

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

THE FINLEY HOSPITAL,)	
)	
Respondent,)	
)	
and)	Case No. 33-CA-14942
)	33-CA-15132
SERVICE EMPLOYEES)	33-CA-15193
INTERNATIONAL UNION, LOCAL 199,)	
Charging Party.)	

REPLY BRIEF OF RESPONDENT

THE FINLEY HOSPITAL

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I. ANNUAL WAGE INCREASES UNLIKE SEVERANCE PAY ARE NOT A VESTED RIGHT, CASE 33-CA-15193

General Counsel claims that, following the expiration of a labor agreement, federal labor policy mandates an employer continue to grant annual wage increases. General Counsel also claims this mandate is independent of any principles of contract interpretation. General Counsel's position is not supported by the language of the National Labor Relations Act ("Act"), and flies in the face of several Supreme Court decisions. Nowhere in the Act, not in Section 7, Section 8(a)(5), Section 8(d), or in Section 9(c), is there an obligation that an employer grant an annual wage increase, much less a 3 percent increase. Nonetheless, General Counsel urges the Board to affirm the Administrative Law Judge's ("ALJ") decision, arguing Finley has a "misunderstanding of its obligation" (G.C. Br. 26), and that Finley has "confused its statutory obligation to continue terms and conditions with its contractual obligations" (G.C. Br. 29).¹

The Court's decision in *Litton Financial Printing v. NLRB*, 501 U.S. 190 (1991) is instructive (if not dispositive). In the context of determining whether rights under a labor agreement and the duty to arbitrate survived the expiration of the labor agreement, the Court started its analysis by reciting the well-established rule that when a labor agreement expires it ceases to exist as a legally binding document.² The Court then provided three circumstances in which a right could be said to "arise under" the Agreement and the duty to arbitrate continued

¹ Local 199 claims that it is undisputed Finley made a unilateral change (Un. Br. 1). Finley categorically and unequivocally denies it made a unilateral change. As explained in its Brief in Support of Exceptions ("Finley Brief") and reiterated herein, Finley submits the *status quo* upon the expiration of the 2005 Agreement was that no wage increases were due on employees' anniversary dates.

² Citing *Laborers Health & Welfare Fund v. Advanced Lightweight Concrete*, 484 U.S. 539 (1988).

post-contract expiration: first, the events giving rise to the dispute occurred before the labor agreement expired; second, the dispute involved rights which had *vested* under the expired agreement; third, “under normal principles of contract interpretation” the expired agreement provided the right survived post-expiration. 501 U.S. at 206.

A. By Its Express or Implied Terms The Wage Increase Did Not Survive The Contract’s Expiration

It follows that, if the parties can provide “under normal principles of contract interpretation” that rights and duties will continue post-contract expiration, than the parties also can provide “expressly or by clear implication” that rights and duties will *not* continue post-contract expiration. *Cf. Nolde Bros. v. Local No. 358*, 430 U.S. 243, 255 (1977). General Counsel, however, nowhere recognizes that normal principles of contract interpretation must be used to resolve the issue of whether the 3 percent wage increase on the employees’ anniversary date continues post-contract expiration under the third prong of *Litton Financial Printing*.

In the language the Board itself has described as “clear”, *see Meilman Foods*, 234 NLRB 698 (1978), the parties entitled Section 20.3 of their Agreement as “Base Rate Increases During Term of Agreement” (G.C. Ex.4, p.23), Using similar language, the parties placed a temporal limitation on the time period during which increases would be adjusted on the nurses’ anniversary date: “For the duration of the Agreement ...”. *Id.* The parties also agreed to a temporal limitation on the period during which the increase would be 3 percent “...the term of this Agreement”. *Id.* The language of 20.3 per adventure meets the “expressly or clearly implied” standard of *Nolde Bros.*, *supra*. Therefore, the Board is obligated to give effect to the parties’ Agreement, *see Hyatt Mgt. Co. of N.Y. v. NLRB*, 817 F.2d.140 (D.C. Cir.1987), and the Complaint in Case 33-CA-15193 dismissed.

B. General Counsel Improperly Identified The *Status Quo*

Assuming arguendo, the parties did not limit the wage increase to the duration of their Agreement “expressly or by clear implication”, the core of this dispute then lies in defining the *status quo*. Finley urges the Board to examine Section 20.3 of the parties’ 2005 Agreement in its entirety. General Counsel urges the Board to dissect Section 20.3 and to adopt select portions of Section 20.3 as the *status quo* and ignore the language which places a limit on the duration of the employees’ wage increase.

