respondent AEELA’s position that whether the “zipper” clause of Article 53 should have had

effect is immaterial to the case at hand, because AEELA did in fact pay the Christmas Bonuses for 2017 and 2018 according to the plain language of Article 41 of the expired 2013-2017 CBA (Joint Exhibit 4(b)) .

Respondent excepts to the ALJ's recitation of facts, item IV, entitled "In 2017 and 2018 Respondent Reduced the Christmas Bonus Payments" (ALJD page 4, Lines 29-35, Page 5, Lines 1-40), as follows.

The ALJ's findings of fact in ALJD page 4, Lines 29-35, and page 5, Lines 1-5 are inaccurate. First, in that Respondent did not reduce the Christmas Bonus Payment, as stated in item IV's heading. The reduction of the Christmas Bonus to the amount provided by Law 148 (maximum of \$600.00) was not unilaterally decided by AEELA, it is what the parties agreed to pursuant to the plain language of the contract, specifically in the first sentence of Article 41. Furthermore, the description starting in ALJD page 4, line 31-35, and ending in ALJD page 5, Lines 1-5, is not materially relevant. A letter informing "all unionized personnel" of the status of the negotiations, including a proposed modification to the Law No. 148 amount, is immaterial to the case at hand because the parties never came to an agreement to a new collective bargaining agreement, and the language of Article 41 from the expired collective bargaining agreement remained the status quo between October 31, 2017 and December 21, 2017.

Likewise, the ALJ's findings of fact in ALJD page 5, Lines 2-5 are inaccurate, as it contains a flawed description by the ALJ of the stipulated evidence submitted by the parties. Specifically, said finding by the ALJ states that "On December 5, 2017, the Union accepted Respondent's proposed Christmas Bonus of 8.65% of salary to a maximum of \$40,000 for years 2017 and 2018. (Jt. Exhs. 11(b), 12 (b).) That term was reiterated **and then Respondent**

attached a condition to the Christmas Bonus—subject to acceptance of the extending the contract until June 30, 2019 and certain salary provisions”. (ALJD page 4, L. 30 to end of page, page 5 first paragraph, emphasis added). The stipulated evidence shows that it is not accurate that at said time Respondent attached a new condition to the Christmas Bonus proposal. Rather, it shows that on December 5, 2017 it was the Union who attached several conditions to its purported acceptance of AEELA’s Christmas Bonus proposal at the time, including an extension to the CBA until January 31, 2018 (Jt. Exh. 11(b)). On that same day, December 5, 2017, Respondent replied that the extension until January 31, 2018 was rejected, and reiterated its position that the purported extension be agreed upon until January 30, 2019. (Jt. Exh. 12 (b)). Also, this finding is immaterial to the case at hand because the parties never came to an agreement to a new collective bargaining agreement, and the language of Article 41 from the expired collective bargaining agreement remained the status quo between October 31, 2017 and December 21, 2017.

Moreover, AEELA excepts to the ALJ’s finding, as if materially significant, that “Despite traditionally paying the Christmas Bonus the day before Thanksgiving, Respondent waited to pay employees on December 15, 2017”. (ALJD page 5, L. 7-11). As asserted beforehand, the plain language of Article 41’s first sentence, as agreed upon by the parties, states that AEELA shall pay the amount as provided by Law No. 148 of June 30, 1969, and said statute provides that employers pay the Christmas Bonus on or before December 15 of each year. Since Article 41 does not contain a modification pertaining to 2017 for payment of the Christmas Bonus, Respondent paid the Christmas Bonus as mandated by the first sentence of said Article, which states that it shall be paid as provided by Law No. 148. Law No. 148 of June 30, 1969, as amended, states the following in 29 L.P.R.A, 502:

“§ 502 Date of payment; penalty

The payment of the bonus herein established **shall be made normally between November 15 and December 15 of each year**. If the payment of the bonus herein established is not made within the period stated above, the employer shall be required to pay, in addition to said bonus, a sum equal to one-half of the sum of the bonus by reason of additional compensation when the payment has been made within the first six (6) months of its noncompliance. If the payment is delayed more than six (6) months, the employer shall be required to pay another sum equal to said bonus, as additional compensation. June 30, 1969, No. 148, p. 550, § 2; June 19, 1970, No. 12, p. 428, § 2; Jan. 26, 2017, No. 4, § 3.24.” (Emphasis added).

Additionally, Respondent excepts to the ALJ’s finding that “For the 2017 Christmas Bonus, Respondent significantly reduced the Christmas Bonus from previous years and paid almost every bargaining unit a gross amount of \$600.00”. (ALJD page 5, L. 8-11). As stated beforehand, AEELA did not reduce the Christmas Bonus amount to be paid for 2017. Rather, the parties agreed to the language of the expired CBA (the status quo at the time), which contained a provision for the payment as provided by Law 148, which in turn defines a formula with a maximum of \$600.00.

Finally, as it pertains to item IV of the ALJD’s Findings of Facts, AEELA excepts to the ALJ’s inaccurate description of the stipulated facts and evidence submitted by the parties, in finding that “On December 15, 2018, Respondent paid to employees a maximum Christmas bonus of \$600.00 gross pay **instead of the formula stated in the extended collective bargaining agreement**. (Stip. 50-51; Jt. Exh. 36 (b))”. (ALJD page 5, L. 38-40).

