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August 27, 2012

VIA E-FILING

Lester A. Heltzer, Executive Secretary  
Office of Executive Secretary  
National Labor Relations Board  
1099 14<sup>th</sup> Street, N.W.  
Room 11602  
Washington, DC 20570-0001

Re: Hanson Aggregate B.M.C., Inc.  
Cases 4-CA-033330, 4-CA-033508,  
4-CA-033547, 4-CA-034290,  
4-CA-034362, 4-CA-034363  
and 4-CA-034378

Dear Mr. Heltzer:

Attached please find Region Four's Response to the Charging Party's Request For Review of the Acting General Counsel's Decision on Appeal From Compliance Determination in the above-captioned matter along with attached Exhibits. A copy of this Brief with Exhibits has been served on this date to the parties below by electronic mail.

Very truly yours,

CARMEN P. CIALINO, JR.  
Counsel for Region Four of the  
National Labor Relations Board

cc:

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

HANSON AGGREGATES B.M.C., INC.

and

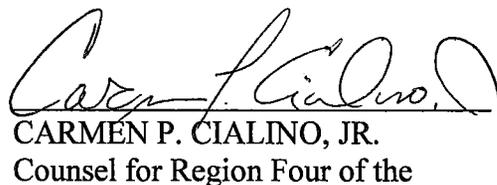
Cases 4-CA-033330  
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4-CA-034290  
4-CA-034362  
4-CA-034363 and  
4-CA-034378

INTERNATIONAL UNION OF OPERATING  
ENGINEERS, LOCAL 542, AFL-CIO

**RESPONSE TO THE CHARGING PARTY'S  
REQUEST FOR REVIEW OF THE GENERAL COUNSEL'S  
DECISION ON APPEAL OF THE REGIONAL DIRECTOR'S COMPLIANCE  
DETERMINATION**

Dated: August 27, 2012

Respectfully submitted,

  
CARMEN P. CIALINO, JR.  
Counsel for Region Four of the  
National Labor Relations Board

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## I. INTRODUCTION

Pursuant to the NLRB Casehandling Manual, (Part Three) Compliance Proceedings (the Manual) Section 10602.4, Counsel for the Region<sup>1</sup> submits this response (the Response) to International Union of Operating Engineers Local 542, AFL-CIO (The Union or the Charging Party)'s July 6, 2012 Request for Review of the Acting General Counsel's Decision on Appeal from Compliance Determination (RFR). For the reasons set forth below, Counsel for the Region submits that the Request for Review should be denied.

On September 30, 2008, the Board issued its Decision and Order in *Hanson Aggregates, BMC, Inc.*, 353 NLRB 287. The Order required Hanson Aggregates, BMC, Inc. (Respondent or Employer) to take certain action to remedy its adjudicated unfair labor practices. Under the Order, Respondent was required, *inter alia*, to make whole employees for losses caused by Respondent's unlawful unilateral changes of October 24, 2005 and January 1, 2006, and to rescind these changes on request of the Union. The Order was enforced by the Third Circuit Court of Appeals pursuant to a Court Judgment which issued on November 17, 2009 in *NLRB v. Hanson Aggregates BMC, Inc.* No. 09-2817. For three years thereafter, the Region dealt with the parties to assure that Respondent fully complied with the Board's Order. By letter dated October 17, 2011, the Region's Compliance Officer informed the Union of the Region's determination that Respondent had fully complied with the Order and sought the Union's position on Compliance.<sup>2</sup>

After considering the Union's objections, and in accordance with the Manual Section 10600 and Section 102.52 of the Board's Rules and Regulations, the Regional Director issued

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<sup>1</sup> All references to "the Region" refer to the Fourth Region of the National Labor Relations Board and its staff.

<sup>2</sup> A copy of the Compliance Officer's October 17, 2011 letter is attached as Exhibit 1.

the Compliance Determination dated December 20, 2011 in which she found that Respondent had fully complied with the Board's Order.<sup>3</sup> On January 26, 2012, the Union filed an appeal of the Compliance Determination with the Acting General Counsel. On June 26, 2012, the Acting General Counsel denied the Union's appeal.

The principal remedial issue raised by the the RFR concerns the Respondent's alleged failure to comply with the Union's purported request to rescind the compensation system that was unilaterally implemented by the Employer on January 1, 2006, the wage increases that were granted under this compensation system and to restore the skill points compensation system that existed prior to January 1, 2006 (the skill points system). As discussed in the Compliance Determination, and more fully below, in the Region's view, the Union has failed to make a clear, written request to Respondent to rescind the new compensation system and the associated wage increases, and to restore the skill point system. Accordingly, Counsel for the Region submits that the portion of the Union's RFR that deals with this subject should be denied.

