

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

THE AMERICAN NATIONAL RED CROSS,
GREAT LAKES BLOOD SERVICES REGION
and MID-MICHIGAN CHAPTER,

Respondents,

and

LOCAL 459, OFFICE AND PROFESSIONAL
EMPLOYEES INTERNATIONAL UNION, AFL-CIO

CASES 7-CA-52033
 7-CA-52288
 7-CA-52544
 7-CA-52811
 7-CA-53018

Charging Party OPEIU,

and

LOCAL 580, INTERNATIONAL BROTHERHOOD
OF TEAMSTERS

CASES 7-CA-52282
 7-CA-52308
 7-CA-52487

Charging Party IBT.

REPLY OF OFFICE AND PROFESSIONAL EMPLOYEES LOCAL 459
TO RESPONDENTS' ANSWERING BRIEF
(Corrected)

Submitted By:

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Charging Party OPEIU Local 459 replies to Respondents' August 4, 2011 Answering Brief as follows:

I. RESPONDENT MID-MICHIGAN CHAPTER FAILED TO DEMONSTRATE THE EXISTENCE OF A PAST PRACTICE OF LIKE OR SIMILAR CHANGES TO THE RETIREMENT SYSTEM/DEFINED BENEFIT PENSION PLAN, ACCORDINGLY, THE ALJ ERRONEOUSLY FOUND THAT THE STATUS QUO WAS PRESERVED BY RESPONDENT'S ELIMINATION OF THE DEFINED BENEFIT PENSION PLAN FOR EMPLOYEES HIRED ON OR AFTER JULY 1, 2009.

In a desperate effort to distinguish *E.I DuPont de Nemours and Co.*, 355 NLRB No. 176 (2010), Respondent Chapter claims that its asserted history of changes was not “premised” on the expired contractual waiver or “reservation of rights” provisions but rather on an independent “past practice”.¹ That argument is wholly without merit. Here, the contractual provisions at issue and Respondent Chapter’s past changes to the pension plan are inextricably intertwined. Not one iota of evidence was presented by Respondent to support the conclusion that absent the existence of the contractual reservation of rights provisions, the Union would not have objected to the unilateral changes made.² Indeed, if Respondent’s actions were not, as it claims, taken pursuant to these

¹ The expired Chapter CBA provides as follows:

Section 1. The [Chapter] shall continue to participate in the retirement program of the American National Red Cross on the same basis as the present or as it hereafter shall be amended by the American National Red Cross.

Contrary to Respondent Chapter’s assertion, the ALJ never concluded that the above language did not constitute a reservation of right clause. Rather, the ALJ only concluded that the language did not reserve any rights to the Chapter. The above language clearly constitutes a reservation of rights to the American National Red Cross, and under the well-established principals of *E.I DuPont*, such language could not be relied upon by the National Red Cross post-contract expiration to effectuate changes to existing terms and conditions of employment for Chapter employees represented by OPEIU. As has been extensively discussed both in OPEIU’s post-hearing brief to the ALJ as well as its Answering Brief to Respondents’ Exceptions, the American National Red Cross (inclusive of all its Chapters and Blood Service Regions) “is a single, Congressionally-chartered nonprofit organization”. (CPO 10, p. 3). It is “a single legal entity” (CPO 10, p. 119). Moreover, “*ultimate liability for all actions of the chapters as well as blood services regions, lie with the national organization’s Board and management*”. (CPO 10, p. 119). Accordingly, the National Red Cross is the only legal entity in existence for purposes of these cases, and it is, therefore, the Employer of all employees of both its affiliate Chapters and Blood Service Regions.

² Indeed, under cross-examination, Respondent witness Shearer admitted that the Union was not even notified by Red Cross of the vast majority of the administrative, or statutory compliance-related changes made to the retirement system

contractual “waiver” provisions, it begs the question why the Chapter continued to rigidly insist on the inclusion of such provisions in each and every successive CBA, and made proposals for even broader waivers during the instant negotiations for successor contracts.