The record shows that Stipulations 50-51 read as follows;

“50. On December 15, 2018, Respondent again paid a Christmas bonus to eligible bargaining unit employees up to a maximum amount of \$600 per employee. Joint Exhibit 37 consists of a document prepared by Respondent showing the Christmas bonus amounts paid to unit employees in 2018.”

“51. The first time, since at least 2006, that Respondent paid unit employees a Christmas bonus amount based on the fixed amount of \$600 per each employee was in December 15, 2017, and subsequently on December 15, 2018. For every one

of those years, from 2006 up to 2016, the parties' CBA contained a particular modification for the calculation for each year's Christmas bonus payment. The CBA between Respondent and the Union in effect from July 1, 2013, through June 30, 2017, referenced above in paragraph 12 and marked as Joint Exhibit 3, **only contains specific modifications for the years 2013, 2014, 2015 and 2016.**"

Nothing in these stipulations suggests that the \$600.00 paid to employees as a maximum Christmas bonus was done "**instead of the formula stated in the extended collective bargaining agreement**". This inaccurate description of the stipulations fails to even acknowledge the existence of language in the first sentence of Article 41 of the expired collective bargaining agreement that refers to a formula provided by Law 148, that in turn amounts to a maximum of \$600.00.

The ALJD's Finding of Fact item V., under the heading "Respondent's Informative Motion" (ALJD page, Lines 42-47, page 6, Lines 1-12) are immaterial¹.

The facts in the case at hand are not as complicated as it may seem upon perusing the ALJD. In summary, this case involves a Bonus that is paid to unit employees during the Christmas season pursuant to Article 41 of the collective bargaining agreement. The contractual language of said Article has always contained the following first sentence, asserting that the parties have agreed that AEELA will pay the Christmas bonus amount as per the formula provided under the local Christmas Bonus law (a maximum amount of \$600.00, six percent (6%) of the total maximum wage of ten thousand dollars (\$10,000)): "*The Association will grant the Christmas Bonus as provided in Law No. 148 of June 30, 1969, as amended...*" (See Joint Exhibits 1(b)- 4(b)).

¹ Almost a month after submitting the parties' Joint Motion And Stipulation of Facts and Documents, AEELA declared an impasse, in September 5, 2019, and implemented its best last final offer, which included payment of an additional amount for the 2018 Christmas Bonus. Consequently, the parties had talks about the possibility of adding a stipulated fact regarding said payment. However, when the time came for the parties to file briefs, October 9, 2019, the General Counsel had never responded one way or the other to AEELA's request to include said additional stipulated fact. AEELA eventually withdrew its motion, and the issue turned moot, as a matter to be handled in the compliance stage, if necessary.

The formula provided under Law No. 148 of June 30, 1969, 29 L.P.R.A. § 501, as amended, reads as follows:

“§ 501 Payment

Any employer who employs one or more workers or employees within the period of twelve (12) months comprised from October 1st of any calendar year through September 30th of the following calendar year shall be required to pay to each one of said employees, who has worked seven hundred (700) hours or more, or one hundred (100) hours or more in the case of dock workers, within the aforementioned period, a bonus equal to six percent (6%) of the total maximum wage of ten thousand dollars (\$10,000) earned by the employee or worker within said period of time. It is hereby provided that every employer who employs fifteen (15) employees or less shall pay a bonus equal to three percent (3%) of the total maximum wage of ten thousand dollars (\$10,000).

As for employees hired after the effective date of the 'Labor Transformation and Flexibility Act', any employer who has more than twenty (20) employees during more than twenty-six (26) weeks within the twelve (12)-year period comprised from October 1st of any year through September 30th, of the following calendar year, shall be required to pay each employee who has worked at least one thousand, three hundred fifty (1,350) hours or more during said period, a bonus equal to two percent (2%) of the total wage earned up to six hundred dollars (\$600.00). If an employer has twenty (20) employees or less during more than twenty-six (26) weeks within the twelve (12)-year period comprised from October 1st of any year through September 30th of the following calendar year, such employer shall be required to pay each employee who has worked at least one thousand, three hundred fifty (1,350) hours or more during said period, a bonus equal to two percent (2%) of the total wage earned up to three hundred dollars (\$300.00).

The total of the amounts paid on account of said bonus shall not exceed fifteen percent (15%) of the net annual profit of the employer, within the period comprised from September 30th of the preceding year until September 30th of the year to which the bonus corresponds. In computing the total hours worked by an employee to receive the benefits of this chapter, those hours worked for the same employer, even if the services have been rendered in different businesses, trades, and other activities of this employer, shall be counted. In order to determine net profits, the amount of the net loss carryover of previous years and account receivables that remain unpaid at the end of the period covered in the balance sheet as well as in the profits and loss statement shall not be included.

As for employees hired after the effective date of the 'Labor Transformation and Flexibility Act', the bonus required shall be fifty percent (50%) of what is provided herein during their first year of employment.

