

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

In the Matter of:

LEIFERMAN ENTERPRISES, LLC d/b/a
HARMON AUTO GLASS,

Respondent,

And

INTERNATIONAL UNION OF PAINTERS
AND
ALLIED TRADES – DISTRICT COUNCIL 82

And

LIGHTHOUSE MANAGEMENT GROUP,
INC., RECEIVER

Party in Interest.

Case No. 18-CA-18134

**PARTY IN INTEREST
LIGHTHOUSE MANAGEMENT
GROUP’S REPLY BRIEF
IN SUPPORT OF EXCEPTIONS
TO THE DECISION OF THE
ADMINISTRATIVE LAW JUDGE¹**

Pursuant to Section 102.46(h) of the Rules and Regulations of the National Labor Relations Board, Party in Interest, Lighthouse Management Group, Inc. (“Lighthouse” or “the Receiver”), for itself, and as Receiver on behalf of Respondent Leiferman Enterprises, LLC (“Leiferman” or “the Company”), submits the following Reply Brief in Support of its Exceptions to the Decision of Administrative Law Judge (“ALJ”) Jane Vandeventer in the above-captioned matter.

¹ Lighthouse Management, Inc., has received notice that Counsel for General Counsel’s submission of his Answering Brief was untimely, and therefore not forwarded to the Board. However, Lighthouse notes that a copy of Counsel of General Counsel’s Brief has been retained in the Board’s informal case file. Lighthouse therefore submits this Reply Brief for the Board to consider at its discretion.

ARGUMENT

I. GENERAL COUNSEL'S CONTENTION THAT LIGHTHOUSE IS OBLIGATED TO CARRY OUT THE TERMS OF THE PROPOSED ORDER IS UNFOUNDED.

Counsel for the General Counsel (hereinafter "General Counsel"), in his Answering Brief to Respondent's Exceptions, argues that Lighthouse, as Receiver of Respondent Leiferman Enterprises, LLC, must remedy Leiferman's alleged unfair labor practices through use of Leiferman's funds. In so arguing, General Counsel implicitly admits that the ALJ's holding that "Lighthouse is obligated to carry out the terms of any Order issued by the Board," (ALJ Dec. at 10), is overly broad, because it does not limit this obligation to the assets of Leiferman. Specifically, General Counsel states his position as:

that the Receiver is subject to the Board's jurisdiction, and that the Receiver must remedy Respondent's unfair labor practices, just as a trustee appointed under the provisions of the Bankruptcy Code must remedy violations of the Act that occurred before the trustee was appointed. See *Ohio Container Service*, 277 NLRB 305, 306 (1985). The unfair labor practices would be remedied from Respondent's funds, not the Receiver's.

(GC Brief at 2).

On this point, General Counsel contends Lighthouse appeared to "misinterpret" General Counsel's contentions before the ALJ. (GC Br. at 1). However, the issue is not of the interpretation of General Counsel's contentions, but rather, whether the ALJ's holding was erroneous. Given General Counsel's stated position, it is uncontested that the broad remedial obligation imposed on Lighthouse by the ALJ, which so broadly obligates Lighthouse to remedy the alleged unfair labor practices that it could be required to expend its own funds to do so, is simply not supported by law.

However General Counsel's further argument, that Lighthouse, as a state court receiver, "must remedy Respondent's unlawful conduct from Respondent's funds," is also erroneous.² (See GC Br. at 2). Requiring that Lighthouse "must remedy" the alleged unfair labor practices would require that Lighthouse prioritize this remedial obligation above the claims of all other creditors. In this regard, General Counsel contends that Lighthouse "stands in the place of Scott Leiferman, the former manager," and should be treated as a trustee under the federal Bankruptcy Code. (*Id.*) The only authority General Counsel cites for this contention is *Ohio Container Service*, 277 NLRB 305 (1985). (GC Br. at 2). However, *Ohio Container* involved the obligations of a federal bankruptcy trustee, not a state court receiver, and therefore does not address the issue of whether a state court receiver may be required to prioritize a remedial order issued by the Board over the claims of other creditors.

