

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

LONGO EN-TECH EN-TECH PUERTO
RICO, LLC

and

UNITED STEEL WORKERS, LOCAL 6871,
AFL-CIO, CLC

Cases 12-CA-248406
12-CA-252309

EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE’S DECISION

TO THE HONORABLE BOARD:

NOW APPEARS Longo En-tech Puerto Rico, LLC (herein called “Longo En-tech” the “Company” or “Respondent”), through the undersigned counsel and respectfully states and prays:

I. INTRODUCTION AND PROCEDURAL BACKGROUND

This case stems from several charges pursuant to section 8 (a) (5) and 8 (a) (1) of the Act. In the Amended Complaint the General Counsel (“GC”) alleged that:

- a. Since on or about June 12, 2019, Respondent has failed and refused to meet and bargain with the Union at reasonable time and places for the purpose of negotiating a CBA.
- b. On or about August 23, Respondent informed the Union that Respondent would select the Union’s shop steward as a condition of reaching a CBA and informed the Union that unless the Union accepted Respondent’s proposal related to drug use, it would not engaged in any further bargaining with the union.
- c. Respondent changed the established superseniority rights of employees in the Unit who are shop stewards, including Ernesto Fernández (“E. Fernandez”).

Longo-En-tech is a company dedicated to the manufacturing and rehabilitation of specialized liners and technology for sewer and water pipes. As part of their operation, it may include some incidental construction.

Longo En-tech had a labor contract with United Steelworkers ("USW") Local 6871 for its production and maintenance employees. The Collective Bargaining Agreement ("CBA") expired in October 2017 and later was extended until February 2018.

Due to the lack of projects, this company has a reduced its head count in Puerto Rico which currently is around seventeen (17) employees.

Regarding the layoff related charge, the evidence in this case established the status quo and the agreement between the parties dictated that skills and efficiency factors are taken into consideration over seniority unless they are similarly employees, for those layoffs that are not consider prolonged or extended. Prolonged layoff meaning over six (6) months or more.

As to the privileged seniority provision, which should have no effect after the expiration of the collective bargaining agreement, it dictates that it is for the term of the agreement only and within the job classification.

E. Fernandez is an operator of heavy equipment. That classification has been used by the company, recognized by the union and the employees and negotiated and agreed by the parties before August 2019. He was laid off for lack of work for those skills or job classification. The Company did not change any terms and condition that have not been previously negotiated with the union.

On August 7, 2020, the Administrative Law Judge ("ALJ") Kimberly Sorg-Graves issued a Decision in the present case ("Decision") whereby- among other charges- it erroneously applied the provisions of an expired Collective Bargaining Agreement between the Respondent and the

Union and concluded that Longo En-tech only had one job classification and, therefore, violated Section 8(a)(5) and (1) of the NLRA by laying-off E. Fernandez instead of other employees.

Pursuant to Section 102.46(b)(1) of the Board Rules and Regulations, Longo En-tech files this document containing its exceptions to the ALJ's Decision.

II. EXCEPTIONS

Exception A: The ALJ erred in ruling that Longo En-tech only had one job classification.

The ALJ found that when drafting the CBA, Longo En-tech and the Union agreed to a single job classification of laborers with the agreement to revisit the issue later, if necessary, but never did during the term or the extension of the CBA. Moreover, the AJL concluded that Longo En-tech could not rely upon any unilaterally established job classification to justify E. Fernández's layoff. (See Decision, P. 21).

Upon reaching said conclusions, the ALJ completely ignored the testimony of Jose Saavedra, who testified as follow:

Q. What was it prepared for?

A. This was part of -- the owner wanted to show the Union that it was a list of time, not a list of time. It was just -- our position was that the guys were already well paid, all overpaid, not only in comparison to bases of the union contract but also in the market of Puerto Rico. And this shows the percentage of what the guys are getting paid and some of the benefits they're accruing, **plus the classifications at the end**, if they have driver's licenses, if they have any special training, because that's more or less how we move on the rates. The guy earned more once he became more qualified.

