

**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, AEROSPAZIO E
IMPLEMENTOS AGRICOLAS, U.A.W.,
LOCAL 1850

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

**AEELA’S RESPONSE IN OPPOSITION TO THE CHARGING PARTY UNION’S
MOTION FOR RECONSIDERATION AND/OR CLARIFICATION OF BOARD
DECISION**

COMES NOW BEFORE THE NATIONAL LABOR RELATIONS BOARD,
Asociación de Empleados del Estado Libre Asociado de Puerto Rico (hereinafter referred to as
“**AEELA**” and/or “**Respondent**”) through the undersigned counsel and very respectfully
REQUEST and **PRAY** as follows:

A. INTRODUCTION

On January 14, 2021, this Board correctly reversed the Administrative Law Judge decision. The Board determined, first, that Respondent did not unilaterally change unit employees’ terms and conditions of employment, thus did not violate Section 8(a)(5) of the Act, when on December 2017 it paid unit employees Christmas bonuses up to a maximum of \$600. Secondly, that the Respondent did not modify the CBA in violation of Section 8(a)(5) within the meaning of Section 8(d), when on December 2018 it paid unit employees Christmas bonuses up to a maximum amount of \$600. By reaching this decision, the Board reviewed and analyzed the substantive terms of the

expired agreement that determined the post-expiration status quo.

In reversing the ALJ's decision, the Board relied on the relevant provision of the 2013-2017 agreement. Article 41 of that agreement states that: "the respondent will grant the Christmas Bonus as provided in Law No. 148 of June 30, 1969, as amended, with the following modifications:" and then specifically and deliberately addressed the agreed modification for each of the 4 precise years where said modifications would be made: 2013, 2014, 2015, 2016.

That is what the plain language of Article 41 provides. The 2013-2017 agreement had expired, and on December 15, 2017 - the date provided by the expired contract for the payment of the Christmas bonus – it is a stipulated fact that there was no extension to the expired contract, and no successor agreement had been concluded. In addition to this, even if by December 15, 2017 there had been a valid extension agreed to by the parties, the clear language of the expired contract designated that the modifications only applied precisely to years 2013, 2014, 2015 and 2016. Thus, it follows that the Christmas bonus for any other unspecified years would be the one pursuant to the language contained in the first sentence of Article 41, "as provided in Law No. 148 of June 30, 1969, as amended", which, as stipulated by the parties, amounts to a maximum of \$600.00. It is also a stipulated fact that on December 15, 2017 Respondent paid a Christmas bonus to eligible bargaining unit employees up to the maximum amount of \$600 per employee.

Thus, the Respondent maintained the status quo when it paid bonuses in December 2017 in the manner directed by the language of the expired collective bargaining agreement, which in turn alluded to the amount as assigned by Law No. 148, for years not explicitly modified. To reach this determination this Board correctly concluded that AEELA's interpretation had a sound arguable basis in the contract. Prevailing case law states that where that is the case, the Board does not seek to determine which of two equally plausible contract interpretations is correct.

In fact, in order to illustrate the clearly flawed nature of the ALJ's decision, the Board's Decision and Order concluded that not only is AEELA's interpretation arguably sound, but that the contract language was so plainly clear that in this case there are simply no two equally plausible contract interpretations, *and that the only plausible one is the Respondent's*.

Mostly based on this statement by the Board, on March 11, 2021, the United Auto Workers, Local 1850 (hereinafter referred to as "the Union") filed a Motion for Reconsideration and/or Clarification of Board Decision. The Union's Motion should be rejected for at least two reasons. First, the Board's decision is fully consistent with the "Sound Arguable Basis" Standard applied in the cases cited. Second, the Union's Motion should be denied because it seeks to raise a new legal theory and/or argument, one that was never pursued either by the General Counsel or the Union. Essentially, the Union is now unsuccessfully trying to construct the argument that purportedly the Board majority ignored its own sound arguable basis doctrine, having interpreted the Christmas bonus provision in a manner that goes against the Union, rather than confining itself to applying the "sound arguable basis" analysis. Interestingly, it is evident that the Union's position all along has been that the Board majority should have ignored its own sound arguable basis doctrine, by interpreting the Christmas bonus provision, **but in favor of the Union**, by disregarding the language of the Article and instead delving into an alleged "past practice" analysis, that upon close inspection is not "past practice", but rather the compliance of the terms of Article 41. This argument is palpably preposterous and trivial.

