

**UNITED STATES OF AMERICA BEFORE THE
NATIONAL LABOR RELATIONS BOARD
REGION 2**

NBCUniversal Media, LLC
Respondent

and

Case No.: 2-CA-262640

NewsGuild of New York, Local 31003,
TNG/CWA
Charging Party

**ACTING GENERAL COUNSEL’S BRIEF IN SUPPORT OF CROSS EXCEPTIONS
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

1. The ALJ failed to conclude that Respondent’s decision to rescind the 2020 merit wage increase was a *fait accompli*. (Cross Exception No. 1)

While the ALJ correctly concluded that Respondent failed to bargain over Respondent’s rescission of the 2020 merit wage increase in violation of the Act, Acting General Counsel (“Acting GC”) contends that the ALJ failed to conclude that Respondent presented its decision to rescind the 2020 merit wage increase as a *fait accompli* (ALJD p. 11, fn 10).¹

The undisputed evidence shows that on May 5, 2020, Respondent announced its decision to roll back the annual merit wage increase that was given to employees, including Unit employees, on June 8, 2020 (ALJD p.3; lines 37-44; G.C. Exh. 19, 21). Respondent CEO Jeff Shell issued Respondent’s rollback announcement in an email to all employees (ALJD p.3; lines 37-44; G. C. Exh. 19). This announcement also contained a Q&A link that provided additional information regarding the rollback procedure, including the amount of the rollback, who would be affected

¹ Throughout this brief, abbreviated references are employed as follows: “ALJD” followed by page and line numbers to designate the ALJ’s Decision; “R. Excep” followed by a number to designate Respondent’s exceptions; “R. Br.” followed by a page number to designate Respondent’s brief in support of exceptions; “T” followed by page numbers to designate Transcript pages; “G.C.Exh.” followed by exhibit number to designate General Counsel’s Exhibits; Jt. Exh. followed by an Exhibit number designates Joint Exhibits.

and the effective date of June 8, 2020 (G. C. Exh. 21). According to Shell's email and supplemental Q&A, the rollback would reduce an employee's salary up to three percent without reducing an employee's threshold salary below \$100,000 (G. C. Exh. 21).

The evidence further shows that Respondent did not inform the Union of this rollback until after its decision was made and announced to employees. The undisputed record evidence shows that Shell's announcement was issued at 12:59PM on May 5 (G.C. Exh. 19), but Respondent's conference call with the Union to discuss the rollback did not occur until later that evening (Tr. 45,47; G.C. Exh. 6). Therefore, the timing of Respondent's announcement of its decision to roll back merit wage increases clearly shows that Respondent's decision was made before it afforded the Union any opportunity to bargain about the rollback.

In addition, the undisputed evidence regarding the three conference calls clearly shows that Respondent had no intent on engaging in meaningful bargaining over the rollback and that its decision to rescind the 2020 merit wage increases was a *fait accompli*.

In order to determine whether an employer has presented a union with a *fait accompli*, the Board considers objective evidence regarding the presentation of the proposed change and the employer's decision-making process. *KGTV*, 355 NLRB 1283 (2010) (union's "subjective impression of its bargaining partner's intention is insufficient" to establish *fait accompli*); *Bell Atlantic Corp.*, 336 NLRB 1076, 1087 (2001); *Haddon Craftsmen*, 300 NLRB 789 (1990). While presenting a proposed change as a fully formulated plan or the use of positive language does not definitively establish a *fait accompli*, statements conveying an irrevocable decision constitute significant evidence that bargaining would be futile. See *UAW-DaimlerChrysler National Training Center*, 341 NLRB 431, 433 (2004) (employer presented *fait accompli* by telling union that layoff was a "done deal"); *Pontiac Osteopathic Hospital*, 336 NLRB 1021, 1023-1024

(notice stating that changes “will be implemented” and other “unequivocal language” evidence of *fait accompli*). The Board also evaluates the timing of the employer's statements vis a vis the actual implementation of the change, the manner in which the change is presented, and other evidence pertinent to the existence of a “fixed intent” to make the change at issue which obviates the possibility of meaningful bargaining. *Ciba-Geigy Pharmaceutical Division*, 264 NLRB 1013, 1017 (1982), *enf.d.* 722 F.2d 1120 (3rd Cir. 1983) (“if the notice is too short a time before implementation, or because the employer has no intention of changing its mind, then the notice is nothing more than informing the union of a *fait accompli*”); *Patrish, LLC, D/B/A Northwest Airport Inn*, 359 NLRB 690 (2013) (*fait accompli* established given owner's testimony that a decision to subcontract bargaining unit work had already been made and implemented, and union bargaining proposals regarding employee compensation “made no difference”).

