

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

CALDWELL MANUFACTURING COMPANY

and

Cases 3-CA-24955
3-CA-25076

LOCAL 81331, IUE-AFL-CIO, CLC

Ron Scott, Esq., and Sandra Larkin, Esq.,
for the General Counsel.
Roy R. Galewski, Esq. (Harris Beach PLC),
of Pittsford, New York, for the Respondent.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

EARL E. SHAMWELL JR., Administrative Law Judge: This case was heard by me on March 13, 2007, in Buffalo, New York, based on a backpay specification and notice of hearing.

The Board issued a Decision and Order in the underlying unfair labor practice proceeding on April 28, 2006. The Board's decision determined that the Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally implementing on April 20, 2004, its final bargaining proposal at a time when the parties has not reached a valid impasse. The decision in pertinent part ordered the Respondent:

[T]o place in effect all terms and conditions of employment provided by the contract that expired March 15, 2004, and to maintain those terms in effect until the parties have bargained to agreement or a valid impasse, or the Union has agreed to changes [and] to make whole the until employees and former unit employees for any loss of wages or other benefits they suffered as a result of the Respondent's implementation of its final proposal on April 26, 2004.¹

On December 21, 2006, the Regional Director for Region 3 issued her Compliance Specification and Notice of Hearing. On January 9, 2007, the Respondent timely filed its answer to the compliance specification admitting and denying some of the allegations contained in the specification, but essentially stating that it had fully complied with the obligations required by the Board's Decision and Order and requesting a dismissal of the specification.

¹ See GC Exh. 1(a), the Board's April 28, 2006 decision affirming Judge Paul Bogas' June 22, 2005 decision which included the recommended remedy as stated above.

Also, on December 21, 2006, the Respondent and the Regional Director entered into a Stipulation (in pertinent part) as follows:²

5 The following matters are stipulated by and between respective counsel for both the Respondent and the General Counsel for the National Labor Relations Board.

1. The Respondent has not been able to reach agreement with the Board concerning whether the wage rates applicable to the newly created jobs of machine operator and maintenance mechanic AAAs must be maintained after the positions to which affected employees are returning are restored to be in compliance with the Board's Order. Accordingly, Respondent reserves the right to a hearing before an administrative law judge on this issue. The Respondent further reserves its right to have the decision of the administrative law judge following such hearing, reviewed by the Board in due course, and its right to seek review of the Board determination by a Federal Court of Appeals. In the event the Respondent seeks such review, it is understood the only issue before the Board or court will be whether Respondent must maintain the wage rates applicable to machine operators and maintenance mechanics AAAs when the former positions are restored by Respondent, and affected employees are returned to those positions. [Emphasis supplied.]

2. The Respondent hereby waives its right under Section 10(e) and (f) of the Act (29 U.S.C. 160 (e) and (f) to contest either the propriety of the Board's Orders issued on April 28, 2006, or the findings of fact and conclusions of law underlying that Order.

I. THE MARCH 13, 2007 COMPLIANCE HEARING³

A. *The Compliance Specification*

The Respondent admitted both in its answer and at the hearing to the following allegations contained in the specification.

1. (a) Effective April 25, 2004, Respondent unilaterally implemented its March 22, 2004 contract proposal, which included, inter alia, combining job classifications, in two specific circumstances.

2. (a) The first circumstance was the combination of the following positions [rod machine operator, tube mill operator, spring subcell operator, and utility worker A, parts] into one job position entitled "machine operator."

(b) The second circumstance was the combination of [general maintenance mechanic AA and tool & die AA positions] into one job position entitled maintenance machinist,⁴ more commonly known as "MM AAA."

² See GC Exh. 2. Jeff R. Siddons, Charging Party representative, appeared at the hearing on March 13, 2007, and approved of and signed the stipulation on that date. (Tr. 16.)

³ The General Counsel filed his Motion to Correct Transcript on April 18, 2007. On April 24, 2007, the Respondent's counsel submitted a letter in response to but not in opposition to the motion. I have reviewed the motion and the transcript and will conclude that the proposed corrections are appropriate. The motion is granted.

⁴ The Respondent noted that in the compliance specification and its answer, the maintenance machinist AAA position was erroneously stated as maintenance mechanic AAA.