The RFR generally asserts that the Union is contesting Respondent's compliance with the entire Board Order. However, other than the principal remedial issue discussed above, the only specific assertions that the Union makes are: 1) that unit employees have not fully recovered the losses they suffered due to Respondent's unilateral changes to the compensation system; 2) that it has not been informed of the parts of the Board Order with which Respondent has complied; and 3) that the Region told the Union that it was too late to make a proper request to Respondent to rescind the compensation system. For the reasons set forth morefully below, each of those assertions are meritless. With regard to the Union's claim concerning the losses suffered due to

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<sup>3</sup> There was a typographical error on page 1, paragraph 2 of the Compliance Determination. It stated that the Union contended that Respondent *restored* its skill points wage system. It should have stated that the Union contended that Respondent *had not restored* its skill points wage system.

Respondent's unilateral changes to the compensation system, the Region correctly determined the backpay due by calculating the difference between what the unit employees would have received under the skill point system and what they did receive under the new compensation system. As to the Union's assertion that it was not informed about the portions of the Board Order with which Respondent had complied, the Union was well-informed by both Respondent and the Region of the various remedial steps Respondent took throughout the compliance process. With respect to the Union's contention that the Region told the Union that it was too late to make a proper rescission request concerning the compensation system, the Region never made such a statement to the Union. The RFR does not raise any assertions that would form a basis for altering the Regional Director's Compliance Determination that Respondent has fully complied with the Board's Order and that the above-captioned cases should be closed on compliance. Accordingly, the RFR should be denied in its entirety.

For background purposes, this Response provides a general overview of the compliance process, including the remedial steps Respondent has taken to comply with the Board's Order. Following the discussion of the compliance process, Counsel for the Region addresses the Union's specific assertions.

## **II. THE COMPLIANCE PROCESS**

### **1. Paragraph 2(b) of the Board's Enforced Order: Rescission of Unilateral Changes**

Under paragraph 2(b) of the Board's Order, Respondent is required, on request of the Union, to rescind changes to terms and conditions of employment unilaterally implemented on October 24, 2005 and January 1, 2006. The terms and conditions of employment implemented

by Respondent on January 1, 2006<sup>4</sup> include: wage increases and lump sum payments to employees, the eliminations of skill point and wage level systems, the continuation of the Respondent's healthcare and retirement plans, and the implementation of a new attendance policy *Hanson, supra* at 303. As to these items the Union only clearly requested that Respondent rescind its health care coverage, its pension plan, its attendance policy and its disciplinary policy. Respondent fully complied with each of these rescission requests<sup>5</sup> and the Union has never contended, and does not now contend that Respondent's rescission of these unilaterally implemented benefits and policies was in any way inadequate.<sup>6</sup> During the Region's lengthy compliance investigation, the Region has been in frequent contact with both the Union and Respondent to clarify both the full extent of the unilateral changes that were implemented on January 1, 2006 and the Union's rescission requests. The change that Respondent made to its compensation system effective on January 1, 2006 is the only unilaterally changed term or condition of employment covered by paragraph 2(b) of the Order that remains in dispute. For the reasons set forth in the Compliance Determination, as amplified in Sections III and IV below, the Region has concluded that the Union has not made a clear request that the new compensation system and the associated wage increases be rescinded and replaced with the skill point system.

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<sup>4</sup> The only unilateral change that occurred on October 24, 2005 was Respondent's implementation of a premium holiday for dental coverage (i.e. employees did not have to pay for dental coverage). The premium holiday ceased on December 31, 2005. Thus, Respondent rescinded the premium holiday on its own accord as of December 31, 2005.

<sup>5</sup> High Mark Blue Cross/Blue Shield, the administrator of the healthcare plan in effect prior to January 1, 2006, informed Respondent that it was no longer able to underwrite the coverage for that plan. Nevertheless, Respondent has maintained coverage comparable to that plan by administering its own plan. Copies of High Mark's letter to Respondent dated March 12, 2009, and Respondent's letter to the Union dated April 6, 2009 are attached as Exhibits 2(a) and (b).

<sup>6</sup> The RFR (p. 5) acknowledges that the previous pension plan has been restored.

**2. Paragraphs 2(c)(d) and (e) of the Board's Order: Remediating of Respondent's Unilaterally Changed Attendance and Disciplinary Policies**

Under paragraphs 2(c) and (d) of the Board's Order, Respondent was respectively required to reinstate and make whole unit employees who were discharged pursuant to Respondent's unilaterally implemented attendance policy who would not have been discharged under Respondent's pre-existing attendance policy. Under paragraph 2(e) of the Board's Order, Respondent was required to expunge the disciplinary records of employees who were discharged or disciplined pursuant to Respondent's unilaterally implemented attendance policy. Because Respondent also unilaterally implemented a disciplinary policy, which the Union sought to have rescinded, the Region concluded that unit employees who were disciplined pursuant to Respondent's unlawfully implemented disciplinary policy were also eligible for the reinstatement, make whole and expunction remedies.