Even assuming, *arguendo*, that the contractual reservation of rights provisions are “irrelevant” as Respondent suggests, the evidence of past “changes” introduced by Respondent Chapter is wholly insufficient to support the conclusion that the total and complete elimination of the defined benefit pension plan, and the replacement of same with an “enhanced 401(k) plan”, was a change “consistent” with any established past practice. Contrary to Respondent’s repeated assertions, the record evidence in these matters fails to support the ALJ’s conclusion that the status quo with respect to the defined benefit pension plan (“retirement system”) was “dynamic” rather than “static”, and that Respondent’s complete elimination of the defined benefit pension plan for all employees hired on or after July 1, 2009 was consistent with changes made in prior years.

More specifically, the record is devoid of a single instance of a past change to the defined benefit pension plan whereby that benefit was eliminated or even significantly reduced for any class of employees. Rather, as the ALJ found, the voluminous documents and testimony introduced by Respondents unequivocally established that there was only one set of substantive changes to the defined benefit pension plan (retirement system) since 2000, all of which occurred simultaneously in July 2005.³ All other changes were purely administrative, or a result of changes in IRS guidelines or mandated ERISA regulations; did not significantly impact the level of benefit to the participating employee; and notice of same was not even transmitted to the Union when the changes were made. (R 57-83, T-1297-1477, 1762-1839). Most significantly for purposes of the “past

plan and 401(k) plan, which further militates against a finding that the Union voluntarily acquiesced to such changes so as to create a “past practice” of unchallenged changes by Respondents to such plans. (T-1762-1839).

³ Those changes consisted of lowering the percentage for calculating years of benefit service to 1% of average pay; increasing the age to receive unreduced benefits from 60 to 65; and discontinuing the post-retirement 1% annual increase and voluntary after-tax contributions by employees.

practice” argument propounded by Respondent, there was absolutely no evidence of any past change whereby the defined pension benefit (retirement system) was eliminated.⁴

A single set of substantive changes occurring simultaneously on one occasion over the course of the instant lengthy bargaining relationship is wholly insufficient to establish a past practice of acquiescence or acceptance by the Union of such changes. Likewise, a past practice of making administrative changes to employee benefits does not privilege the unilateral reduction or elimination of those same benefits. Rather, the evidence must establish that the changes made as part of the “past practice” are of the same nature as the changes at issue. An employer who has a past practice of granting annual wage increases must continue that practice, but that same employer cannot unilaterally implement a wage reduction under the guise of a “past practice” of making “changes” to wage rates. *Palm Beach Metro Transportation, LLC*, 357 NLRB No. 26, slip op. at 1 (Jul. 26, 2011)(Board held that past practice of reducing days and hours of work not established where past reductions were not of a comparable amount of days and hours); *Caterpillar, Inc.*, 355 NLRB No. 91, slip op. at 2-3 (Aug. 17, 2010)(past changes to prescription drug plan did not establish “past practice” sufficient to allow unilateral implementation of a “generic first” program where prior changes were not similar in nature to the change at issue, even though each change altered the prescription drug plan).

It is Respondent’s burden of proof to demonstrate a past practice. That burden requires Respondent to establish that the practice occurred “with such regularity and frequency that employees could reasonably expect the ‘practice’ to continue or reoccur on a regular and consistent basis.” *Id.* Here, Respondent has demonstrated no practice whatsoever of eliminating the defined

⁴ Indeed, the contractual language which provides that the Chapter “shall continue to participate in the retirement program of the American National Red Cross on the same basis as the present or as it hereafter shall be amended by the American National Red Cross” specifically contemplates the continuation of the defined benefit retirement system. There is no contractual language reserving to Red Cross the right to eliminate the pension plan (retirement system).

benefit pension plan (retirement system), let alone one occurring with such “regularity and frequency” that employees would expect such practice to continue. Indeed, in direct conflict with Respondent’s assertions, the only “past practice” which existed in this case was the *maintenance and continuation* of the retirement system as a defined benefit pension plan. Respondent Chapter’s unilateral elimination of the retirement system was contrary to the established “past practice”, changed the existing status quo, and, therefore, ran afoul of well-settled legal precedent and, contrary to the erroneous conclusion of the ALJ, violated Section 8(a)(5) of the Act.

II. THE REVERSAL OF THE ALJ’S LIMITATION ON REMEDIAL RELIEF AND THE RETROACTIVE APPLICATION OF GOYA FOODS IS APPROPRIATE AND WOULD NOT BE “MANIFESTLY UNJUST” TO RESPONDENTS.