The ALJ determined (at General Counsel’s urging) that Section 20.3 created a term or condition of employment which survived the expiration of the 2005 Agreement (J.D. 11-13). The specific term or condition created was a 3 percent wage increase due and owing on the employees’ anniversary date (J.D. 13, lines 15-17). There was no explanation of the express or implied term which purportedly extended this clause post-contract expiration.

General Counsel’s arguments notwithstanding, the ALJ was not empowered under the guise of resolving an unfair labor practice allegation to rewrite the parties’ 2005 Agreement. *See NLRB v. Katz*, 369 U.S. 736 (1962); *H.K. Porter v. NLRB*, 397 U.S. 99 (1970); *Cf. Hyatt Management Corp. of N.Y. v. NLRB*, 817 F.2d.140, 142 (D.C. Cir. 1987) (affirming the Board’s decision to refuse to grant wages and benefits for a period of time different from the period the parties intended). Yet, it is apparent that the ALJ “interpreted” the 2005 Agreement so as to effectively write its terms. First he deleted a portion of the title of Section 20.3. The ALJ determined that the words “During the Term of the Agreement” were surplusage by operation of law once the 2005 Agreement expired, and had no meaning, purpose or effect whatsoever.

The ALJ then rewrote the first sentence of Section 20.3, which defined the period during which “Base Rate Increases” would be granted. The first sentence provided “For the duration of this Agreement, the Hospital will adjust the pay of Nurses on his/her anniversary date” (G.C.

Ex. 4, p.23). Once again, the ALJ determined that the words “for the duration of this Agreement” were surplusage by operation of law once the 2005 Agreement expired, giving the language no meaning, purpose nor effect.

Finally, the ALJ rewrote the second sentence of Section 20.3 which defined the amount of the increase and the eligible employees. It too had a self-contained temporal limitation on its effectiveness, providing: “Such pay increases for Nurses not on probation, during the term of this Agreement will be three (3) percent...” (G.C. Ex.4, P.23) Again, the ALJ determined that the words “during the term of this Agreement” were surplusage by operation of law once the 2005 Agreement expired, and had no meaning, purpose or effect.

The ALJ justified his “reformation” of the Agreement on policy grounds (rather than contract language): [to do otherwise] would have the natural effect of causing unit employees to believe they have been effectively punished for supporting the Union, since they have been deprived of the raises they received not only during the term of the contract but for many years before then. (J.D. 13, lines 1-4). This “policy” has been rejected by the Supreme Court as a general proposition. *See NLRB v. Insurance Agents’ International Union*, 361 U.S. 477(1960). The “effectively punished” theory adopted by the ALJ necessarily precludes an offensive lock-out – yet an offensive lockout was approved by the Court. *See American Shipbuilding v. NLRB*, 379 U.S. 814 (1964).

A determination of the rights and responsibilities of the parties to a contract necessarily begins with the words the parties use to memorialize their agreement. *See Restatement 2d of Contracts* §201. This same rule applies to determinations made in disputes involving collective bargaining agreements. *See Elkouri & Elkouri, How Arbitration Works*, 5ed., pp. 26. The ALJ, however, did not examine the language of the 2005 Agreement. Rather, the ALJ jumped to the

conclusion that the award of a 3 percent wage increase on an employee's anniversary date was a term or condition of employment and, therefore, survived the expiration of the 2005 Agreement, and worked backwards, *Contra, Meilman Foods*, 234 NLRB 698 (1978) ("during the life of the agreement" was clear); *UAW v. Cleveland Gear*, 1983 WL 2174 (N.D. Ohio) ("during term of this collective bargaining agreement" was "clear" and benefits expired when agreement expired).

There is a complete void in General Counsel's argument on the contract interpretation issue and with good reason. There are no cases that either directly or indirectly support her theory. To the contrary, the cases from the courts (and the Board) that have directly addressed the meaning of clauses such as "during the term" and "for the duration of" are unanimous in holding such clauses cause the expiration of the operative clause. Finley Brief, pp 16-23.

General Counsel's attempt to distinguish court decisions giving effect to the plain "clear" meaning is unavailing (G.C. Br. 28). The particular labor statute under which the language is interpreted is irrelevant, as the federal courts are tasked to create a body of federal common law for the enforcement and interpretation of collective bargaining agreements. *See Textile Workers v. Lincoln Mills of Alabama*, 353 U.S. 448 (1957). The Supreme Court has expressly rejected the argument that it adopt one set of contract interpretation rules for NLRB cases and another for §301 suits. *See Litton Financial Printing*, 501 U.S. 190, *supra*.