Despite the Union's intent on conducting all sorts of legal maneuvering to achieve their desired result, the truth of the matter is that clear contractual language agreed upon by the parties still continues to be the standard by which matters such as this one must be resolved. Perhaps the

Union now wishes that they had obtained a different language in the bargaining table, but it is certainly not within the Board's role to simply bestow it on them despite language to the contrary.

For the reasons stated below, the Union has failed to meet the high threshold required by Section 102.48(d)(1) to support a motion for reconsider. The Board did not commit a material error justifying "extraordinary circumstances" here. The Union simple wishes the Board to conclude differently and ignore the plain language of Article 41. But the weight of the evidence in the record as a whole clearly supports the Board's conclusion. The Union's motion should therefore be denied.

The only way for the Union's argument to be plausible would require that the first sentence of Article 41 be erased¹. Clearly, it is not within the NLRB's discretion 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 obtain said provisions in the bargaining table.

B. ARGUMENT

I. Standard of Review

A party may move for reconsideration because of "extraordinary circumstances." 29 C.F.R. § 102.48(d)(1). On a motion for reconsideration, a party must state with particularity the material errors claimed. *Id.* Where a party fails to demonstrate extraordinary circumstances warranting reconsideration, such motion should be denied. See, Willis Roof Consulting, Inc., Case No. 26-CA-20852, 2011 WL 2632615 (July 1, 2011); County Waste of Ulster, LLC, 355 NLRB No. 193 (Sept. 27, 2010); Flour Daniel, Inc., 353 NLRB No. 79 (Jan. 27, 2009). Here, the Union has failed

¹ This is essentially what the ALJ's decision did, then taking a long legal route into supposed "past practice" in order to arrive to a position that favored the Union.

to present extraordinary circumstances or material errors, and therefore its motion should be denied.

II. Relevant Legal Principles

The Board has recognized that an employer has not violated Section 8(a)(5) by modifying terms and conditions of employment under a CBA where the employer has a “sound arguable basis” for its interpretation of a contract and it is not motivated by animus or bad faith. Bath Iron Works, 345 NLRB 499 (2005) at 502. This exception has limits: no “sound arguable basis” in support of an employer’s purported interpretation of the contract can exist where, that interpretation runs “counter to the clear intention of the parties,” *Id.*, or the contract “cannot be colorably interpreted to permit” the employer’s interpretation, MV Transp., Inc., 368 NLRB No. 66, 2019 WL 4316958, at *30 (Sept. 10, 2019).

In contrast, the Board applies the "sound arguable basis" standard in § 8(d) contract modification cases. The Board will not find an unfair labor practice if (1) the employer's interpretation of its contractual rights has a sound arguable basis in the contract and (2) the employer was not motivated by union animus, acting in bad faith, or in any way seeking to undermine the union's status as a collective bargaining representative. See, Westinghouse Elec. Corp., 313 N.L.R.B. 452, 452 (1993), enforced mem. sub nom. Salaried Employees Ass'n v. NLRB, 46 F.3d 1126 (4th Cir.1995). An example of the Board’s application of the “sound arguable basis” test is Bath Iron Works Corp., 345 NLRB 499 (2005), enforced sub nom. Bath Marine Draftsmen Assn. v. NLRB, 475 F.3d 14 (1st Cir. 2007). There, the Board stated the test as follows: “[w]here an employer has a ‘sound arguable basis’ for its interpretation of a contract and is not ‘motivated by union animus or . . . acting in bad faith,’ the Board ordinarily will not find a violation.” Bath Iron Works, 345 NLRB at 502 (citing NCR Corp., 271 NLRB 1212, 1213 (1984))

(emphasis added)).