The Region reviewed the disciplinary actions that Respondent had taken against unit employees for the year prior to January 1, 2006 in order to determine how it had applied its attendance and disciplinary policies prior to its unilateral implementation of new attendance and disciplinary policies. The Region additionally reviewed all disciplinary actions that Respondent took against unit employees from January 1, 2006 until the attendance and disciplinary policies were rescinded on August 6, 2009.<sup>7</sup> Through this review process, the Region identified four unit employees whose discharges needed to be remedied under paragraphs 2(c)(d) and (e) and 12 unit employees whose discipline needed to be expunged under paragraph 2(e). Once the Region identified the unit employees who were entitled to a make whole remedy, the Region obtained the necessary payroll records from Respondent and interim earnings/mitigation information from

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<sup>7</sup> Approximately 40 employees were disciplined during this period of time.

the claimants in order to calculate backpay. By the time the Region had completed its backpay calculations, the Region had fully informed the Union of its conclusions with respect to which claimants were eligible for reinstatement, which claimants' records needed to be expunged, and the amount of backpay due to each claimant. The Union did not object to the Region's conclusions, and Respondent complied with the Region's instructions regarding the reinstatement, make whole and expunction remedies. In accordance with the Region's instructions to Respondent, four employees received offers of reinstatement.<sup>8</sup> These four individuals and three other employees who were unlawfully suspended received a total of \$424,311 in backpay.<sup>9</sup> 12 employees' records were expunged.

**3. Paragraph 2(d) of the Board's Order: Remedying of Respondent's Unilaterally Changed Health Insurance Coverage and Pension Plan**

During the course of the compliance investigation, the Region gathered the necessary records to calculate that unit employees had suffered losses due to changes in Respondent's health insurance coverage (i.e. higher premiums). The Region advised Respondent of the amount that it owed to the unit employees, Respondent paid the amount as directed, \$31,115 to 47 claimants, and the Union was apprised of these payments.<sup>10</sup> The RFR does not assert that the handling of this remedy was inadequate.

Because of changes that Respondent had unilaterally made to its pension plan, certain employees were entitled to have their pension credits in Respondent's pre-implementation pension plan restored. The Region worked with Respondent over a number of months to obtain the required documentation showing that the unit employees' pension credits were fully

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<sup>8</sup> Copies of the reinstatement letters are attached as Exhibit 3.

<sup>9</sup> A copy of the Region's backpay calculations is attached as Exhibit 4.

<sup>10</sup> A copy of the Regional Director's letter to the Union dated January 26, 2010 attaching a chart showing individuals receiving reimbursement and amounts received is attached as Exhibit 5.

restored.<sup>11</sup> The Union does not contend in the Request for Review that the unit employees' pension credits were improperly restored.

**4. Paragraphs 2(f)(g) and (h) of the Board's Order: Remedying of Respondent's Failure to Properly Respond to Information Requests**

Paragraphs 2(f)(g) and (h) of the Board's Order involve affirmative acts Respondent was required to take in order to remedy its failure to properly respond to information requests made by the Union. Respondent fully complied with these remedial provisions. The Union has never asserted otherwise.

**5. Paragraph 2(j) of the Board's Order: Posting of the Board Notice**

Under paragraph 2(j) of the Board's Order, Respondent was required to post the traditional Board Notice for 60 consecutive days. Respondent has complied with the Notice posting provision, and the Union has never claimed that Respondent failed to fulfill this compliance requirement.

**III. PROCEDURAL HISTORY AND FACTS PERTAINING TO RESPONDENT'S COMPENSATION SYSTEM AND THE UNION'S RESCISSION REQUEST CONCERNING RESPONDENT'S COMPENSATION SYSTEM**

The compliance investigation disclosed that prior to January 1, 2006 bargaining unit employees were paid under a compensation system that combined an individual base wage classified by levels with a skill point component. Each job classification contained three skill levels with a minimum base wage assigned to each level. In conjunction with the base wage level component, employees could earn skill points entitling them to a wage increase of \$.07 per hour per skill point. Employees earned skill points by moving up a level in a given job classification

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<sup>11</sup> A copy of the relevant pension documentation is attached as Exhibits 6(a) and 6(b).