This bonus shall constitute a compensation in addition to any other wages or benefits of any other kind to which the employee is entitled. The employer may credit against said obligation any other bonus previously paid to the employee during the year on any account; provided, that the employer has notified the

employee in writing of his intent to apply such other bonus toward the payment of the bonus required under this chapter. June 30, 1969, No. 148, p. 550, § 1; June 19, 1970, No. 12, p. 428, § 1; June 25, 1972, No. 27, p. 427, § 1; Sept. 29, 2005, No. 124, § 1; Jan. 26, 2017, No. 4, § 3.23.”

After said first sentence, every collective bargaining agreement submitted as joint exhibit by the parties includes contractual language by which the parties referred to specific time constrained modifications to the \$600.00 maximum under Law No.148.

For instance, the 2002-2005 CBA (Joint Exhibit 1(b)) contains a modification by which the parties agreed that AEELA would pay a formula for an amount higher than the \$600.00 maximum, but only during the term of the agreement; *“The Association will grant the Christmas Bonus as provided in Law No. 148 of June 30, 1969, as amended, with the modification of eight and a half percent (8 ½%) of the earned wages up to a maximum of \$30,000.00 dollars during the term of this Agreement.”*(Emphasis added).

After said contract, the evidence shows that the parties negotiated and agreed to a variation in language for every subsequent contract, whereby the outlined modifications to the Law No. 148 amounts since then refer to explicitly designated years. All collective bargaining agreements signed by the parties (submitted as joint exhibits 2(b), 3(b) and 4(b)), covering every Christmas season from 2006 to 2016, refer to modifications assigned to particularly designated years. For instance, the last collective bargaining agreement signed by the parties, valid from July 1, 2013 to June 30, 2017, states the following; *“The Association will grant the Christmas Bonus as provided in Law No. 148 of June 30, 1969, as amended, with the following modification: Eight point sixty percent (8.60%) of the salaries earned up to maximum of \$37,000 in 2013. Eight point sixty percent (8.60%) of the salaries earned up to a maximum of \$38,000 in 2014. Eight point sixty-five percent (8.65%) of the salaries earned up to a maximum of \$39,000 in 2015. Eight point*

sixty-five percent (8.65%) of the salaries earned up to a maximum of \$40,000 in 2016. Salaries to be considered shall be the ones earned between October 1st of the previous year and September 30th of the year corresponding to the bonus”. (Emphasis added).

There is no dispute that AEELA paid more than the \$600.00 maximum provided in Law No. 148 from at least 2006 to 2016. However, it is also a stipulated fact that “for every one of those years, from 2006 up to 2016, the parties’ CBA contained **a particular modification** for the calculation for each year’s Christmas bonus payment. The CBA between Respondent and the Union in effect from July 1, 2013, through June 30, 2017, referenced above in paragraph 12 and marked as Joint Exhibit 3, **only contains specific modifications for the years 2013, 2014, 2015 and 2016”**. (See Stip. 18, Stip. 51). (Emphasis added).

The CBA expired on June 30, 2017 (Joint Exhibit 4(b)), and the parties have been engaged in bargaining for a successor CBA to the one that expired on June 30, 2017 since about May 24, 2017(See Stip. 15). Evidently, these bargaining negotiations included multiple proposals regarding Article 41 (See Stip. 17, 21-23, 25-29, 31-32, 34-38, 40-48). However, as of today, no new CBA has been agreed to by the parties (See Stip. 52).

When the Christmas season for 2017 arrived, the parties had not agreed to a new CBA, and also had not agreed to an extension of the CBA for the period from December 1, 2017 through December 20, 2017. (See Stip. 16). Consequently, since there was no contract language between the parties designating a modification for the 2017 Christmas Bonus, and pursuant to the language contained in the first sentence of Article 41, on December 15, 2017 Respondent paid a Christmas bonus to eligible bargaining unit employees up to the maximum amount of \$600 per employee. (See Stip. 30, and Joint Exhibit 16, which consists of a document prepared by Respondent showing the Christmas bonus amounts paid to unit employees in 2017).

The parties continued bargaining throughout the year 2018 but failed to agree on a new CBA. While the parties had agreed to an extension of the 2013-2016 contract covering the Christmas season for 2018 (See Stip. 14, Joint Exhibit 5), Article 41 of the extended CBA did not contain contract language designating a modification for the 2018 Christmas Bonus. Consequently, since there was no contract language between the parties designating a modification for the 2018 Christmas Bonus, and pursuant to the language contained in the first sentence of Article 41, on December 15, 2018 Respondent again paid, as per Law. No. 148, a Christmas bonus to eligible bargaining unit employees of up to the maximum amount of \$600 per employee. (see Stip. 50 and Joint Exhibit 37, which consists of a document prepared by Respondent showing the Christmas bonus amounts paid to unit employees in 2018).

I. ARGUMENT

RESPONDENT DID NOT VIOLATE SECTION 8(a)(1) AND (5), BY PAYING THE 2017 AND 2018 CHRISTMAS BONUS AMOUNTS AS PROVIDED BY PUERTO RICO’S LAW NO. 148 OF 1969. PURSUANT TO THE PREVALENT STATUS QUO - THE PLAIN LANGUAGE OF THE 2013-2017 COLLECTIVE BARGAINING AGREEMENT - AAELA WAS ONLY REQUIRED TO PAY THE CHRISTMAS BONUS AMOUNT AS PROVIDED BY SAID LAW, WHICH ENTAILS A MAXIMUM AMOUNT OF \$600.00².