As discussed in Lighthouse's Brief in Support of Exceptions (hereinafter "Lighthouse's initial Brief"), Board case law recognizes that a state court receiver is distinct from a bankruptcy trustee. *See, Cone-Heiden Corp.*, 305 NLRB 1045 (1991). In that case, the Board explicitly recognized that the obligations imposed on a trustee, or a debtor-in-possession, under federal bankruptcy principles, do not apply to a state court receiver. *Id.* General Counsel makes no attempt to distinguish *Cone-Heiden*, or explain how his contentions are consistent with its holding. Indeed, his contention that Lighthouse "stands in the place of Scott Leiferman," is in direct conflict with the holding in *Cone-Heiden* that a state court receiver is a fiduciary of the

² General Counsel also asserts that he "has no knowledge of the current status of Respondent, whether its business still exists, and if it does, whether the Receiver is still charged with managing the business." (GC Br. at 2). In this regard, General Counsel is being disingenuous, since Region 18 is currently investigating a charge filed against the purchaser of Leiferman's assets, which alleges that the purchaser is a successor of Leiferman. General Counsel obviously knows that the Receiver has completed the sale of Leiferman's assets. Both the Board, and General Counsel, are urged, therefore, to take notice that Leiferman Enterprises, LLC, as an entity, is an empty shell, and that the assets of the sale have been disbursed, such that Leiferman has no assets that the Receiver could use to satisfy a back pay order.

creditors, not an agent of the business held in receivership. Moreover, it is clear that a receiver is an agent of the court which appointed it, not of any of the parties.

Finally, General Counsel also erroneously asserts that Lighthouse had “sole discretion” as to disposal of funds in the operation of Leiferman’s business. *Id.* In so arguing, General Counsel simply ignores the limitations on that “discretion” imposed by the Receivership Order of the state court, as well as by Lighthouse’s fiduciary obligations to the creditors. Pursuant to the state court’s Order, Lighthouse’s authority is limited and delineated as follows:

The Receiver is authorized to operate the business and assets of Leiferman Enterprises LLC in a manner designed to preserve and maximize the value of said business and assets. The Receiver is also authorized to pursue the sale of Leiferman Enterprises, LLC or its assets. The Receiver is authorized and empowered to sell Leiferman Enterprises, LLC and its assets with the prior written consent of HAIP and after approval of the Court after notice to defendants and an opportunity for a hearing.

(R. Ex. 6, p. 5).

The Order further explicitly limits Lighthouse’s authority by providing it may “[P]ay obligations previously incurred by Leiferman Enterprises, LLC **only** if deemed necessary by the Receiver for the preservation of HAIP’s collateral.” (*Id.* at p. 6)(emphasis added). Therefore, contrary to General Counsel’s contention, Lighthouse’s “discretion” with respect to managing the business and assets of Leiferman Enterprises, LLC, was strictly limited by its obligation to preserve the Leiferman assets for the benefit of the secured creditor (HAIP).

Finally, even if, for sake of argument only, one accepts General Counsel’s argument that the principles underlying the federal Bankruptcy Code do apply to Lighthouse, General Counsel’s argument that Lighthouse must remedy the alleged unfair labor practices still fails. The Supreme Court has held that, in the context of bankruptcy, obligations imposed by any remedial order issued by the Board are **not** entitled to special priority over the claims of other creditors.

Nathanson v. National Labor Relations Board, 344 U.S. 25, 27 (1952). In *Nathanson* the Court specifically stated that, with respect to a back pay order issued by the Board against a debtor in bankruptcy, “the contest now is not between employees and management but between various classes of creditors . . . the question of whether it should be paid in preference to other creditors is a question to be answered by the Bankruptcy Act . . . We can find in the Bankruptcy Act no warrant for giving these back pay awards different treatment than other wage claims enjoy.” *Id.* at 28-29.