or by completing certain training.<sup>12</sup> On January 1, 2006, Respondent unlawfully implemented the new compensation system eliminating the skill point component and replacing it with a system in which wages were tied to newly-designed job classifications. Under the new compensation system (hereafter referred to as NCS), employees were granted annual wage increases during the years 2006 through 2008, according to their job classification and the skill point system was eliminated.<sup>13</sup>

By letter dated October 8, 2008, the Union requested that Respondent “rescind the changes to terms and conditions of employment unilaterally implemented by the Employer on October 24, 2005 and continuing, as referenced at paragraph 2(b) of the Board’s Order”.<sup>14</sup> By letter dated November 5, 2008, the Union indicated that Respondent had failed to “submit and restore conditions to 2005.”<sup>15</sup> During bargaining sessions in late 2008 and early 2009, the Employer raised questions about precisely what terms and conditions the Union wanted rescinded. In response the Union sent the Employer a letter dated March 20, 2009.<sup>16</sup> In that letter, the Union referred to its letter of October 8, 2008 and noted that it was again demanding that Respondent “restore conditions as they existed on October 2005”. The Union enumerated the specific terms and conditions of employment it wanted restored and rescinded. In item 4 of the letter, the Union stated, “Reimburse all employees any lost income that may have resulted in the change of the skill points policy and bargain promotion(s) accordingly [sic] to the skill points

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<sup>12</sup> Copies of the Employer’s description of this policy as described to the Union along with corresponding job classifications and skill levels are attached as Exhibits 7 (a)(b) and (c).

<sup>13</sup> A copy of the Employer’s proposed wage scale, as implemented in January 2, 2006 is attached as Exhibit 8.

<sup>14</sup> A copy of the Union’s letter of October 8, 2008 is attached as Exhibit 9.

<sup>15</sup> A copy of the Union’s letter of November 5, 2008 is attached as Exhibit 10.

<sup>16</sup> A copy of the Union’s letter of March 20, 2009 is attached as Exhibit 11.

policy.” The Union made no other reference to the compensation system in this letter; it mentioned neither reinstatement of skill points nor rescission of the wage increases.

By letter dated April 6, 2009, Respondent notified the Union that it was in contact with the Region regarding the steps it would need to take in order to comply with Paragraphs 2(b) and 2(d) of the Board’s Order as those paragraphs related to skill points.<sup>17</sup> The Region was unable to determine from the Union’s March 20, 2009 letter precisely what actions it wanted Respondent to take with regard to rescinding the new compensation system and restoring NCS and the associated wage increases that would have accrued since January 1, 2006 under NCS. As set forth in Union Organizer Frank Bankard’s affidavit of March 16, 2010 (p.3), the Union advised the Region that it did not want the wage increases rescinded; but also advised the Region that by the March 20, 2009 letter the Union was asking for Respondent to restore the skill point wage increases that employees would have received since January 1, 2006 under the skill point system.<sup>18</sup> The Region orally communicated the Union’s position concerning the compensation system to Respondent. Respondent asserted to the Region that the Union was not privileged to seek the restoration of the skill point system along with the associated skill point wage increases without also seeking the rescission of the wage increases granted under the NCS, because the compensation proposal the Employer implemented on January 1, 2006 was an integrated proposal which replaced the skill point system with the NCS.<sup>19</sup>

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<sup>17</sup> Respondent’s letter of April 6, 2009 is Exhibit 2(b).

<sup>18</sup> A copy of Bankard’s affidavit is attached as Exhibit 12.

<sup>19</sup> A copy of e-mail communications between the Region and the Employer’s Attorney on August 10, 2009 referring to these discussions and briefly describing Respondent’s position on this issue is attached as Exhibit 13.

Respondent elaborated in a position statement dated May 29, 2009 which outlined the background of the skill points system and of the parties' bargaining over the NCS.<sup>20</sup> Respondent's position statement also addressed its views of the Union's request to *only* restore the skill point system and skill point wage increases. Respondent asserted that the Union's request to extract the skill point position of the 2005 wage system and to graft it onto the wage system implemented in 2006, which included substantial wage increases, as a replacement for the prior system was unwarranted and would impose a compensation system that had not been proposed by either party prior to its January 1, 2006 implementation. Respondent has maintained the same position regarding the Union's request to restore the skill point system and the associated skill point wages increases.

The Regional Director concluded that during the parties bargaining in 2004 and 2005 Respondent proposed that the prior skill point system be replaced with the NCS. During the course of the parties bargaining prior to January 1, 2006, the parties discussed Respondent's compensation proposal, but no agreement was reached. The Regional Director decided that Respondent had unlawfully proposed and implemented an integrated compensation system consisting of the elimination of skill points and a replacement compensation system providing for wages and wage increases corresponding to job classifications.