“THE ASSOCIATION WILL GRANT THE CHRISTMAS BONUS AS PROVIDED IN LAW NO. 148 OF JUNE 30, 1969, AS AMENDED, WITH THE FOLLOWING MODIFICATION:”

We begin our argument with the above quote of the first sentence of Article 41, squarely because for some mysterious reason it appears that the ALJ failed to even recognize

² For purposes of this Brief, Respondent has combined its arguments to related Exceptions to the Decision and Recommended Order of the Administrative Law Judge (Exceptions) filed separately with this Brief.

that this language was agreed upon and written into the contractual provisions of said Article 41. An inspection of the ALJD reveals, that - aside from an erroneous quotation of the same in ALJD page 3, Lines 19-20 – the fact that this language exists is not even acknowledged in the decision. Given that no analysis of any kind was even attempted by the ALJ to ascertain its effect upon this case, it almost seems as if the approach by the ALJ to the same was that maybe by ignoring it, it will simply vanish and go away, disappearing from the contract along with AEELA’s assertions.

A. The ALJ's Analysis

From the start of its Analysis it is clear that, with no explanation whatsoever, the ALJ has discarded the plain language contentions made by Respondent. The ALJD begins by mistakenly articulating Respondent’s allegations in this case - overlooking the existence of the first sentence of Article 41 - and then verges into a flawed examination of the concept of “past practice” to support its defective conclusion, along with what seems to be a silent application of a variation of the theory of “Dynamic Status Quo” that has been expressly rejected by the recently decided Pittsburgh Post-Gazette, 368 NLRB 41 (2019). Adding insult to injury, the ALJ then seems to apply the “clear and unmistakable waiver” rather than the contract coverage test recently restored by the Board in MV Transportation, Inc., 368 NLRB No. 66 (2019).

1. The ALJ’s Analysis Concerning the Parties’ Positions

On its relentless path towards its decision that Respondent unilaterally reduced the Christmas bonus amounts for 2017 and 2018, the ALJD somehow failed to even grasp AEELA’s plain language arguments in this case. That is why Respondent excepts to the ALJ’s Analysis, section entitled The Parties’ Positions (ALJD page 6, Lines 14-50), as follows.

AEELA excepts to the Analysis of the Administrative Law Judge (ALJ) that allegedly AEELA “contends that the collective bargaining agreement’s specific language limits payment of the Christmas Bonus to years 2013 through 2016, **but nothing for years 2017 and 2018**”. (ALJD page 6 L. 35-40). This is a misreading of Respondent’s arguments. AEELA has never asserted that its employees were entitled to nothing for years 2017 and 2018; but rather that the contractual language of the expired CBA explicitly required for AEELA to pay the amount as provided by Law No. 148 of June 30, 1969, and not the modifications that the contract language had specifically assigned to particular years 2013, 2014, 2015 and 2016.

Furthermore, AEELA also excepts to the Analysis of the Administrative Law Judge (ALJ) that Respondent’s position was that “no past practice existed because the contract term was no longer applicable” (ALJD page 6 L. 40-42). This is another misconstrued depiction of Respondent’s arguments.

As will be discussed later, it is true that AEELA asserts that there is no evidence of past practice in this case, but not for the reasons stated by the ALJ. Also, it is our contention that the contract language of the expired CBA was, in fact, applicable as being the status quo at the time, and that said contractual language explicitly required for AEELA to pay the \$600.00 maximum amount as provided by Law No. 148 of June 30, 1969, and not the modifications that the contract language had specifically assigned to particular years.

Additionally, AEELA excepts to the finding of the Administrative Law Judge (ALJ) that AEELA’s position was that “The parties did not agree on any bonuses for 2017 and 2018 and therefore Respondent is responsible only for the years stated in the agreement, which defines the status quo” (ALJD page 6 L. 44-46). This is also a misconstrued depiction of Respondent’s arguments. AEELA has never claimed that it is “responsible only for the years

stated in the agreement, which defines the status quo.”

It is our assertion that the contract provisions were, in fact, applicable as being the status quo at the time, and that said contractual language explicitly required for AEELA to pay the amount up to a maximum of \$600, as provided by Law No. 148 of June 30, 1969 (which AEELA paid). **In fact, it is our position that the parties actually did agree on the amounts to be paid as bonuses for 2017 and 2018, because the parties had set the applicable amount (a maximum of \$600.00, as per Law No. 148) in the first sentence of Article 41, since no modifications were designated for said years.** AEELA paid the Christmas Bonus amounts pursuant to the modifications expressly designated in the CBA for the years 2013, 2014, 2015 and 2016. The maximum of \$600, as designated in the first sentence of Article 41, was paid for unspecified years, such as 2017 and 2018. Clearly, as per the applicable status quo, AEELA realizes that it was responsible for the Christmas Bonus for years 2017 and 2018, but it is unquestionable that the parties did not agree to modifications with increases to the \$600 maximum for said years. Thus, according to the plain language of Article 41, said \$600 maximum amount was what AEELA and the Union agreed upon.