Furthermore, the Board has consistently found that “where the manner of the respondent's presentation of a change in terms and conditions of employment to the union precludes a meaningful opportunity for the union to bargain,” the change constitutes a *fait accompli*, such that the union's failure to demand bargaining does not constitute a waiver. See *Pontiac Osteopathic Hospital*, 336 NLRB 1021, 1023 (2001). The obligation to bargain requires that the employer “at least inform the union of its proposed actions under circumstances which afford a reasonable opportunity for counter arguments or proposals.” *Intersystems Design & Technology Corp.*, 278 NLRB 759 (1986), quoting *Gulf States Mfg. v. NLRB*, 704 F.2d 1390, 1397 (1983) (citations omitted). Informing the union of a change in a manner which precludes meaningful bargaining divests the union of its obligation to demand bargaining or have inaction construed as a waiver. *Id.*

Here, the undisputed evidence shows that after announcing its decision to roll back the 2020 merit wage increases, Respondent and the Union discussed the rollback during three conference calls held on May 5, May 13 and May 22, 2020. During these calls, the unrefuted evidence shows, as the ALJ concluded, that Respondent never planned to bargain with the Union about its rollback decision. Instead, Respondent scheduled the calls in order to inform the Union of its “fixed intent” on implementing the rollback of the merit wage increases. In this regard, the unrefuted and corroborated testimonies of Sloan and James clearly show that Laks and Mukho repeatedly informed the Union that Respondent was rolling back the merit wage increases, that the rollback was part of the merit review process, that it was discretionary, that they did not have to bargain about the rollback and that it was effective as of June 8 (ALJD p. 4, lines 17-20; Tr. 48,52,57,102,104; G. C. Exhs. 14, 15, 16, 26). Although Dictor informed Laks and Mukho that Respondent could not unilaterally change the merit wage increases without bargaining with the Union, that such a change was a violation of the Act, and that the rollback was never part of the merit review process (Tr. 53, 57, 103, 104), Laks and Mukho ignored Dictor’s attempt to engage in bargaining and continued to offer their “perception” of Respondent’s rollback decision (Tr. 48, 52, 57, 58,104,105; G. C. Exhs. 14, 15, 16, 26). Even when Dictor proposed an alternative option to exempt Unit employees from the rollback decision (Tr. 58, G. C. Exh. 16), Laks and Mukho refused to entertain alternative counter arguments and proposals. Instead, Laks and Mukho repeatedly confirmed Respondent’s fully formulated plan and decision to roll back the Unit’s merit wage increases as of June 8 (Tr. 52-58; 102-104; G. C. Exhs. 14, 15, 16, 26). Without doubt, Laks and Mukho were not interested in the Union’s concerns or any modifications to Respondent’s rollback decision and were not interested in bargaining about the rollback decision.

Based on this unrefuted evidence, the Board, herein, should find that Respondent presented a *fait accompli*, an “irrevocable decision,” when it announced the rollback on May 5 without giving the Union an opportunity to engage in meaningful bargaining before implementing the rollback and therefore violated the Act. The Board should also conclude that the ALJ failed to make a similar finding (ALJD p. 11, fn 10).

2. The ALJ failed to order Respondent, upon request, to bargain about the rescission of the merit wage increase to overall impasse and failed to include such an order in the Notice to Employees. (Cross Exception No. 4)

The ALJ correctly concluded that Respondent unilaterally implemented a wage rollback on or about June 8, 2020 without bargaining with the Union to a lawful overall impasse in negotiations in violation of Section 8(a)(1) and (5) of the Act. (ALJD p. 12; lines 21-23). However, the ALJ failed to recommend the appropriate remedy and order for such a violation (ALD p. 12, 13, 14; lines 29-36, 1-41; 11-17; Appendix).

Acting GC requests that the ALJ’s recommended Remedy and Order be consistent with the ALJ’s Conclusion of Law and include the requirement that Respondent, upon request, bargain with the Union about the rescission of the merit wage increase until the parties reach an overall impasse for their first collective-bargaining agreement. The Notice to Employees should also reflect this Remedy and Order.

3. The ALJ erred by inserting a timeliness requirement for submission of W-2 forms without also allowing for possible extensions. (Cross Exception No. 2)

The Acting GC sought a special remedy in this matter that would require Respondent to submit W-2 forms, reflecting the backpay paid to affected employees, to the Regional Director. The ALJ recommended the special remedy by requiring that Respondent provide the Regional Director for Region 2 the affected employees’ W-2 forms “within 21 days.” The Acting GC proposes a slight modification of that remedy to allow for circumstances where the Regional

Director may grant additional time. Accordingly, the Acting GC requests that the Board amend the ALJ's recommended remedy, as follows:

Within 21 days of the date the amount of backpay is fixed either by agreement or Board order, or such additional time as the Regional Director may allow for good cause shown, file with the Regional Director for Region 2 a copy of each backpay recipient's corresponding W-2 form(s) reflecting the backpay award.