Contrary to Respondents’ assertions, the reversal of the ALJ’s limitation on remedial relief by the application of the Board’s recent decision in *Goya Foods of Florida*, 356 NLRB No. 184 (6/22/11), would not be “manifestly unjust” to Respondents.

First, as the Board noted in *Goya Foods*, the Board in deciding *Brooklyn Hospital Center*, 344 NLRB 404 (2005), departed, without explanation or justification, from over 40 years of established Board precedent requiring an employer to make whole employees for losses suffered as a result of unilateral changes to terms or conditions of employment. *Goya Foods*, 356 NLRB No. 184, slip op. at 2-3. The Board went on to hold that returning to the “make-whole relief” policy in place for 40 years prior to *Brooklyn Hospital* was “preferable because it fully compensates employees for economic losses caused by respondent unfair labor practices”, and that such make whole relief “vindicates” the Act’s policies and purposes. *Id.*, slip op. at 3.

Although Respondents correctly note that in deciding whether retroactivity would be unjust, the Board considers “the reliance of the parties on preexisting law, the effect of retroactivity on the purposes of the Act, and any particular injustice arising from retroactive application”, Respondents

misstate the Board's conclusions favoring retroactivity in *Goya*, and, as will be shown, their attempts to avoid retroactive application in the instant case find no support in the *Goya* decision.

Specifically, in deciding that retroactive application was not unjust in *Goya* as it related to "reliance of the parties on preexisting law", the Board ruled that the employer was done no injustice by the retroactive application of new precedent relating to a purely *remedial* issue because there was no reliance by the employer upon any prior existing precedent when deciding to take the unlawful action on which *liability* was based. As it stated:

Moreover, because our ruling addresses only a remedial issue, and does not create a new standard for determining whether conduct constitutes an unfair labor practice, the Respondent cannot fairly be said to have relied on *Brooklyn Hospital* when deciding whether to take the unlawful action on which its liability is based. *Kentucky River Medical Center*, 356 NLRB No. 8, slip op. at 5 (2010).

Here, as in *Goya*, Respondent does not claim to have, and "cannot fairly be said to have", relied on *Brooklyn Hospital* when it decided to unilaterally make the changes to 401(k) benefits, the defined benefit pension plan, retiree medical benefits, and health insurance benefits on which its liability is based.

Next, in deciding that retroactive application was not unjust in *Goya* as it related to "the effect of retroactivity on the purposes of the Act", the Board found no injustice for the reason that "retroactive application will promote the purposes of the Act by ensuring that adversely affected employees will be make whole". Likewise, here, the application of the legal standard for make whole remedial relief which was in place for 40 years prior to the Board's precipitous and unexplained departure in *Brooklyn Hospital*, will promote the purposes and policies of the Act by ensuring that the employees harmed by Respondents' unilateral changes are made whole for losses suffered as a result of such conduct. Furthermore, as noted by the Board in *Goya*, the restoration of the Board's previously relied upon "make whole" remedy will hopefully serve as a disincentive for Respondents to implement similar unilateral changes in the future.

Finally, Respondents have failed to articulate any particular injustice that will be done to them by the retroactive application of *Goya Foods*, for the simple reason that none exists. Accordingly, reversal of the ALJ's limitation on the "make whole" remedy is warranted and application of the Board's decision in *Goya Foods* is appropriate.

CONCLUSION

For all of the foregoing reasons⁵, Charging Party OPEIU requests that the Board grant its Exceptions to the ALJ's Decision and proposed Order, reverse the ALJ's partial dismissal of the Complaint as it relates to OPEIU, find that Respondent ANRC Chapter and ANRC Region violated Section 8(a)(5) of the Act, and order the remedial relief appropriate under current law.

Respectfully submitted this 17th day of August 2011.

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⁵ All other issues addressed in Respondents' Answering Brief have been fully briefed by OPEIU in its Brief Supporting Exceptions to the Decision and Order of the Administrative Law Judge and no additional reply is necessary.

CERTIFICATE OF SERVICE

TINAMARIE PAPPAS states that on August 17, 2011, she e-filed Reply of Office and Professional Employees Local 459 to Respondents' Answering Brief , through the Board's e-filing system, and served all counsel of record via electronic transmission, at the email addresses set forth below:

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The above statements are true and correct to the best of my information, knowledge and belief.

s/ Tinamarie Pappas _____.