Therefore, the Region, in agreement with Respondent, concluded that under the Board's Order the Union was only entitled to request to have the skill point system restored if it was demanding rescission of the NCS, including the wage classification system and the associated wage increases. The Region advised the Union of this in late 2009. In response, by email dated January 5, 2010, the Union suggested that it had never given the Region any indication that it

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<sup>20</sup> A copy of Respondent's May 29, 2009 position statement is Exhibit 7.

was only seeking for Respondent to restore skill points.<sup>21</sup> Bankard's March 16, 2010 affidavit, referred to above, was principally taken for the purpose of further investigating the Union's position concerning its rescission request as it pertained to the compensation system. In the affidavit, Bankard admitted that he had previously told the Board Agent assigned to this case that the Union in its letter of March 20, 2009 was asking Respondent to restore the skill points but was not asking for the NCS wage increases to be rescinded. However, Bankard further stated, that the Union, as of the time of the affidavit, wanted Respondent to restore the skill points and skill points system and to rescind the wage increases back to the wages in place in October 2005. Thereafter, the Region informed the Union that if it wished for Respondent to restore the skill points and rescind the wage increases under the NCS, it should put this request in writing to Respondent.<sup>22</sup> The Union never made such a request.

By letter dated August 31, 2011, Respondent gave the Union an opportunity to clarify in writing that it actually wanted the wage increases rescinded.<sup>23</sup> In this letter, Respondent explicitly requested that the Union state whether it wanted the wage increases rescinded. The Union did respond in writing, but did not answer the question directly. By email dated August 31, 2011, the Union replied that it had been clear on this matter at the bargaining table along with numerous written correspondences.<sup>24</sup> The Union's response prompted a September 2, 2011 letter from Respondent disagreeing with the Union's conclusion concerning the clarity of its request.<sup>25</sup> By email dated September 2, 2011, the Union cryptically replied that Respondent had not

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<sup>21</sup> The Union's email of January 5, 2010 is attached as Exhibit 14.

<sup>22</sup> A copy of a file memo showing the Region advised Bankard of this is attached as Exhibit 15.

<sup>23</sup> A copy of Respondent's August 31, 2011 letter is attached as Exhibit 16.

<sup>24</sup> A copy of the Union's August 31, 2011 email is attached as Exhibit 17.

<sup>25</sup> A copy of Respondent's September 2, 2011 letter is attached as Exhibit 18.

“complied per the Board’s Order and demands of the Union.”<sup>26</sup> Again, the Union failed to state that it wanted the wage increases rescinded.

**IV. THE UNION HAS NOT MADE A CLEAR AND ADEQUATE REQUEST TO RESCIND THE COMPENSATION SYSTEM UNDER PARAGRAPH 2(B) OF THE BOARD ORDER**

**A. In the Circumstances of this Case, it was Necessary for the Union to Make a Written Request to Respondent to Restore the Skill Point System and Skill Point Increases and to Rescind the NCS and the Associated Wage Increases**

The Regional Director recognizes that a written rescission request is not a per se requirement of paragraph 2(b) of the Board Order. Accordingly, the Region did not take the position that any of the Union’s other rescission requests needed to be in writing. However, in the unique circumstances of this case, the Regional Director has concluded that Respondent is not obligated to take any further remedial action with respect to the rescinding or restoring of the compensation system until the Union has made a clear written request to rescind the NCS and the associated wage increases and, to restore the skill point system and skill point wage increases.

In the Union’s letter of March 20, 2009, it specified the terms and conditions of employment it wanted rescinded/restored pursuant to the Board’s Order. The Union did **not** state in its March 20, 2009 letter that it was seeking to have the NCS and the associated wage increases rescinded and, as established above, the Region was able to confirm from discussions with the Union that it did **not** want the wage increases granted under the new compensation rescinded. Instead, it only wanted Respondent to restore the skill point system and to add the skill points that would have accrued since January 1, 2006 to the wage increases that Respondent had already given under the NCS. Respondent has asserted since at least May 29, 2009 that the Union’s request with regard to **only** restoring the skill point system was not valid, because

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<sup>26</sup> A copy of the Union’s September 2, 2011 email is attached as Exhibit 19.

complying with its request without rescinding the wage increases would create an entirely new compensation system that was not contemplated by the parties' bargaining discussions prior to the January 1, 2006 implementation and would amount to only a partial restoration of the compensation situation that would have existed in the absence of its unlawful implementation of the NCS. The Regional Director agreed. She concluded that because Respondent had implemented an integrated compensation proposal consisting of the elimination of its skill point system and the replacement by a system providing for wages and wage increases corresponding to job classifications, the Union's request for Respondent to award the skill point compensation under the skill point system without rescinding the wage increases under the NCS did not constitute a rescission request encompassed by paragraph 2(b) of the Board Order. Thereafter, the Union reversed its position and began asserting to the Region that it wanted skill points restored and the wage increases granted under the new compensation rescinded. In these circumstances, the Regional Director decided that until the Union sent a new written rescission request concerning the compensation system to Respondent, Respondent could not be on proper notice that the Union had made a request that superseded its March 20, 2009 written request or that is clearly covered by paragraph 2(b) of the Order.