Here, the state court appointed Lighthouse as receiver for the purpose of protecting, and ultimately selling, Leiferman’s assets for the benefit of the secured creditor, pursuant to Article 9 of the Uniform Commercial Code (“UCC”). (R.Ex. 6). In this regard, Article 9 sets forth priorities among security interests, providing, in part, that perfected security interests have priority over unperfected security interests, and that secured interests have priority amongst themselves based on the date the security interests were perfected. Minn. Stat. § 336.9-322(a). In the immediate case, General Counsel alleges that unfair labor practices occurred in August and September 2006, long after the security interest of the secured creditor was perfected (which, according to the court which issued the receivership order, occurred in 2004). (*See*, R. Ex. 6, p. 2). Therefore, under the prioritization of claims outlined in Article 9, a back pay award issued by the Board for those alleged unfair labor practices cannot have priority over the claim of the secured creditor.

Because General Counsel analogizes the current situation to that of bankruptcy, and contends Lighthouse holds a position analogous to that of a bankruptcy trustee, General Counsel’s own analogy also requires that he recognize this priority of claims. In short, even under General Counsel’s theory, the ALJ’s decision is faulty, because the Receiver cannot be

ordered to remedy the alleged unfair labor practices in any manner that undermines the priority of the secured creditor to collect the amounts owed to it.

Thus, to the extent the ALJ's Decision obligates Lighthouse to remedy Leiferman's alleged unfair labor practices without regard to the limited assets of the Leiferman estate, General Counsel apparently agrees that such an obligation is overly broad. Furthermore, as a state court receiver, Lighthouse is not, as General Counsel contends, in a position analogous to that of a bankruptcy trustee. Finally, even if General Counsel's analogy to bankruptcy law is accepted, that law still would not prioritize compliance with a Board order over the right of the secured creditor to recover monies owed it. In short, to the extent the ALJ's Decision and Order requires Lighthouse to take actions which are inconsistent with the UCC, and therefore with its duties as receiver, that Order conflicts with established law, and must be reversed.

II. RESPONDENT DID NOT VIOLATE THE ACT BY FAILING TO PROVIDE INFORMATION TO THE UNION.

A. Information about Health Insurance.

General Counsel argues that the ALJ correctly found that Leiferman unlawfully failed to provide employee healthcare cost information to the Union, first asserting that Lighthouse, in its initial Brief, wrongly "states that the Union did not ask for the premium costs until it sent letters to Respondent on August 18 and September 8, 2006." (GC Brief at 3). This misconstrues Lighthouse's argument. Rather, as supported by the record, Lighthouse argued that Leiferman responded to the Union's request for information about health insurance costs during the final bargaining session by providing information, and an explanation, about those costs. (*See*, Lighthouse's initial Brief, at 20, Tr. 219). However, as Lighthouse pointed out, the Union did not inform the Company that this information and explanation were inadequate, but instead made

later additional requests by the letters referenced above. (GC Exs. 16, 17). Thus, the Union initially accepted the information as sufficient, and only made the additional request when grasping for ways to further delay an impasse.

General Counsel also contends there is no evidence to support Lighthouse's argument that the Company could not provide a specific dollar amount for those costs, because they varied from individual to individual. However, General Counsel himself subsequently states that the Company told the Union the cost "varies on whether you have dependents or not and the rest of the circumstances," (GC Br. At 3, Tr. 219), precisely the record evidence claimed not to exist.

B. The Union's Request for Merit Pay Standards.

General Counsel next argues that the ALJ correctly found the Company was obligated to supply the Union with information about standards for its merit pay proposal, or, if none existed, to "develop some." (GC Br. P. 5). The Company's proposal, however, was for management to give merit pay increases and rewards at its discretion, **not based on structured standards**. Thus General Counsel contends that the Company was obligated to change its bargaining proposal, so that there would be standards. However, the Board does not have the authority to require an employer to change the substantive terms of its proposals. *See, Coastal Electric Cooperative*, 311 NLRB 1126 (1993)(adamant insistence on multiple hard line proposals is not unlawful).