2. The ALJD’s Misguided Reliance on Purported Past Practice

Under the heading “III. In 2017 and 2018 Respondent Violated Section 8(a)(5) And (1) By Failing To Pay The Employee’s Contractual Christmas Bonus”, the ALJ once again resumes its refusal to acknowledge the existence of the first sentence of Article 41, by simply maintaining that Respondent “implemented changes to the Christmas bonus” and that it had an obligation to bargain before doing so. (See ALJD page 7, Lines 26-34). To come to this inaccurate conclusion the ALJD deviates into an erroneous understanding of the concept of past practice. Likewise, merely declaring continuously that “the Christmas bonus was a past

practice” (See ALJD page 7 L. 35-45, page 8 L. 5-45, page 9 L. 1-46) does not make it so, nor does it negate the effect of the first sentence of Article 41.

AEELA excepts to the ALJ’s analysis on the concept of past practice, because it fails to distinguish the fundamental difference between the true meaning of said concept, as opposed to when the parties act in compliance with express provisions of the contract, as AEELA did by paying the Christmas bonus pursuant to the modifications to the \$600.00 maximum agreed upon by the parties for every specifically singled year between 2006 and 2016.

The concept of past practice does not refer to the act of continuously complying with the express provisions of the contract. As the Supreme Court has stated in defining past practice, said concept applies when “[t]he labor arbitrator's source of law **is not confined to the express provisions of the contract**, as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement **although not expressed in it.**” United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581–82, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960). (Emphasis added). An alleged past practice may not be invoked to supersede clear and unambiguous contract language.

In essence, past practice is a longstanding, recurring practice that both the union and the employer know about and accept, to the point that the practice has become an **implied** agreement (also referred to as an agreement by conduct) between the parties. In other words, past practice refers to continuous conduct by the parties that may create obligations that were left unwritten in the CBA, or that may help supply meaning to a gray area of the contract. A past practice, however, is not the act of continuously complying with express provisions of the CBA, nor can it create a term of the contract where the term sought to be established is contrary

to a clear and unambiguous term of a written nature which was entered into at arm's length by the parties and was executed by both parties. Peabody Coal Company River King Pit 6 and United Mine Workers of America District 12, Local 1148, 1992 WL 12744888 (June 30, 1992).

Here there is no evidence of past practice, because there is no proof on the stipulated record that before 2017 there were previous instances where AEELA had to pay a Christmas Bonus in a particular year that was not specifically mentioned in Article 41 as having a modification. In other words, paying the modifications to the Christmas Bonus amount that the CBA explicitly provided for years 2002 to 2016 does not constitute "past practice", but rather compliance with the letter of the contract.

Consequently, AEELA excepts to the analysis of the ALJ that "Here, General Counsel establishes the past practice, which existed since 2013 and forward. It was paid annually according to the terms of the collective bargaining agreements." (ALJD page 8 L. 40-45). As stated previously, there seems to be a fundamental confusion in the ALJ's analysis with regards to the difference between the concept of past practice, as opposed to merely acting in compliance with the contractual provisions of the collective bargaining agreements in effect between 2002 and 2016.

In looking for a definition of the status quo, there was simply no reason for the ALJ to deviate to a purported past practice, for a glance at the plain language of the first sentence of Article 41 provides the answer.

3. The ALJD's Implicit Reliance on the Rejected "Dynamic Status Quo" Theory

AEELA excepts the analysis of the Administrative Law Judge (ALJ) that "Employees could expect the Christmas bonus to be paid according to the percent and maximum established in the collective bargaining agreements, not according to the limits set by the

Commonwealth’s law.” (ALJD page 8, L. 40-45). Once again, to come to this conclusion the ALJ has, for all practical purposes, and without authority to do so, simply erased the first sentence of Article 41, which explicitly designates the obligation to pay the amount up to a maximum of \$600, as set by the Commonwealth’s Law (No. 148 of June 30, 1969, which AEELA paid). Also, the ALJ appears to simply assume, without any evidence on the record to sustain said assumption, and contrary to the language, that the modifications specified for particular years were to be permanent, because “Employees **could expect** the Christmas bonus to be paid according” to the modifications.

In stating that the Christmas bonus amount depends on the alleged employees’ expectations, rather than the express provisions of the contract (specifically the first sentence of Article 41), it appears that that the ALJ was determined to decide this case under the theory of “Dynamic Status Quo”³, for all intents and purposes disregarding that this has been expressly rejected in Pittsburgh Post-Gazette, 368 NLRB 41 (2019). Pittsburgh Post-Gazette Id., at p. 3, held the following:

“It is well established that ‘the status quo is...defined by reference to the substantive terms of the expired contract.’ Hinson v. NLRB, 428 F.2d 133, 139 (8th Cir. 1970). In finding the violation, the judge interpreted the healthcare insurance provisions in the expired agreements to create a postcontract status quo of paying annual contribution increases. However, **that interpretation does not reflect the actual terms of the agreement**”. (Emphasis added).