Continued

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3. (a) Effective April 26 2004, Respondent implemented an hourly wage rate for the newly created position of machine operator, which resulted in some of the employees who were reclassified as machine operators receiving an increase in their hourly wage. Below is a list of the individuals whose jobs were combined, as well as the amount of any hourly wage increase received, their prior positions, prior rate and new rate.⁵

| Name | Increase | Prior position | Prior Rate | New Rate |
|-------------------|----------|-------------------------|------------|----------|
| Bill Carson | \$.20 | rod machine operator | \$3.70 | 3.90 |
| Anthony Dinapoli | \$.20 | rod machine operator | \$3.70 | 3.90 |
| James D'Onofrio | \$.20 | tube mill operator | \$3.70 | 3.90 |
| Liz Fulkerson | \$.20 | rod machine operator | \$3.70 | 3.90 |
| Josephine Gatti | \$.00 | spring subcell operator | \$3.90 | 3.90 |
| Flossie McPherson | \$.00 | spring subcell operator | \$3.90 | 3.90 |
| Joseph Padilla | \$.00 | spring subcell operator | \$3.90 | 3.90 |
| Natalia Pantoja | \$.30 | spring subcell operator | \$3.60 | 3.90 |
| Tom Vanroo | \$.00 | spring subcell operator | \$3.90 | 3.90 |
| Crystal Zurbzycki | \$.20 | rod machine operator | \$3.70 | 3.90 |
| Ricardo Zurbzycki | \$.20 | tube mill operator | \$3.70 | 3.90 |

(b) Effective April 26, 2004, Respondent implemented an hourly wage rate for the new created position of "MM AAAs," which resulted in all of the employees who were reclassified as MM AAAs receiving an increase in their hourly wage. Below is a list of the individuals whose jobs were combined, as well as the amount of the hourly wage increase received, their prior position, prior rate and new rate:

| Name | Increase | Prior position | Prior Rate | New Rate |
|--------------|----------|----------------|------------|----------|
| Shawn Arnett | \$.13 | general MM AA | \$6.37 | \$6.50 |
| Barry Brew | \$.13 | general MM AA | \$6.37 | \$6.50 |
| Dan Campbell | \$.13 | general MM AA | \$6.37 | \$6.50 |
| Daniel Dowd | \$.13 | tool & die AA | \$6.37 | \$6.50 |
| Dan Price | \$.13 | general MM AA | \$6.37 | \$6.50 |

(Tr. 10.)

⁵ In its answer, the Respondent stated that any machine operator affected by the change who was earning more than the new rate was "red circled" at the higher rate, so no decrease in pay occurred. Ibrahim Gulec and Mike King were two "red circled" machine operators and are not therefore included in the specification.

| | | | | |
|---------------|-------|---------------|--------|--------|
| Gary Townsend | \$.13 | general MM AA | \$6.37 | \$6.50 |
| Kevin Vandyke | \$.13 | general MM AA | \$6.37 | \$6.50 |
| Ken Yoffredo | \$.13 | general MM AA | \$6.37 | \$6.50 |

5 4. (a) After issuance of the Board's Decision and Order, the Union requested Respondent to rescind the job combination referenced in 2(a) and 2(b) above.

5. (a) Respondent agreed to rescind the job combinations effective January 1, 2007, and informed the Union that, [sic] also effective January 1, 2007.

B. Contentions of the Parties⁶

The General Counsel contends that in view of the parties' stipulations and agreements, there is no dispute regarding the propriety of his backpay formula as contained in the specification. He submits that by virtue of the Respondent's admissions regarding the specification, there is no challenge to his method of calculating backpay. Accordingly, the General Counsel asserts that he has met his burden to establish the reasonableness and appropriateness of the instant compliance specification.

The General Counsel further asserts that to comply fully with the Board's Order, the Respondent must maintain the wage increases given to those affected employees.

The Respondent indeed does not contest the specification as such but argues that it has fully complied with the Board's Order by rescinding the combined positions of machine operator and MM AAA, returning affecting employees to their former positions, and reinstating the wage rates associated with the former positions. The Respondent asserts that it is not required to maintain the wage increases associated with the unilateral changes found unlawful by the Board.

II. Discussion and Conclusions

A. The Law Applicable to Backpay Compliance Proceedings

With respect to compliance proceedings, the Board has established well-settled principles governing the resolution of backpay disputes through its own and Court proceedings.

Generally, where an unfair labor practice has been found, some backpay is presumptively owed by the offending employer in a backpay proceeding. *La Favorita, Inc.*, 313 NLRB 902 (1994), enfd. 48 F.3d 1231 (10th Cir. 1995).

The objective in compliance proceedings is to restore, to the extent feasible, the status quo ante by restoring the circumstances that would have existed had there been no unfair labor practices. *Hubert Distributors, Inc.*, 344 NLRB No. 29 (2005); *Alaska Pulp Corp.*, 326 NLRB 522, 523 (1998), citing *Phelps-Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941).