The Union objects to the Region's position. The basis for the Union's refusal to make such a written request is that the Union anticipates that Respondent will use a written request for rescission of the compensation system as a propaganda tool against it. Accordingly, as conceded in its January 26, 2012 appeal to the General Counsel of the Compliance determination (p.2) the Union has unequivocally stated that it will not make such a written request.<sup>27</sup> The Union argues that it has made oral requests which adequately notified Respondent that it wanted the NCS wage

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<sup>27</sup> A copy of this January 26, 2012 appeal is attached as Exhibit 20.

increases rescinded in addition to wanting the skill points restored. Because the Union maintained shifting positions on this subject – by failing to make a rescission request in its March 20, 2009 letter, and by advising the Region that it was only seeking restoration of the skill point system - the Region asserts that any oral rescission requests pertaining to the compensation system were not sufficient to constitute adequate notification to Respondent under paragraph 2(b) of the Board Order.

**B. The Union has not Made a Written Rescission Request Concerning the Compensation System that is Encompassed by Paragraph 2(b) of the Board Order**

The Union asserts that it has made a written rescission request concerning the compensation system that is covered by paragraph 2(b) of the Board Order. In support of this assertion, the Union relies on its written requests of October 8, 2008, March 20, 2009 and November 15, 2011.<sup>28</sup> As was noted previously, in the October 8, 2008 letter the Union requested that Respondent “rescind the changes to terms and conditions of employment unilaterally implemented by the Employer on October 24, 2005 and continuing, as referenced at paragraph 2(b) of the Board’s Order.” This request cannot be viewed in a vacuum. Respondent had subsequent discussions with the Union in which it sought for it to outline specifically what terms and conditions of employment it wanted rescinded. The Union’s March 20, 2009 letter responded to this request. Since it is clear that the Union did not seek or intend for Respondent to rescind the wage increases under the new compensation system based on its March 20, 2009 letter, there is no basis for concluding that the Union wanted Respondent to rescind the NCS wage increases based on its earlier October 8, 2008 letter.

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<sup>28</sup> A copy of Respondent’s November 15, 2011 letter is attached as Exhibit 21.

In its letter of November 15, 2011, while making a passing reference to recently discovered wage rates and job titles, the Union requested that Respondent “restore all conditions to October 2005.” This is similar to language it used in its letters of October 8, 2008 and November 5, 2008. When the Union wrote the October 8, 2008 and November 5, 2008 letters it was not contemplating or seeking for Respondent to rescind the wage increases. Accordingly, in the Region’s view, by making the same type of general request on November 15, 2011 the Union did not clarify for Respondent that it is reversing its original position on the NCS wage increases and that it was now seeking to have the NCS wage increases rescinded. This is particularly true in light of the Union’s failure to directly state in response to Respondent’s letter of August 31, 2011 that it wanted this rescission.

The Regional Director’s conclusion that the Union has not made a clear, written request to rescind the NCS wage increases was confirmed by the Union’s appeal to the Acting General Counsel of the Regional Director’s Compliance Determination. Therein, the Union emphatically stated that it would not comply with the Region’s request that it specify in writing that it wants the wage increases rescinded. On page 4 of the RFR the Union again states it should not be required to place such demands in writing. These statements are tantamount to admissions that none of the Union’s prior written communications constituted a written request to have the NCS wage increases rescinded. Thus, in the Region’s view, the Union has not made a clear written rescission request to Respondent concerning the compensation system which would supersede its March 20, 2009 letter or which would be covered by paragraph 2(b) of the Board Order by clarifying that it wants the NCS wage increases rescinded.

C. **The Union's Affidavit does not Establish that the Union has Made a Rescission Request to the Employer Pertaining to the Compensation System**

The Union contends that Bankard's affidavit of March 16, 2010 is sufficient to put Respondent on notice under paragraph 2(b) that in addition to wanting the skill points restored it wanted the wage increases rescinded. In effect, the Union asserts that the Region should have acted as its agent to communicate its changed rescission request concerning the compensation system.