The idea behind this test is that “a mere breach of contract is not in itself an unfair labor practice,” NCR Corp., 271 NLRB at 1213 n.6, and “the Board will not enter the dispute to serve the function of arbitrator in determining which party’s interpretation is correct,” *Id.* at 1213.3 In Bath Iron Works, for example, the central issue was whether the employer violated the Act by merging its pension plan with that of its corporate parent, without the consent of three unions representing the employees. *Id.* at 499. Each relevant CBA referred to plan documents in the section dealing with employee benefit plans, and two of the three CBAs explicitly stated that the terms and conditions of employee benefit plans were governed by plan documents. *Id.* at 499-500. The employer cited several articles in the plan documents as a source of authority to implement the merger and argued that it therefore had a “sound arguable basis” to merge the plans without modifying the CBA. *Id.* at 500. The General Counsel, on the other hand, argued that the plan documents were not part of the CBAs and did not contain 3 The 2007 Agreement provides for arbitration “[i]n the event of a dispute regarding [its] application or interpretation” J.A. 157-58. Appeal: 12-1022 Doc: 51 Filed: 02/28/2013 Pg: 13 of 1614 a right to merge the plan. *Id.* at 503. The Board concluded that the General Counsel’s interpretation was “no more [reasonable] than the [employer’s],” and thus dismissed the complaint. *Id.* In other cases applying the “sound arguable basis” test to reject the General Counsel’s unfair labor practice allegations, the Board has also found the competing contract interpretations to be substantially equally reasonable. See NCR Corp., 271 NLRB at 1213 (“The Board is not compelled to endorse either of these two equally plausible interpretations of the contract’s operation in this case.”); Vickers, Inc., 153 NLRB 561, 570 (1965) (finding that the employer’s interpretation of the disputed contract clause “not only was reasonable . . . but also was an interpretation which found tacit support from the Union’s

conduct”).

II. The Board’s Decision is fully consistent with the “Sound Arguable Basis” Standard

The Union centered its argument against the Board’s Decision alleging that the Board ignored the central command of its “sound arguable basis” standard, and purportedly instead did just the opposite, interpreted the contract when it said “there are no two equally plausible interpretations here. There is only one plausible interpretation and it favors the Respondent”.

Although the Union’s allegation on the merits is clearly erroneous, we must first point out that said allegation indisputably failed to refute in any way the fact that AEELA’s contract interpretation **is plausible**. There is no doubt that AEELA’s interpretation of the CBA is plausible; thus, even if the Board took back its statement that “there is only one plausible interpretation and it favors the Respondent”, the result would have been the same; that Respondent had a sound arguable basis for interpreting the language of Article 41 for the 2017 and 2018 bonuses as it did.

It is also undeniable that all of the Christmas Bonus Articles negotiated between AEELA and the Union throughout the years begin with the same sentence, establishing that the parties have agreed that AEELA will pay the amount as provided under the local Christmas Bonus law (a maximum amount of \$600.00): “*The Association will grant the Christmas Bonus as provided in Law No. 148 of June 30, 1969, as amended,...*” It is also a fact that the language in all these contracts then go on to provide definite modifications to said amount, but in every one of these contracts **the modifications are limited to either the term of the agreement** (the 2002-2005 CBA), **or to explicitly designated years** (all other CBA’s since then, up to the latest one, 2013-2017). What is clearly of consequence, is that **none of the above extensions included any language whereby the parties agreed to provide modifications to the Christmas Bonus amounts for the years 2017 or 2018, or for any other unspecified years.**

The language of the contract is specific and does not provide for a payment of the Christmas Bonus in excess of the amount under Law No. 148 for the year 2017 or after. This situation had never happened before; thus, there was no past practice, and AEELA followed the reasonable and logical interpretation of the language agreed to by the parties. In the past, there was always a CBA in effect that contained the specific amount modification for each year. As noted by the Board in its decision, from the stipulated facts and the documents in record, there is no evidence that this had happened before:

“Here, the Respondent’s historical payment of greater-than-statutory bonus amounts was always pursuant to the terms of Article 41 in the parties’ successive collective bargaining agreements. Critically, there is no evidence of how the parties previously applied Article 41 during hiatus periods, and therefore no evidence of an extracontractual past practice”.