C. *Allied Signal*, NLRB 330 NLRB 1216 (2000) is Distinguishable

General Counsel's argument that *Allied Signal* controls is unpersuasive (G.C. Br. 27-29). *Allied Signal* begins its analysis with the finding that the employer's obligation to award severance pay extended post-contract expiration. General Counsel's reliance on *Allied Signal* is misplaced because of the nature of the benefit involved in that decision. It is well established that severance pay is a vested benefit, earned or accrued as a consequence of an employee's

years of service. *See e.g., Kulins v. Nalco*, 121 Ill.App.3d, 550, 459 N.E.2d. 1038, 1044 (1st Dist., 1984) (“the right to earn severance pay, ...arose and vested during the term of the 1967 policy and, consequently, survived the termination or modification of that policy”). *Cf. Nolde Bros.*, 430 U.S. 243 (“The dispute [over severance pay] therefore, although arising *after* the expiration of the collective bargaining agreement, clearly arises *under* that contract.”); *See also John Wiley & Sons v. Livingston*, 376 U.S. 543 (1964).

In contrast, the right to future wage increases is not a vested benefit. Rather, future wage increases are negotiated for each year of the agreement, if indeed an increase is awarded. It is well established that wage increases vary from year to year, are occasionally replaced with a lump sum payment, are simply not awarded at all, or occasionally even negative. The ALJ’s decision to treat an annual wage increase as a vested right that survived the expiration of the parties’ 2005 Agreement represents a radical departure from established norms of collective bargaining and should be rejected. *Cf. Hyatt Management Corp. of N.Y. v. NLRB*, 817 F.2d. 140, 143 (D.C. Cir.1987) (“neither the Courts nor the Board can change or nullify substantive contractual provisions”).

General Counsel’s reliance on *Allied Signal* is misplaced for a second reason. In *Allied Signal*, the Board nowhere conducted the inquiry required by *Litton Financial Printing*, namely whether the parties had expressly or impliedly agreed that the duty to award severance pay would end with the agreement’s expiration. (It does not appear the respondent raised this argument.)

It is only after the contract language inquiry is conducted and concluded that the Board examines whether there was a clear and unmistakable waiver. Because the first step under *Litton Financial Printing* requires a searching review of the contract, General Counsel misstates the law

when she states that the “sound arguable basis” standard is not applicable (G.C. Br. 30). To the contrary, in *Indiana & Michigan Electric Co.*, 284 NLRB 53, 59 (1987), the Board adopted and applied the sound arguable basis standard of *NCR Corp.*, 271 NLRB 1212 (1984), in determining the duties and responsibilities of the parties post-contract expiration. *Bath Iron Works*, 345 NLRB No. 33 (2005), *aff’d sub nom, Bath Marine Draftsmen’s Association v. NLRB*, 475 F.3d 14 (1st Cir. 2007), does not change this result. To the contrary, until the initial rights of the parties are determined, it is impossible to determine if there has been a change in the *status quo*. It is only after the initial rights are determined that the unilateral change analysis of *Bath Iron Works* is applied.

In short, General Counsel’s argument jumps to the desired conclusion and then works backwards. This argument (rhetorical tactic), however, directly contradicts the Court’s decision in *Nolde Bros.*, *supra.* Since the language is “clear”, thus, certainly meeting the “clearly implied” standard, there is no reason to explore the oral “bargaining history,” from either in the negotiations leading up to the 2005 Agreement or in the negotiations immediately preceding the June 20, 2006 expiration of that Agreement. Parol evidence (of the sort adduced by General Counsel) cannot override or supersede clear contract language. *See CJC Holdings, Inc.*, 315 NLRB 813 (1994).

II. GENERAL COUNSEL’S ARGUMENT CONCERNING CO-WORKERS NAMES IGNORES EXTANT BOARD LAW, CASE 33-CA-14942

General Counsel’s argument, that the ALJ’s finding that Finley did not adequately respond to the Union’s information request for co-workers’ names should be upheld, misstates the facts and conveniently fails to mention extant Board law.

Finley disclosed handwritten complaints made by co-workers as well as notes from managerial employees who met with the complaining co-workers. (R. Ex. 4, pp. 76-86).

General Counsel also fails to acknowledge that the first name of the nurse in the Rehab Unit “Jacquie” (R.Ex. 4, p. 72) corresponds to the “Jacquie Frick” identified in Finley’s September 27 letter (G.C. Ex.9). This fact belies the ALJ’s speculative finding that Finley did not disclose the names of the complaining co-workers. J.D. 11 (“...in the absence of record evidence, I will not find that they are the same co-workers who witnessed Gross abusing patients”).³

General Counsel’s view that Respondent must engage in multi-step requests for Union approval of suggested compromises before it may fulfill its legal obligation as defined by Board law is simply wrong. (*see* G.C. Br.5, “Respondent never asked the Union if it would withdraw the request”). General Counsel’s position fails to recognize that the Board has for a number of years, in a number of decisions addressing a multitude of situations, ruled that, despite the objections of the union, an employer can meet its obligations under the Act by providing redacted statements or summaries (Finley Br. pp. 33-34)⁴. That being the case, Finley had no obligation to provide the names and contact information for individuals whose statements or whose summarized complaints had been provided to the Union. Thus, the ALJ’s findings of a violation in Case 33-CA-14942 cannot be sustained.