It is clear that the intent of the Board Order is for the Union to make any rescission requests directly to Respondent. The Region never offered to act as the Union's agent with respect to the fulfillment of this legal obligation. As it readily admits, the Union was informed by the Region that it would have to make its specific request in writing to Respondent. The Union has presented no evidence that the Region had apparent or actual authority to act for the Union by clarifying for Respondent that the Union wanted to alter its earlier rescission request of March 20, 2009 pertaining to the compensation system. See *Barney's Club*, 288 NLRB 803 (1988) (employer could not rely on its claimed notification to a Board Agent of its willingness to bargain in defense of a refusal to bargain allegation, since Board Agent did not have actual or apparent authority to act on behalf of the employer). As the Region was not an agent of the Union for purposes of communicating the Union's changed rescission request, the March 16, 2010 affidavit does not suffice to establish that the Union properly made a bona fide rescission request to Respondent pertaining to the compensation system under paragraph 2(b) of the Board Order.

V. **THE UNION'S ARGUMENT REGARDING SKILL POINTS BACKPAY, AND ATTACKING THE REGION'S CALCULATION OF IT, LACKS MERIT**

The Union argues that a majority of unit employees suffered losses because their compensation under skill points would have exceeded the compensation under the post January

1, 2006 compensation system. The Union also asserts that the Region's erroneous backpay calculations regarding the Employer's elimination of skill points were based on the personal agenda of the Compliance Officer. The Union's claims are belied by its own admissions and by the documentary evidence discussed below.

The Region conducted an extensive investigation that resulted in limited make whole relief for Respondent's unilateral elimination of the skill point system explained above in Section III. On November 20, 2009, Respondent submitted a detailed position statement and substantial evidence in support of its argument that no make whole relief was appropriate with respect to elimination of its skill point system.<sup>29</sup> Specifically, Respondent argued that each employee received more in wages and lump sum payments under the 2005 compensation system than they would have received under the pre-implementation compensation system including skill points. Respondent's submission included a verified statement of Plant Manager Doug Chilson which delineated every training opportunity and skill acquisition which would have resulted in a wage increase of \$.07 for each hour worked in the backpay period.<sup>30</sup> The submission also included a chart comparing maximum potential skill point earnings with actual wage earnings due to the unlawfully implemented wage increases and lump sum payments. For each employee, the chart showed advantages obtained by the unlawful increases ranging in size from \$500 to \$22,000. According to Respondent, this data showed that no backpay was owed for its elimination of skill points.

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<sup>29</sup> A copy of the position statement and relevant portions of the evidence which accompanied it is attached as Exhibit 22.

<sup>30</sup> Chilson's verification was supported by documentary evidence consisting of certificates of training and other materials showing completion of training sessions by Unit employees. Several of these documents are attached for illustrative purposes and the remainder will be supplied if requested.

By letter dated December 22, 2009, Field Attorney Elana Hollo<sup>31</sup> supplied the Union with the information contained in the Respondent's position statement and sought the Union's position regarding Respondent's assertion that there was no financial liability for the elimination of its skill point policy.<sup>32</sup> As stated in the letter:

As the enclosed documents show, the Employer has no liability because the employees earned more money under the new wage system than they did under the previous one.

In an e-mail dated December 28, 2009, Bankard acknowledged the accuracy of the highlighted portion of the December 22, 2009 letter by stating:

Elana, I have received the information on skill points. It's not a wonder that the employees received more with the unlawful implemented plan since it has accelerators in it. (Emphasis supplied)<sup>33</sup>

In the calendar year 2010, the Union posed numerous objections to the supporting information supplied by the Employer. This caused the Region to examine all of the relevant facts for each employee affected by the new compensation system. Near the end of this process, by facsimile dated November 9, 2010, Field Attorney Hollo sent summary charts to the Respondent's counsel which showed that contrary to Respondent's November 20, 2009 position statement nine employees would have fared better under skill point retention than receipt of the

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<sup>31</sup> The RFR misidentifies this individual as the "Compliance Officer."

<sup>32</sup> A copy of the December 22, 2009 letter is attached as Exhibit 23.

<sup>33</sup> A copy of Bankard's December 28, 2009 e-mail is attached as Exhibit 24.

unlawful wage increases.<sup>34</sup> One of the charts identified each employee, listed each skill point earned, and the quarter in which it was earned. A separate chart demonstrated the difference between the old and new compensation systems by identifying the pre-existing wage rate, that wage rate enhanced by the hourly \$.07 earned by acquisition of skill points, and the actual hourly rate received pursuant to the wage increases unlawfully granted.

Several examples are provided. The chart shows that employee Alvarez was entitled to no backpay. His 2005 wage rate was \$15.02. Based on obtaining one skill point his rate would have been \$15.09. His actual pay rate was \$15.85. Therefore, he was better off under the unlawfully implemented system than he would have been if Respondent retained its skill point system. In contrast, employee Filkins was entitled to some backpay. His 2005 wage rate was \$16.33. With eight skill points his hourly rate would have been \$16.89 which exceeded his 2006 hourly pay rate of \$16.50. However, by 2007, under the unlawful plan, his wage rate was \$17.25 which exceeded the rate he would have received if Respondent retained skill points. Accordingly, he was entitled to backpay for periods of 2006, but none thereafter.