C. The Union's Request for Financial Information.

General Counsel argues that the ALJ correctly found that the Company unlawfully failed to provide the Union with requested financial information, and first contends there was no evidence the Union requested the information in bad faith. General Counsel also attempts to distinguish *H & H Pretzel Company*, 277 NLRB 1327 (1985), cited in Lighthouse's initial Brief, from the facts of the immediate case. However the pertinent facts are analogous. As in *H & H*

Pretzel, Leiferman was in financial distress and needed rapid financial relief. (Tr. 33, 82). Although the Union was admittedly aware of the Company's financial distress through five weeks of negotiation, it did not request proof of that status until late in the last negotiation session, after the Company had made its final offer. (*Id.*) These facts are all similar to those in *H & H Pretzel*. Moreover, here, Union witness Gavanda admitted he knew of the Company's financial distress. (Tr. 82). Such admitted knowledge demonstrates the Union had no need of proof, because it had no good faith doubt of the Company's financial status. Moreover, the strategic timing of the request – just after the Company's presentation of its final offer – further supports the same finding as the Board made in *H & H Pretzel*, that the request was intended to delay negotiations, rather than verify the Company's financial status.

III. THE PARTIES HAD REACHED AN IMPASSE IN NEGOTIATIONS.

General Counsel argues the ALJ correctly found that Leiferman also violated Section 8(a)(5) of the Act by unilaterally implementing the economic terms of its final contract offer in the absence of a bargaining impasse. Again, General Counsel attempts, to no avail, to distinguish *H & H Pretzel* from the immediate case, arguing that, unlike the immediate facts, proof of impasse was established in that case because the union originally declined to examine company financial records when they were offered at the beginning of negotiations. (GC Br. at 11). General Counsel also argues that the Union was “making some concessions.” (*Id.*)

General Counsel simply misconstrues the basic holding of *H & H Pretzel*, that when a union is on notice from the beginning of negotiations that an employer is in financial distress and in need of immediate economic concessions, dilatory moves, such as last minute requests for financial information, or, small concessions on collateral issues, will not prevent establishment of an impasse. If such a bargaining strategy were sufficient to prevent impasse, then any union

which faces concessionary demands from a financially distressed employer could prolong negotiations and maintain the status quo simply by making last minute information requests, and a series of small collateral concessions, even though it has no intention of reaching agreement on the core economic issues. As the ALJ in *H & H Pretzel* observed, if such a strategy is allowed to delay an impasse, that “would simply mean that the Union continues to enjoy the old contract benefits, which makes it happy, and the Employer continues suffering what it considers impossible economic conditions.” 277 NLRB at 1334.

Here, the Union admitted it knew of the Company’s financial distress well before negotiations began. (Tr. 82). Thus, there was no need to verify the authenticity of the Company’s claim of distress, and its last minute request for information could only be for a dilatory purpose. Further, on economic issues, the Union took the position early in negotiations that it could not give the Company a better deal than that contained in the Glassworkers’ Agreements it had with other employers. (Tr. 35). Thus, on the key issues of the negotiation, the Union indicated it would not agree to the concessions the Company needed. Further bargaining therefore, could not be reasonably expected to result in an agreement. An impasse, therefore, existed.

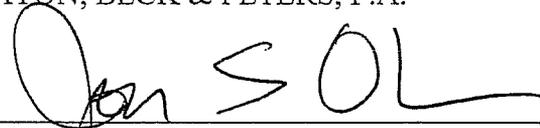
CONCLUSION

For the reasons discussed herein, and in its prior Brief and Exceptions, the Receiver, Lighthouse Management, Inc., for itself, and on behalf of the Respondent in its possession, requests that the Administrative Law Judge’s Decision be reversed.

Dated: September 14, 2007

SEATON, BECK & PETERS, P.A.

By:

A handwritten signature in black ink that reads "Jon S. Olson". The signature is written over a horizontal line.

Douglas P. Seaton (Reg. No. 127759)

Jon S. Olson (Reg. No. 0278440)

7300 Metro Boulevard, Suite 500

Minneapolis, Minnesota 55439

Tel: 952-896-1700

Fax: 952-986-1704

**ATTORNEYS FOR LIGHTHOUSE MANAGEMENT
GROUP, INC., RECEIVER of LEIFERMAN
ENTERPRISES, LLC, AND PARTY IN INTEREST**