4. **The ALJD’s Analysis on Contract Coverage and Waiver Tests**

Here, the ALJ’s analysis turns into a feeble attempt at discounting Respondent’s plain language contentions, allegedly under both the Contract Coverage and Waiver Test. Further review of said analysis demonstrates that the ALJ is in fact deciding the case according to the now

³ As resolved in the now superseded The Finley Hospital, 362 NLRB No. 102 (2015), *enf denied* 827 F.3d 720 (8th Cir. 2016).

abandoned clear and unmistakable waiver test.

First of all, AEELA excepts to the ALJ's pronouncements that "Respondent contends that, because the language of the expired agreement did not contain modification for year 2017, it had no obligation to continue the term according to the 2016 payment schedule⁴ and instead reverted to the terms of PR Law No. 148. (R. BR. At 10) This argument is unavailing because of the law's exception for collective bargaining agreements". (ALJD page 9, L. 5-20).

AEELA has never maintained that this is an issue of whether statutory rights under Law No. 148 apply by the mere existence of the law, or that by mere virtue of said law the Christmas bonus reverted to its terms. What AEELA contends is that the parties specifically agreed, by outlining the language of the first sentence of Article 41, for AEELA to pay the amount *as provided by Law No. 148 of June 30*.

In fact, the only reason for this language to exist is because the parties expressly agreed for AEELA to pay as provided by Law No. 148 (up to a maximum amount of \$600.00), with modifications only allocated to specifically defined years. This is made even clearer by the fact that the statutory provisions of Law No. 148 do not apply by its own terms to employees covered by a collective bargaining agreement. Therefore, it makes sense that, for the employees to be eligible to receive said statutory bonus, the parties would have to agree to it in the contractual language of Article 41.

Thus, the only way for the opposing argument to be plausible would require that the first

⁴ It is telling that the ALJD refers to a "*2016 payment schedule*". The ALJ's unwarranted attachment of the word "schedule" suggests that there is a sequence of events in chronological order in which said events are intended to continue taking place. However, aside from the ALJ's flawed assessment on the concept of past practice, nothing on the record indicates that the parties meant for the modifications to be a "schedule", nor permanent after the last year (2016), but rather that the plain language of the contract was put in place specifically in order for said modifications to be solely tied to the intended years. The ALJ cites no evidence of intent on the record, as there is none, nor any Board precedent for that proposition. The ALJ's attempt to backdoor such an obligation should be rejected.

sentence of Article 41 be erased. Clearly, it is not within the NLRB's *raison d'être* to substitute language to benefit the Union's contention. If the Union wanted the prevailing status quo to be the higher amounts negotiated specifically for the years 2013 to 2016, it was up to the Union to bargain to eliminate the first sentence of Article 41.

In the case at hand, as in the incorrectly decided The Finley Hospital, 362 NLRB No. 102 (2015), *enf denied* 827 F.3d 720 (8th Cir. 2016), it is evident that the ALJ wrongly framed its decision on the basis of "waiver", and then reasoning that absent a clear and unmistakable waiver, the employer was obligated to continue paying for 2017 and 2018 the modified amount that the parties designated for the 2016 Christmas Bonus. Instead, the first step that the ALJ should have taken was defining the status quo, which, under Intermountain Rural Electric Assn. v. NLRB, 984 F.2d 1562, 1567 (10th Cir.), was defined by the "contract language itself." Finley Hospital, 362 NLRB No. 102 at 12. Here, despite the ALJ's proclivity to look elsewhere, the contract language that defines the status quo has been there from the beginning; "the Association will grant the Christmas Bonus as provided in Law No. 148 of June 30, 1969, as amended,".

B. The Other Cases Cited by the ALJ Do Not Support Her Conclusion

Nonetheless, the ALJD's analysis continues its unyielding path towards determining that AEELA violated the law under the contract coverage test, by pointing to the alleged precedents of Wilkes-Barre General Hospital, 362 NLRB No. 148 (2015), *enfd.* 857 F. 3d 364 (DC Cir. 2017); San Juan Bautista Medical Center, 356 NLRB 736(2011); and Hospital San Carlos Borromeo, 355 NLRB 153 (2010).

San Juan Bautista Medical Center, *Id.*, is different from the case at hand, in that the employer in said case simply refused to pay unit employees any Christmas bonus amount at all.

Analogous to the case at hand, the contractual language in said case called for paying a Christmas bonus “according to the dispositions of Law 148”. However, the employer requested exemption from the Puerto Rico Department of Labor (as provided by said law), and said Department granted the exemption only to “those employees that are not part of the bargaining unit”. Despite that, the employer unilaterally decided not to pay any Christmas Bonus amount whatsoever to unit employees:

“In November 2009, The Respondent requested a Christmas bonus exemption from the Secretary. On December 4, the Puerto Rico Department of Labor and Human Resources (the Department) informed the Respondent that it was determining whether the Respondent qualified for an exemption; **its letter also stated that any exemption granted would apply only to employees not covered by the collective-bargaining agreement.** On December 11, the Department informed the Union that it had granted the Respondent an exemption, **but stated that it had specifically informed the Respondent that the exemption would “only apply to those employees that are not part of the bargaining unit” covered by the collective-bargaining agreement.** Nevertheless, the Respondent *737 refused to pay the contractual bonus to its bargaining-unit employees.” San Juan Bautista Medical Center, Id., page 2. (Emphasis added).