Q. And please go to page number 5 of that exhibit.

A. Yeah.

Q. It appears a **list of classification in your proposal**?

A. Yes.

Q. Okay. **How did this compare with the way that the Company at that time was operating and has continued to operate?**

A. Yeah, we divided the Company more or less in two different sections, just to avoid that the guys from one classification couldn't move to the other or bump people out. But these are

very start rates. Actually I don't think very few people even earn this right now in the Company, but it's the starting rates, and **these are the classifications that we use on a daily basis or most of the time.**

Q. **And was this discussed with the Union?**

A. **Yes.**

Q. **And what was the position with regard to the Union, if you recall, with regard to these classifications?**

A. **It was accepted in one of the meetings.**

(See Hearing Transcript, P. 150, L. 6-25, P. 151, L. 1-11, and Joint Exhibit 12). (Emphasis added).

The AJL also ignored the Union representative's testimony (Yaphet Torres) and the fact that he admitted that the Union accepted the job classifications proposed by Longo En-tech:

Q. BY MR. GEORGE: You sent that proposal?

A. Yes.

Q. **And in this proposal, on page 5, the Union accepted the classifications proposed by the Employer; is that correct?**

A. What page?

Q. Page 5.

A. I don't -- you're saying the English version, right?

Q. No, the Spanish one.

A. **Correct.**

(See Hearing Transcript, P. 89, L. 18-25, P. 90, L. 1, and Joint Exhibit 12). (Emphasis added).

Exception B: The ALJ erred in ruling that E. Fernández was consider a laborer at the time of his layoff.

The ALJ obviated the uncontested fact that E. Fernández was consider an operator and not a laborer at the time of E. Fernández layoff had established different job classifications. (See Decision, P. 21). This fact was admitted by E. Fernández.

Q. What functions did you perform while working for Longo En Tech?

A. Heavy equipment operator, truck driver.

(See Hearing Transcript, P. 113, L. 6-8)

The Union's representative also admitted after confronted with a document that E. Fernández works under the job classification of operator. Accordingly, he testified:

Q. BY MR. GEORGE: Mr. Ernesto Fernandez was an operator; is that correct?

A. I don't know. I'm not sure.

Q. You don't know.

A. I'm not sure.

(See Hearing Transcript, P. 79, L. 18-22).

Q. BY MR. GEORGE: **This is the submission agreement that was signed by you in the arbitration case?**

A. **Correct.**

Q. **And in this submission agreement, it states that the claimant was an operator; is that correct?**

A. **Correct.**

Q. And that he was laid off for a lack of work; is that correct?

A. Correct.

Q. And the issue of that explanation that there was lack of work for operator was in the response that Mr. Jose Saavedra gave to you in your email and the letter in response to your grievance; is that correct?

A. Correct.

(See Hearing Transcript, P. 80, L. 3-16, and Joint Exhibit 33).
(Emphasis added).

As it can be seen, ALJ's finding is not supported by relevant evidence that a reasonable mind might accept as adequate to support such a conclusion. In Universal Camera Corp. v. N.L.R.B., 340 U.S. 474 (1951), the Supreme Court of the United States held that a decision of the National Labor Relations Board may be set aside by a reviewing court if unsupported by substantial evidence based upon the record as a whole.

Accordingly, there is no ground for concluding that Longo-En-tech had only one job classification of laborers and that conclusion is inconsistent with witnesses' testimonies. As previously stated, neither the General Counsel nor the Union could refute the fact that E. Fernández worked as an operator and that this classification was discussed and accepted by the Union. As a

matter of fact, the evidence showed that in his claim the Union described E. Fernández as an operator not as a laborer.

Exception C: The ALJ erred by concluding that the Respondent unilaterally changed the status quo of employees' superseniority rights under the expired CBA by laying off E. Fernandez before other less-senior employees.

The ALJ erred in concluding that Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing the status quo of employees' superseniority rights under the expired CBA by laying off E. Fernández before other employees. (See Decision, P. 22)

First, Respondent complied with the layoffs, seniority and even the superseniority status quo or the CBA provision's requirement that layoffs be done following skills when it is not extend- less than 6 months- and later following seniority per job classifications. Therefore, Respondent did not engage in a unilateral change without giving the Union notice and an opportunity to bargain.

Second, the facts surrounding this case establish that the other three employees with less seniority- two of them who were carpenters- were laid off a month after E. Fernandez and the other had the necessary skills that E. Fernandez did not have.