The General Counsel's burden is to demonstrate the gross amount of backpay due, that is, what amount the employee would have received but for the employer's illegal conduct. The General Counsel, in demonstrating gross amounts owed, need not show an exact amount, an

⁶ The Charging Party joins the General Counsel regarding the contentions of the parties in this special proceeding.

approximate amount is sufficient. *Laborers Local 158 (Worthy Bros.)*, 301 NLRB 35 (1992). Thus, it is well established that any formula which approximates what the discriminatee would have earned absent the discrimination is acceptable if it is not unreasonable or arbitrary under the circumstances. *Am Del Co., Inc.*, 234 NLRB 1040 (1978), *Frank Mascali Construction*, 289 NLRB 1155 (1988).

The Court and the Board have held that any doubts and uncertainties regarding the resolution of the backpay issue must be resolved in the favor of the discriminatee and against the wrongdoing employer. *United Aircraft Corp.*, 204 NLRB 1068 (1973). Once this has been established, the employer must then demonstrate facts that would mitigate the claimed backpay liability. The employer must, by a preponderance of the evidence, establish and clarify any uncertainties. *Metcalf Excavating*, 282 NLRB 92 (1986).

In seeking objectively to reconstruct backpay amounts as accurately as possible, the General Counsel may properly adopt elements from the suggested formulas of the parties. *Performance Friction Corp.*, 335 NLRB 117 (2001), citing *Hill Transportation Co.*, 102 NLRB 1015, 1020 (1953).

Arriving at a proper backpay determination is often not an exact science or a precise exercise. In *Alaska Pulp Corp.*, supra, the Board stated that:

Determining what would have happened absent a respondent's unfair labor practices . . . is often problematic and inexact. Several equally valid theories may be available, each one yielding a somewhat different result. Accordingly, the General Counsel is allowed a wide discretion in picking a formula.

It is practically axiomatic in Board law that in the case of unlawful unilateral changes in wages, hours, or other terms or conditions of employment, the Board will order that the status quo ante be restored and that employees be made whole for any benefits the employer unilaterally discontinued. *Beacon Journal Publ's Co. v. NLRB*, 401 F.2d 366 (6th Cir. 1968); *Dorsey Trailers, Inc.*, 327 NLRB 835 (1999).

On the other hand, if the change involved the granting of a benefit, the Board will order rescission of the beneficial change only if the union seeks such rescission. *Fresno Bee*, 339 NLRB 1214 fn. 6 (2003); *Great W. Broadcasting Corp.*, 139 NLRB 93 (1962). *Innovative Communications Corp.*, 333 NLRB 665, 668-669 (2001).

Accordingly, in situations where the changes contain both a detriment and a benefit to the affected employees, a status quo ante restoration order is conditioned upon the affirmative desires of the employees as expressed through their bargaining representative. *Children's Hospital of San Francisco*, 312 NLRB 920, 931 (1993).

While in agreement with the General Counsel on the basic Board law regarding the appropriate and standard remedy in unilateral change cases, that is, where some changes are to the detriment of employees and others are to their benefit, a labor organization may require the employer to maintain the benefits and rescind the detrimental changes, the Respondent contends that the instant dispute presents a novel legal issue that runs counter to the traditional Board remedy.

The Respondent asserts that here, there is but a single change—the creation of the new job classifications—and that the Union is improperly attempting to spilt that change in half by requesting that part of the change—the wage increase—remain intact and the other, the new

5 jobs, be rescinded. In short, the Respondent submits that the creation of the new jobs with their attendant increase in job duties and responsibilities along with a concomitant increase in wages, were so integral as to be indivisible. The Respondent submits that its unlawful behavior consisted of unilaterally implementing both components—wages and duties—when it created the machine operator and MM AAA positions, that this constituted a single, indivisible unilateral change.⁷ Accordingly, the Respondent asserts the Union cannot require the employer to maintain only a portion of a singular unilateral change. The Respondent asserts that in its view the Union could have chosen *either* to leave the employees in the new consolidated positions at the new rates *or* rescind the positions and return the workers to their prior positions at the old rates; the Union did not have the option to have it both ways. Thus, since the Union opted for a rescission of the new consolidated positions and the Company has complied with this request, the Respondent contends it has fully complied with the Board's Order.