Ironically, a rational analysis of the facts and holdings in San Juan Bautista Medical Center, Id., leads to the inevitable conclusion that if the employer in said case had paid unit employees the Christmas Bonus amounts “according to the dispositions of Law 148”, that is, up to a maximum of \$600.00, there would have been no violation of Section 8(a)(5) and (1) of the Act. That is what AEELA did in this case, pursuant to the plain language of Article 41.

Hospital San Carlos Borromeo, supra, is also clearly different from the case at hand. There, the plain language of the contract “promised eligible employees a Christmas bonus up to a maximum of \$810, depending on their salary”. Hospital San Carlos Borromeo, Id., at page 1. As in San Juan Bautista Medical Center, the employer, without the Union’s consent, reduced the maximum bonus to \$370.00 based on a partial economic hardship exemption it obtained from the

Puerto Rico Department of Labor. The plain language of the contract, however, was very different from the one in our case, in that it did not state that the Christmas Bonus would be paid “as provided by Law 148”, but rather stated that “The Bonus established herein includes and is not in addition to the one established by law”. Pursuant to said clear contractual language, the Board concluded that “the contractual language on its face merely incorporated the statutory bonus as a component of a single Christmas bonus due unit employees under the contract”. (*Id.*, at page 1). Evidently, different contractual language provides different results.

Lastly, in Wilkes-Barre, *supra*, unlike this case, the plain language of the contract was in direct conflict with the employer’s contention that longevity-based raises were somehow tied to the term of the agreement. Despite the fact that the contract language in Wilkes-Barre clearly tied longevity-based increases to the individual nurse’s employment anniversary date, the employer claimed that the past practice was to pay said increases in the same manner as across-the-board raises, which were tied to the term of the CBA:

“The longevity-based increases, unlike the across-the-board raises, **were tied to an individual nurse’s anniversary date, not to the term of the agreement.** Specifically, the agreement states that longevity-based increases were to be paid on “January 27th of the year following the employee’s anniversary date.” Thus, as the Board held, the across-the-board raises and longevity-based increases were “distinct rights,” and nurses had a continued “right to wage rate increases when they advanced to the next experience level.” *Id.*

The ALJD then turns to an analysis under Wilkes-Barre, *supra*, regarding whether the union waived its rights (see ALJD, L.31-37). It is at this point that it becomes fairly clear that the ALJ’s decision in this case is relying upon the “clear and unmistakable waiver” standard, a legal concept that has been expressly abandoned/rejected by the Board in MV Transportation, Inc. Amalgamated Transit Union Local #1637, AFL-CIO, CLC, Case 28-CA-173, Decision and Order dated September 10, 2019, 368 NLRB No. 66 (2019), instead of

utilizing the “contract coverage” standard which was adopted in said case for being more consistent with the purpose of the Act. Interestingly, the ALJD provides an in passing mention of MV Transportation, Inc, *supra*, in footnote 6 (ALJD page 9), but substantively failed to apply its holding to the case at hand.

In MV Transportation, Inc, *supra*, the Board held that the clear and unmistakable standard is, in practice, impossible to meet, and results in the Board impermissibly sitting in judgment upon contract terms, as the ALJ did in this case:

“2. The clear and unmistakable waiver standard does not effectuate the policies of the Act

a. The waiver standard results in the Board impermissibly sitting in judgment upon contract terms

Interpreting and applying Section 8(d) of the Act, the Supreme Court has held that the “Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements.” NLRB v. American National Insurance Co., 343 U.S. 395, 404 (1952). But that is just what the Board does when it applies the clear and unmistakable waiver standard: **it sits in judgment upon the substantive terms of a collective-bargaining agreement**. In every case in which a contract provision is cited as authorizing unilateral action, the parties will have already bargained, reached an agreement, and reduced that agreement to writing, as Congress envisioned.¹² **Under the clear and unmistakable waiver test, however, the Board will refuse to give effect to contract provisions** granting rights of unilateral action to the employer unless those provisions meet the exacting standards imposed by the Board. Again, those standards require the contract provision to “unequivocally and specifically express [the parties’] mutual intention to permit unilateral employer action with respect to a particular employment term.” Provena, 350 NLRB at 811 (emphasis added). As the cases cited below in footnote 17 demonstrate—and they are just the tip of the iceberg—the **clear and unmistakable waiver standard “is, in practice, impossible to meet,” or virtually so**. Department of Navy v. FLRA, 962 F.2d at 59. **Since application of the clear and unmistakable waiver standard typically results in a refusal to give effect to the plain terms of a collective-bargaining agreement, the Board in applying that standard effectively writes out of the contract language the parties agreed to put into it. Doing so, the Board sits “in judgment upon the substantive terms of collective bargaining agreements,” thereby exercising a power it does not possess.** MV Transportation, Inc., *supra*, at page 4 (emphasis added).