After some further adjustments, Field Attorney Hollo sent a letter dated December 22, 2010 to Respondent's counsel with spreadsheets which showed that nine employees were due backpay and interest in the amount of \$13, 191.26.<sup>35</sup> Respondent paid the amounts listed, and the Region distributed them to the recipients.

The recitation above demonstrates the following: (1) contrary to the Union's unsupported assertion, nine employees out of 48 (far less than a majority) would have been better off with skill point restoration and rescission of the unlawful wage increases; (2) the

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<sup>34</sup> A copy of Hollo's communication to Respondent's counsel and supporting material is attached as Exhibit 25.

<sup>35</sup> A copy of the December 22, 2010 letter and accompanying charts is attached as Exhibit 26.

Region's calculations were based on extensive review of the Employer's evidence and careful consideration of the Union's objections, and were not based on a "personal agenda"; and (3) the Union's objections to the Employer's calculations undermined the latter's claim that no backpay was due.

In the RFR, the Union asserts:

A perfect example of the Employer picking and choosing (sic) which parts of the Board's decision to implement is its position on restoring the Skill Points which the Employer has not paid since 2005, and which the Employer claims to the Region Compliance Officer (sic), the unlawfully implemented raises exceed the Skill Points of the majority of employees would have received (Emphasis supplied).

In the Region's view, the skill point facts stated above illustrate a contrary proposition: the Employer did not arbitrarily choose compliance with parts of the Board's order; it did so only after painstaking investigation and analysis by the Region. Accordingly, the Board must reject the Union's misguided, unsupported attacks regarding the Region's backpay calculations.

**VI. THE UNION'S ASSERTION THAT IT HAS NOT BEEN INFORMED OF THE PARTS OF THE BOARD ORDER WITH WHICH RESPONDENT HAS COMPLIED LACKS MERIT**

The Union claims that it is unable to determine what parts of the Board Order have been complied with, because Respondent has not given it the necessary information to confirm compliance. As demonstrated above in Section V, throughout the compliance process, Respondent and the Region have informed the Union of all remedial acts Respondent has taken

in order to comply with the Board Order. The Union has no basis for contending that it was unaware of any aspect of compliance.

**VII. THE UNION'S CLAIM THAT THE REGION TOLD IT THAT IT WAS TOO LATE TO MAKE AN ADEQUATE RESCISSION REQUEST PERTAINING TO THE COMPENSATION SYSTEM LACKS MERIT**

The Union claims on pages 2 and 3 of its RFR that the Region told the Union that it was too late to make an adequate rescission request pertaining to the compensation system. The Union asserts that it sent a modified letter to Respondent concerning its rescission request on the compensation system. Counsel for the Region is unable to determine to what letter the Union is referring when it refers to a modified letter. To the extent that it is referring to the letter of March 20, 2009, for the reasons set forth above, Counsel for the Region submits that this letter does not contain a rescission request pertaining to the compensation system that is adequate under paragraph 2(b) of the Order.

Counsel for the Region denies the Union's claim that the Region told the Union that it was too late for it to make an adequate rescission request pertaining to the compensation system. The Union's admission that the Region told the Union that it should clarify its rescission request concerning the compensation system in writing to Respondent belies the Union's claim that the Region told it was too late to make such a rescission request. The Region did not and would not have been advising the Union that it should clarify its request in writing while simultaneously telling the Union that if it did so its request would be considered to be "too late." Furthermore, if the Regional Director had concluded that it was too late for the Union to make a rescission request in connection with the compensation system, she would have specified this in the Compliance Determination.

### VIII. CONCLUSION

The Union has suggested that Respondent may not have complied with portions of the Board's Order. However, the only remedial issue the Union has raised is Respondent's failure to comply with paragraph 2(b) of the Board's Order by failing to rescind the wage increases and failing to restore the skill point system. For the reasons set forth in the Compliance Determination and reiterated herein, the Region has concluded that the Union has not made a clear request to Respondent to rescind the wage increases and to restore the skill point system. Accordingly, Respondent is not obligated under the Board's Order to take any further remedial action with regard to the compensation system. The other assertions raised in the Union's Request for Review have no merit. In sum, the Union has not presented any evidence or arguments that would warrant overturning the Regional Director's December 20, 2011 Compliance Determination. Accordingly, the Board should deny the Union's Request for Review.

Respectfully submitted,



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