- Q. BY MR. GEORGE: Question from the counsel for -- excuse me. My name is Carlos George. I'm counsel for Longo-En Tech, and we have not met. I will be asking some questions related to the topics that Counsel for the General Counsel asked you. To questions from the Counsel for General Counsel, you mentioned that -- whether other employees with less seniority than you stayed working at the Company?
- A. Correct.
- Q. My question is on that date, October 24th, and November 1st, that is the date of your letter, did you have knowledge of other employees that were laid off on that same date?
- A. No.
- Q. And you mentioned employees with less seniority than you, Hector Fernandez, Leonel Fernandez, and Enrique Fernandez?
- A. Correct.

(See Hearing Transcript, P. 118, L. 10-25).

Q. And Leonel Fernandez and Hector Fernandez were both carpenters?

A. Carpenters and auxiliary or assistants.

Q. And with regard to those two, Hector and Leonel, both were laid off later that year?

A. Correct.

Q. In December 2019?

A. Correct.

Q. With respect to Enrique Fernandez, he was the vactor technician?

THE INTERPRETER: Vactor?

MR. GEORGE: Vactor, v-a-c-t-o-r.

THE WITNESS: Correct.

(See Hearing Transcript, P. 119, L. 1-13).

Q. BY MR. GEORGE: You never operated a vactor? He was not a vactor technician?

A. No.

(See Hearing Transcript, P. 120, L. 1-3).

Exception D: The administrative judge erred in indicating that the Union contends that there is only one job classification under the contract and that E. Fernández was not the least senior. (See Decision, P. 16)

As previously discussed, the union representative and E. Fernández admitted that there were multiple positions at Longo-Entech at the time of the layoffs and that E. Fernandez was an Operator.

Exception E: The Administrative judge erred in using her own criteria instead on what record establish of what was the intent of the parties with regard term of the “extended layoff”. (See Decision, P. 10 and 22)

In interpreting a contract, the parties' intent underlying the contract language is paramount and is given controlling weight. To determine the parties' intent, the Board looks to both the contract language and to relevant extrinsic evidence, such as the parties' bargaining history and past practice. When there is no extrinsic evidence, the Board looks to the ordinary meaning of

relevant contract terms as applied to the facts of the case. *Resco Products, Inc.*, 331 N.L.R.B. 1546 (2000) In interpreting a collective-bargaining agreement to evaluate the basis of an employer's contractual defense, the Board gives controlling weight to the parties' actual intent underlying the contractual language in question. *Mining Specialists, Inc.*, 314 NLRB 268 (1994).

Both the contract language and the union representative's testimony support that "extended layoff" refers to a layoff of 6 months or more. At the hearing, the union representative testified that this referred to layoffs of more than 6 months. (See Hearing Transcript, P. 77-78). However, the ALJ adopted another definition that is not supported by the record.

Exception F: The ALJ erred in holding that Longo En-tech violated Section 8(a)(5) and (1) of the NLRA and the seniority provisions of the CBA by laying-off E. Fernandez. Even though, he was the only employee under his job classification, operator. (See Decision, P. 21-22)

An employer violates Section 8(a)(5) and (1) of the Act when it unilaterally changes the wages, hours, or other terms and conditions of employment of bargaining unit employees without first providing the collective-bargaining representative with notice and a meaningful opportunity to bargain. *NLRB v. Katz*, 369 U.S. 736 (1962). This is a requirement even if at the time of the change the collective-bargaining agreement between management and the union has expired and a new agreement has not been completed. *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 198 (1991).

In *PG Publishing Co., Inc. d/b/a Pittsburgh Post-Gazette*, 368 NLRB 41 (2019), the Board noted that it is well established that "the status quo is . . . defined by reference to the substantive terms of the expired contract."

The ALJ found that the Company violated the Act and the provisions of the CBA by laying-off E. Fernández without considering that he had more seniority than other employees under the

classification of laborer. As previously discussed, Longo En-tech and the Union agreed and established other job classifications, including that of operator under which E. Fernández worked.

The ALJ erred in concluding that E. Fernández layoff it was not done according to the order of seniority and that, even if Longo En-tech considered efficiency and skills factors in determining which employee, it should have retained and applied the seniority by job classification.