Moreover, the Board found that, in impermissibly sitting in judgment upon contract

terms, the waiver standard almost always ends in altering the parties' deal reached in collective bargaining, "abrogating a lawful agreement merely because one of the bargaining parties is unhappy with a term of the contract and would prefer to negotiate a better arrangement":

“c. The waiver standard alters the parties’ deal reached in collective bargaining

In addition, the collective-bargaining process envisioned by Congress is one in which the parties exchange proposals in an effort to reach an agreement that will compromise their differences, *Reed & Prince Mfg. Co.*, 96 NLRB 850 (1951),¹⁶ and an evenhanded approach to resolving disputes over the interpretation of such agreements is therefore necessary to support that process. However, the clear and unmistakable waiver standard undermines this process by imposing exacting scrutiny solely on those contract provisions that grant the employer the right to act unilaterally, even though such provisions are part and parcel of an agreement that represents the parties' compromise, reached through the give-and-take of negotiations. **Application of the waiver standard typically ends with the Board impermissibly “abrogat[ing] a lawful agreement merely because one of the bargaining parties is unhappy with a term of the contract and would prefer to negotiate a better arrangement.”** *Postal Service*, 8 F.3d at 836.” *MV Transportation, Inc.*, *supra*, at page 6 (emphasis added).

In the case at hand, it is evident that this is precisely what the ALJD has done. The parties' agreement contains the plain contractual language of the first sentence of Article 41, directing AEELA to pay as provided by Law 148 (which AEELA did), but the Union would have preferred a better arrangement (i.e., the modified sums that were limited to specific years). Here, the Union relied on the ALJ to impermissibly alter the agreement, and its wish was initially granted. AEELA now turns to the Board to rectify this error, by giving full effect to the plain meaning of Article 41.

Therefore, for the reasons stated before, AEELA excepts to the ALJ's "Conclusion regarding the alleged decrease in the Christmas bonus", as well as the assumption that "Respondent failed to give the Union advance notice of the change in the Christmas Bonus"

(ALJD, page 9, L.39 to 45).

Likewise, we must also except to the analysis of the ALJ that “I disagree that Respondent articulates a sound basis for the modification. Respondent contends that none of the extensions included any language to provide the Christmas bonus beyond 2016”. (ALJD page 10, L. 30-40). Once again, the ALJ misconstrues AEELA’s argument. AEELA has never stated that the payment of the Christmas bonus should be discontinued beyond 2016, nor that the Christmas bonus article does not survive upon the expiration of the collective bargaining agreement. Once again, the ALJ ignores the basic fact that Article 41 explicitly affords for AEELA to pay the amount as provided by Law No. 148 of June 30, 1969, which AEELA unquestionably did.

On the issue of whether “Respondent articulates a sound basis for the modification”, AEELA must once again stress, as it did in its brief to the ALJ, 1) that there was no “modification” to the Christmas Bonus, and 2) that what AEELA has always asserted is that there is a sound basis for AEELA’s contract interpretation of Article 41. The Board has repeatedly held that “where the dispute is solely one of contract interpretation, and there is no evidence of animus, bad faith, or an intent to undermine the Union, it will not seek to determine which of two equally plausible contract interpretations is correct.” Atwood & Morrill Co., 289 NLRB 794, 795 (1988). In NCR, 271 NLRB 1212, 1213 (1984) the Board held that when “an employer has a sound arguable basis for ascribing a particular meaning to his contract and his action is in accordance with the terms of the contract as he construes it,” the Board will not entertain the dispute to serve the function of arbitrator in determining which party’s interpretation is correct.

This is even more important when considering that it is the General Counsel who bears the

burden of proof in establishing that AEELA's reading of Article 41 violated Section 8(a)(5) and (1) of the Act. Unquestionably, the General Counsel failed to meet said burden. An inspection of the parties' Joint Motion and Stipulation of Facts and Documents shows that, aside from the ALJ's reliance on her misconstrued notion of "past practice" (which must be discarded), there is no evidence on the record to attribute a different meaning to said language.

C. Respondent Excepts to the ALJ'S Conclusions of Law, Remedy, Proposed Order, and Notice to Employees

Respondent excepts to the ALJ's Remedy, Proposed Order, and Notice to Employees. Respondent did not violate the Act. Therefore, there is no basis for any Remedy, Proposed Order or Notice to Employees.

SUMMARY

The ALJ erred when she concluded that Respondent violated Section 8(a)(5) and (1). Respondent AEELA complied with its responsibilities under the expired contract and the status quo when it paid the 2017 and 2018 Christmas Bonuses as provided by Law 148. Board law should not require an employer who complies with specific time defined contractual modifications to the Christmas Bonus amount, to continue those modifications in perpetuity after the contract expires. Therefore, the Board should grant Respondent's Exceptions and dismiss the Consolidated Complaint.

Dated at San Juan, Puerto Rico, this 4th day of December of 2019.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned, as attorneys for Respondent, hereby certifies that a true and exact copy of the foregoing Brief in Support of Respondent's Exceptions was electronically filed via the NLRB E-Filing System with the National Labor Relations Board and served on the parties listed below via email and first-class mail, postage prepaid:

This is to certify that on this same date a true and exact copy of this Motion has been sent to Atty. Manijee Ashrafi-Negroni, Sub-regional Office of the NLRB in Puerto Rico, to the email address Manijee.Ashrafi-Negroni@nlrb.gov; to Atty. Alexandra Sanchez (“charging party”) to asanchez@msglawpr.com.

Dated at San Juan, Puerto Rico, this 4th day of December of 2019.

RESPECTFULLY SUBMITTED.

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