³ General Counsel’s objection to the recitation of the facts forming the basis of Finley’s confidentiality concern reflects a basic misunderstanding of *Detroit Edison v. NLRB*, 440 U.S. 301 (1979). *Detroit Edison* requires a balancing of the employer’s confidentiality concern and the Union’s need for the information. When the employer’s confidentiality concern is high, the scale tilts more heavily towards an alternative disclosure. Similarly, when the union’s need is less, the scale also tilts toward an alternative disclosure. General Counsel nowhere engages in a meaningful balancing analysis. Here there was both a high confidentiality concern and a low need for the information.

⁴ If a union agrees with the employer’s disclosure, it has no reason to file a unfair labor practice. It is only when the union contests the adequacy of the employer’s disclosures that a unfair labor practice is filed and the matter comes before the Board. As the Board’s decisions dismissing unfair labor practice charges, *see* Finley’s Brief, pp. 33-34, demonstrate however, the Board and not the unions are the final arbitrator of an employer’s duty to provide information.

General Counsel also ignores the fact that the Union must demonstrate information is both relevant and *necessary*. Once the Union has the information, a duplicate copy of it is no longer “necessary” and there is no duty to bargain an accommodation. General Counsel’s theory that once an employer denies a request for information it cannot satisfy its bargaining obligation until the union agrees with a proposal, is contrary to Section 8(d) and cases describing it as limiting the Board’s authority and position. *See e.g. H.K. Porter*, 397 U.S. 99. Section 8(d) quite clearly provides that once Finley met its minimal disclosure obligation as defined Board decisions, it could cease all further contact with the Union.

III. GENERAL COUNSEL’S VIEWS ON THE DUTY TO SUPPLY INFORMATION ARE WITHOUT LEGAL SUPPORT, CASE 33-CA-15132

General Counsel argues that Respondent should be held to have violated the Act because the Union did not know it had received the information regarding nurse operations councils earlier (G.C. Br. 17, inclusion of three pages of information in a banker’s box “can hardly be considered compliance”). By that logic, none of the material supplied in January 2006 met the Respondent’s obligation under the Act, since all of the information was contained in “the bankers’ box full of documents” (G.C. Br. pp. 17-18).

If adopted, General Counsel’s position would make a mockery of the duty to provide information. If a union requests a massive amount of information and the employer complies, the employer nonetheless must produce smaller sub-sects of information because the subject was buried in the larger request. Under this theory, the employer would have no duty to respond to massive requests for information since the employer’s production “does not count”.

IV. GENERAL COUNSEL’S REQUEST THAT THE BOARD SHOULD ENTER AN ORDER AS TO VIOLATIONS NOT FOUND SHOULD BE REJECTED

In a footnote appearing on the final page of her brief, General Counsel urges the Board to approve a broader order and remedy than the violations found (G.C. Br. 34, n.22). The Board’s

authority, while broad, is nonetheless limited by the statute. Before a broader order can be imposed, the Board must make a finding that there is a “proclivity” to violate the Act or Respondent was engaged in “widespread or egregious” misconduct. *Hickmott Foods*, 242 NLRB 1357 (1979). No such finding was made by the ALJ, and General Counsel did not except to the ALJ’s failure to do so.

Likewise, in this same footnote, General Counsel requests that the Board defer to the compliance stage the issue of whether certain information requested by the Union exists (G.C. Br. 34, n. 22). The Board flatly rejected this approach in *FES*, 331 NLRB 9 (2000), and should do so again. It is an essential element of General Counsel’s *prima facie* case to prove the existence of the information that the Union requested. The Respondent does not have the burden of establishing the negative, i.e. that the material requested does not exist. *Cf. FES, supra* (no violation unless General Counsel established a vacancy existed.)

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Respectfully Submitted,
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CERTIFICATE OF SERVICE

I, Douglas A. Darch, an attorney, do hereby certify that I have caused a true and correct copy of the foregoing, **Respondent's Reply Brief**, to be electronically submitted to the National Labor Relations Board, and served via Federal Express on 5th day of July, 2007, to the following:

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