The Respondent concedes that the affected employees transferred to the machine operator and MM AAA positions did not experience a material change in their (old) day-to-day job duties after the Company implemented its final proposal which included the consolidation of positions. The Respondent also admits that for business reasons, the Company decided not to avail itself of the increased flexibility and broader management rights it implemented to itself. However, the fact of the matter, the Respondent contends, is that it did implement the changes and provided the training necessary for the affected employees to assume their new duties. Accordingly, the Respondent submits that it cannot be gainsaid that the only implemented change was the wage rates associated with the consolidated positions.⁸

I have reviewed the Board authorities submitted by the parties, supplemented by my own research on the applicable remedies associated with unilateral change cases. I have given special attention to and consideration of the Respondent's argument in which it asserts as factually inapposite the primary authorities cited by the General Counsel, *Innovative Communications*, 333 NLRB 665 (2001), and *Scepter Ingot Castings*, 331 NLRB 1509 (2000). I have found no cases directly on point with the basic facts of this case. Most notably, I have

⁷ The Respondent called as its sole witness Caldwell Plant Manager Kevin Novak, who also served on the Company's negotiating team during the negotiations with the Union. Novak testified at length about the Company's implementation of the combined position descriptions of the former positions that were consolidated to form the new positions. Essentially, Novak explained that the job creation move was made to give the Company additional flexibility, efficiency, and better resource management in the deployment of its workforce. He noted that under the old contract, the Company could only transfer a worker in one job classification to an assignment for a period of 13 weeks. The Company then in a business turndown wanted to better utilize the workforce and the new jobs gave them the option of transferring workers where it needed them without any limitation.

⁸ Novak testified that this essentially was the case. In fact, the parties stipulated and agreed on the record as follows:

The content of the affected employees' day-to-day job duties did not change after they were transferred to machine operator and MM AAA classifications.

Some, but not all employees in the consolidated jobs—MM AAA and machine operator—received training on the duties of the consolidated positions. And such training as was given to the employees was provided by other unit employees. Some employees did not require any training because they already possessed the qualifications or because they had past experience in that job. (Tr. 69–70.)

Novak also testified that because business conditions were down, the Company simply did not have the need to utilize the newly implemented rights.

5 found no case authority to support the core position of the Respondent—the indivisibility of a “single” unilateral change. This is not surprising. It seems clear that the changes that could be the subject of a unilateral change unfair labor practice proceeding are only limited by the number of jobs and associated terms and conditions of employment that exist in the U.S. economy.

Thus, it would seem that the broad remedial rubric for unilateral change cases has of necessity to be applied on a case-by-case basis. In agreement with the Respondent, I note that the Board will not allow employers to be punished for their unlawful conduct and employees will not be given a windfall in benefits. However, in agreement with the General Counsel, I note that the Board clearly allows employees through their chosen representatives to have a say, a choice, as it were, in terms of vindicating their right to be made whole. Thus, the Board allows employees in some respects “to pick and choose” how they may be made whole. The Board clearly realizes that making employees whole for the employer’s past transgressions is certainly often difficult and imprecise. The process is somewhat akin to putting Humpty Dumpty back together again, not impossible, but the resulting effort may show some cracks.

Therefore, it seems that in unilateral change cases, the employees, and not the employer, gets to choose the make-whole remedy as long as the employees’ choice is reasonable and does not produce a windfall or is not punitive, which is not the case here. The Respondent in my view is attempting to circumvent the law by characterizing the nature of its unlawful conduct and dictating options the employees have to rectify its violations of the Act.

I do not view the Respondent’s position as presenting a novel legal issue. Rather, the Respondent in my view attempts to propose a novel characterization or interpretation of the nature of conduct deemed unlawful by the Board. The Respondent’s interpretation of the nature of the unilateral change in my view should not and cannot be controlling. In fact, were the Respondent’s interpretation to prevail, the employees would effectively be denied the choice the Board’s decision accorded them for purposes of making themselves whole, and would allow the Respondent to profit or gain a bargaining advantage in its dealings with its employees.

So irrespective of whether one were to view the creation of the new positions and the establishment of the associated wage rates as singular or bifurcated acts, the fact remains the change was deemed unlawful by the Board. This finding in my view triggers the traditional Board remedy which as stated allows the employees to elect to maintain or reject various aspects of the offending conduct.

Accordingly, in this case the Union is entitled to a return to a status quo ante restoration order, conditioned upon its affirmative desires, here, to request rescission of the consolidated positions, but not restoration of the lower, pre-implementation wage rates. *Children’s Hospital of San Francisco*, 312 NLRB 920 (1993).

RECOMMENDED ORDER⁹

I would recommend that the Respondent, in order to be in full compliance with the Board’s Order in the underlying case, must maintain the wage rates that were implemented by it

⁹ If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

in April 2006. Further, I would recommend that the affected employees shall be made whole for the difference between the two rates from January 1, 2007, until such time the Respondent implements the aforesaid wage rates.

5 Dated, Washington, D.C. May 14, 2007

Earl E. Shamwell Jr.
Administrative Law Judge