The evidence shows that, at the time of E. Fernández' lay-off he was the only employee under the classification of operator and that the three other employees with less seniority were two carpenters and one vactor technician, none of whom were operators. (Hearing Transcript P. 118, L. 22 to P. 119, L. 13). The record also shows that the vactor was the only machinery Longo En-tech cannot stop in its operation and that E. Fernández never operated one. (Hearing Transcript P. 120, L. 1-3; P. 144, L. 11 to P. 146, L. 7; Joint Exhibit #24).

Accordingly, not only there was not a seniority rule to follow because E. Fernández was the only employee under his classification, but also, even if Longo En-tech considered efficiency and skills, it was obliged to retain the vactor technician in order to continue operations. It is evident that Longo En-tech did not violate the seniority provisions of the CBA nor the status quo. E. Fernández was not a carpenter nor a vactor technician.

To that effect the E. Fernández admitted all these facts. (See discussion in Exception C). Hence, the ALJ should have concluded that E. Fernández was the only employee under the operator classification and that his layoff was due to lack of work in accordance with the CBA and the status quo. These are the only conclusions supported by the record and consistent with the applicable law. As such, the Board should reject the ALJ's finding to the contrary.

Exception G: The ALG erred in of concluding that provision of superseniority in an expired collective-bargaining agreement do not cover post expiration unilateral changes pursuant.

Nexstar Broadcasting, Inc. Cases 19–CA–219985 and 19–CA–219987 April 21, 2020) (See Decision, P. 17-21)

After filing the briefs in this case, but before the Administrative Judge's decision, the legal issue of first impression was whether the contract coverage standard applied to changes made after a collective-bargaining agreement expires. The Board held that provisions in an expired collective-bargaining agreement did not cover post expiration unilateral changes unless the agreement contained language explicitly providing that the relevant provision would survive contract expiration. *Nexstar Broadcasting, Inc.* (See Cases 19–CA–219985 and 19–CA–219987 April 21, 2020).

In this case, the superseniority provision- which gave a union representative a privilege over the rest of the union employees- does not survive the CBA expiration. The Respondent was correct in applying the status quo when conducting layoff for lack of work. Thus, the ALJ should have concluded that E. Fernández was the only employee under the operator classification and that his layoff was due to lack of work in accordance with the status quo. These are the only conclusions supported by the record and consistent with the applicable law.

Exception H: The ALG erred in concluding that under that contract coverage standard, Respondent failed followed the terms of the agreement as it is recognized by the parties. MV Transportation, 368 NLRB No. 66, (2019) (See Decision, P. 17-21)

Assuming arguendo that the contract coverage standard applies to the superseniority provision, Longo followed the terms of the agreement as it is recognized by the parties.

The contract coverage standard is based on “ordinary principles of contract interpretation,” *MV Transportation, 368 NLRB No. 66, (2019)*, Under the contract coverage standard, the Board will “examine the plain language of the collective-bargaining agreement to determine whether action

taken by an employer was within the compass or scope of contractual language granting the employer the right to act unilaterally.”

In conducting that inquiry, the Board will apply “ordinary principles of contract interpretation.” “Where contract language covers the act in question, the agreement will have authorized the employer to make the disputed change unilaterally, and the employer will not have violated Section 8(a)(5).” *Id.*, slip op. at 11.

Respondent contends that it complied with the, layoffs, seniority and even the superseniority provision's requirement that layoffs be done following skills when it is not extend- less than 6 months- and later seniority based upon job classifications, and therefore, did not engage in a unilateral change without giving the Union notice and an opportunity to bargain.

III. CONCLUSION

As discussed above, it is evident that E. Fernández' lay-off was due to lack of work for employees under his classification follow the procedure in the expired CBA and the status quo, For the reasons stated above, we respectfully request the Board to admit the Respondent's exceptions, partially reject the ALJ's Decision, and conclude that the ALJ's Decision with regard to the layoff of E. Fernandez must be set aside.

RESPECTFULLY SUBMITTED.

CERTIFICATE OF SERVICE: I certify that on this same date a true and exact copy of this “Exceptions to the Administrative Law Judge's Decision” was electronically filed and served by e-mail on the following parties: Ayesha K. Villegas Estrada, Senior Field Attorney, National Labor Relations Board-Subregion 24 (avillega@nlrb.gov); Mr. Yaphet Torres, United Steelworkers, Local 6871, AFL-CIO, CLC (ytorres@usw.org).

In San Juan, Puerto Rico, this 4th day of September 2020.

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