In this case, **the substantive terms of the contract are contained in the first sentence of Article 41 establishing that the parties have agreed that AEELA will pay the amount as provided under the local Christmas Bonus law (a maximum amount of \$600.00)**, as there is no substantive term by which the Union may argue that the parties agreed to modifications for the year 2017-2018. Furthermore, given the conclusory nature of the language, there was simply no reason to go any further into an alleged “past practice”, unless, of course, the goal was to ultimately find in favor of the Union, regardless of the existing contractual language.

As the Board correctly concluded, not only is there a sound basis for AEELA’s contract interpretation of Article 41 – a fact that the Union fails to substantively dispute in its motion requesting reconsideration – but the Board reaffirms a fact that is self-evident upon reading the language of Article 41; that the only plausible interpretation was Respondent’s.

Despite the Union's wrought argument, basically asserting that this statement somehow intrudes upon the central command of the "sound arguable basis" standard, the truth is that the Board is not interpreting the contract, but simply stating the obvious, that a cursory look at the language of the contract inevitably draws to the Board's conclusion about Article 41, and that there is no other plausible interpretation. A thorough reading of the whole Article 41, without subtracting its first part (as the ALJ's reversed decision did), unquestionably leads to the Board's conclusion that AEELA had a sound arguable basis for the way it paid the Christmas bonuses for 2017 and 2018.

The Board articulated the reasons for the sound arguable basis standard as in Vickers, Inc., stating: Where, as here, 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, and there is "no showing that the employer in interpreting the contract as he did, was motivated by union animus or was acting in bad faith," the Board ordinarily will not exercise its jurisdiction to resolve a dispute between the parties as to whether the employer's interpretation was correct. Vickers, Inc., 153 N.L.R.B. 561, 570 (1965) (footnotes omitted). "Board findings of fact are conclusive as long as they are 'supported by substantial evidence on the record considered as a whole.'" Evergreen Am. Corp. v. NLRB, 531 F.3d 321, 326 (4th Cir. 2008) (quoting 29 U.S.C. § 160(e)). "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" Evergreen, 531 F.3d at 326 (quoting Richardson v. Perales, 402 U.S. 389, 401 (1971)). The evidence on the record affirms the Board's Decision in this case.

III. The Union's allegations must be rejected, because it may not raise new legal arguments at this stage of the litigation that were never pursued either by the General Counsel or the Union.

That the labor agreement was in full force on Christmas Day 2017 is so palpably faulty,

that it must be presumed to be no more than a red herring. First of all, the record shows that Article 41 provides that the Christmas bonus was to be paid “as provided in Law No. 148 of June 30, 1969, as amended”. Said statutory provision states that the bonus is to be paid between November 15 and December 15 of every year. Thus, whether there was an extension in place to the labor agreement by December 25, 2017 (“Christmas Day 2017”) ², is totally irrelevant to the case at hand.

Most notably, the most significant fact that unquestionably refutes this particular argument is that there was simply no contract language between the parties designating a modification for the 2017 Christmas Bonus, and that pursuant to the language contained in the first sentence of Article 41, on December 15, 2017, Respondent correctly paid a Christmas bonus to eligible bargaining unit employees up to the maximum amount of \$600 per employee.

On the other hand, the 2018 Christmas Bonus was paid **in September 2019** and only as part of Respondent’s declaration of **an impasse and consequent implementation of changes in terms and conditions of employment pursuant to its last final offer**, for the still ongoing bargaining process at said time³. The allegation that “there is no surer way to find out what parties meant, than to say what they have done”, is made in a vacuum, and trying to infer other reasons for the payment other than the implementation of the Respondent’s last final offer on impasse.