In a recently issued Decision in *Cascades Containerboard Packaging*, 370 NLRB No.76, slip op. at 4 (Feb. 9, 2021), the Board amended the remedy to include the employer's requirement to submit W-2 forms to the Regional Director. The Amended Order also required that such a submission be made when W-2 forms are generated early in the calendar year. *Id.*, 370 NLRB No. 76, slip op. at 4, fn 3 (Feb. 9, 2021).

The Acting GC's proposed modification is necessary as the lack of timeliness parameters found in *Cascades* encourages delay, while setting a specific timeframe increases the overall effectiveness of the remedy. At the same time, the proposed modified remedy allows for extensions of the 21-day deadline to submit the W-2 forms for good cause shown.

Although *Cascades* is the first case explicitly requiring W-2 forms be submitted, the additional language proposed by the Acting GC setting forth a specific time is the Board's customary approach in Orders. *Id.* Indeed, paragraph 2(e) of the same Board's Order provides the basis for the phrasing of the Acting GC's request. *Id.* Backpay reports and W-2 forms are companion documents. Ordering a respondent to submit the backpay report without concurrently submitting the W-2 form increases the potential for reporting errors to SSA. These reporting errors can incorrectly skew discriminatees' ultimate social security benefits by providing for fewer social security credits, incorrect tax payments, and a smaller social security payout. Indeed, submitting a backpay report without a corresponding W-2 can result in a complete rejection of the submission by SSA. Such a result will cause discriminatees additional,

unintended, and unremedied harm. Without clarification of the Board's Order, discriminatees may not be eligible for benefits that they would have otherwise been entitled to but for a Respondent's unlawful conduct.

On balance, the benefits of clarifying the Board's Order as set forth in *Cascades* to include a specific time requirement outweigh any alleged detriments. Any arguments that it would be overly burdensome to require the submission of W-2 forms prior to the IRS' mandatory reporting period should be rejected. There is no evidence that it is more effort to create a report early than it would be to create it at the traditional time. Similarly, there should be no weight given to any arguments that it is impossible to generate a report early. To the extent there are concerns regarding employees who have accepted reinstatement, the proposed clarification accounts for such an issue, as continued employment with the Respondent would certainly qualify as reason for the Regional Director to provide Respondent with additional time to submit the W-2. Similarly, severing the employment relationship by a discriminatee declining reinstatement would not prevent the creation of a W-2. Rather, failing to timely supply the Region with a W-2 for discriminatees that declined reinstatement would cause unnecessary delay in reporting to the SSA and the potential for errors in their benefits. In sum, without clarification the Board's Order could cause undue harm to discriminatees despite an otherwise favorable remedy.

Based on the above, the Acting GC is requesting that the ALJ's recommended Order be modified to include a timeliness requirement for submission of W-2 forms and discretion to extend the deadline for submission, in order to reduce the risk of a negative impact to an employee's social security benefits and proposes the following language:

Within 21 days of the date the amount of backpay is fixed either by agreement or Board order, or such additional time as the Regional Director may allow for good cause shown,

file with the Regional Director for Region 2 a copy of each backpay recipient's corresponding W-2 form(s) reflecting the backpay award.²

4. The ALJ erred in failing to conform the Remedy, Order and Notice. (Cross Exception No. 3)

The Acting GC requests that the ALJ's recommended Remedy, Order and Notice be conformed to consistently require the special remedy discussed above. (ALJD p. 13, lines 6-7, 36-41 and Appendix). Specifically, the following modified language should be included in the recommended Remedy, Order and Notice:

Within 21 days of the date the amount of backpay is fixed either by agreement or Board order, or such additional time as the Regional Director may allow for good cause shown, file with the Regional Director for Region 2 a copy of each backpay recipient's corresponding W-2 form(s) reflecting the backpay award.

CONCLUSION

For all the reasons set forth above, Acting General Counsel respectfully requests that the Board modify the timeliness requirement for submission of W-2s in ALJ's recommended Remedy, Order and Notice to Employees.

Dated: 24th of March 2021.

Respectfully submitted,



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² This language is similar to the language currently ordered by the Board regarding Respondent's obligation to file a SSA report with the Regional Director.