Above all, these arguments must be disregarded by this Board and the Union’s Motion should be denied because it seeks to raise new legal arguments, that were never pursued either by the General Counsel or the Union. These arguments are brought for the first time now in a Motion for Reconsideration. The Union cannot change its legal theory at this stage of the litigation. It is

² 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.

³ As was informed to the ALJ by Motion.

axiomatic that a “Respondent should not be expected to defend against other theories that are not part of the General Counsel’s case.” Sierra Bullets, LLC, 340 NLRB 242, 242–243 (2003) (reversing the ALJ’s finding of a violation of Section 8(a)(5) because the theory upon which the violation rested was not one the General Counsel pursued in litigation); see also Citi Trends, Inc., 363 NLRB No. 74, slip op. at 1, 2015 (reversing ALJ decision “[b]ecause the General Counsel did not litigate this theory of a violation before the judge”); Lamar Advertising of Hartford, 343 NLRB 261, 265 (2004) (the General Counsel cannot “change theories midstream without giving respondents reasonable notice of the change”).

The parties filed a *Joint Motion and Stipulation of Facts and Documents* on August 9, 2019. With the stipulation of facts, the documents filed in record and the parties respective briefs, it is evidently clear that there is not one stipulation nor an argument from the General Counsel and/or the Union that was brought before the ALJ that address the allegations brought now regarding that “labor agreement was in fact in full force on Christmas Day 2017 and that Respondent paid the 2018 Christmas bonus”. These arguments were not even brought before the Board and for the first time we hear these desperate contentions in a motion to reconsider. Neither ALJ nor the Board addressed these new claims, nor should they have, given that neither the General Counsel nor the Union advanced such a theory.

It is simply too late to adopt and pursue a new, post-litigation legal theory. See Springfield Day Nursery, 362 NLRB No. 30, slip op. at 2 (reversing ALJ decision where theory of the 8(a)(5) allegation was neither alleged in the complaint, nor litigated at the hearing); Lamar, 343 NLRB 261, 265 (2004) (the General Counsel cannot “expand the theory of the violation beyond what was alleged in the complaint and litigated at the hearing”); Pepsi Bottling Group, Inc., 338 NLRB 1123, 1234 (2003) (“It is well established that a violation of the Act cannot be properly found where the violation was not alleged in the complaint and the issue was not fully litigated at the hearing”)

(citations omitted); - 10 - see also Independent Elec. Contractors v. NLRB, 720 F.3d 545, 552 (5th Cir. 2013) (“the Board has recognized that when the General Counsel has chosen to litigate against a respondent on a narrow theory of liability, and the respondent was led to believe that it would not have to defend on a broader theory, an ALJ is not free to resolve the case on a broader theory”).

IV. Conclusion

In light of the foregoing, it is clear the Union has failed to identify any extraordinary circumstances warranting reconsideration. Willis Roof Consulting, Inc., Case No. 26-CA-20852, 2011 WL 2632615 (July 1, 2011); County Waste of Ulster, LLC, 355 NLRB No. 193 (Sept. 27, 2010); Flour Daniel, Inc., 353 NLRB No. 79 (Jan. 27, 2009). Respondent respectfully requests that the Charging Party’s Motion for Reconsideration of The Board’s Decision and Order be dismissed in its entirety.

CERTIFICATE OF SERVICE: The undersigned, as attorneys for Respondent, hereby certifies that a true and exact copy of the foregoing document was electronically filed via the NLRB E-Filing System with the National Labor Relations Board and served on the parties listed below via email to David Cohen, Regional Director, NLRB Region 12, David.cohen@nlrb.gov; Vanessa García, Officer in Charge, NLRB Subregion 24, vanessa.garcia@nlrb.gov; to Atty. Alexandra Sanchez (“charging party”) and Miguel Simonet to asanchez@msglawpr.com, msimonet@msglawpr.com; Atty. Michael Nicholson mnlawannarbor@gmail.com

MARCH 23, 2021.

RESPECTFULLY SUBMITTED.

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