

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

NICHOLS & WRIGHT PAVING, INC.

and

Case 9–CA–41612

INTERNATIONAL UNION OF OPERATING  
ENGINEERS, LOCAL NO. 132, AFL-CIO

and

Case 9–CA–41729

LABORERS' DISTRICT COUNCIL, CHARLESTON,  
WEST VIRGINIA, LABORERS' LOCAL UNION NO. 543

*Eric A. Taylor, Esq.*, for the General Counsel.  
*Roger Williams, Esq.*, for Charging Party Laborers'  
District Council and Laborers Local 543.<sup>1</sup>

**BENCH SUPPLEMENTAL DECISION**

**Statement of the Case**

**MICHAEL A. MARCIONESE, Administrative Law Judge.**<sup>2</sup> I heard this case in Huntington, West Virginia, on May 27, 2008. This is a compliance proceeding initiated by General Counsel's issuance of a compliance specification and notice of hearing on August 14, 2007. On February 23, 2007, the Board issued its Decision and Order in this case, reported at 349 NLRB No. 39, finding that the Respondent, Nichols & Wright Paving, Inc., violated Section 8(a)(1) and (5) of the Act by, inter alia, unlawfully terminating its collective bargaining agreements with the two Charging Party Unions. The Board ordered that the Respondent reinstate the unlawfully terminated collective bargaining agreements and comply with all their terms and conditions retroactive to December 4, 2004. Specifically, Respondent was ordered to make whole the Union's fringe benefit trust funds for the nonpayment of contractually-required contributions; to make the Union's whole for dues and fees that the Respondent failed to deduct and remit; and to make employees whole for any wages lost as a result of the Respondent's failure to pay them the contractual rate of pay. The August 14, 2007 compliance specification set forth the amount of money General Counsel claimed was owed by the Respondent pursuant to the Board's order.<sup>3</sup>

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<sup>1</sup> Brian Blickenstaff, Esq., appeared at the hearing as counsel for Lyndon Graham, identified erroneously in the transcript as "Brendan Grant", the Trustee in Bankruptcy appointed by the bankruptcy court on May 13, 2008 as a result of the Respondent's filing a petition for liquidation under Chapter 7 of the bankruptcy code. Mr. Blickenstaff appeared for the limited purpose of making a motion for a continuance.

<sup>2</sup> The court reporter erroneously identified the undersigned administrative law judge as "Martin Marcionese". The transcript is hereby corrected.

<sup>3</sup> The Board's Order was enforced by mandate of the Fourth Circuit Court of Appeals on February 7, 2008.

On August 20, 2007, the Respondent filed its answer to the compliance specification, admitting that the General Counsel’s mathematical calculations were correct but asserting, as an affirmative defense, that “the parties ... met on various occasions in April and May 2007 and arrived at a settlement agreement specifically disposing of all the issues set out in this Specification...”

On September 10, 2007, Counsel for the General Counsel filed with the Board a Motion for Summary Judgment based on the Respondent’s admission in its answer that the back pay calculations were correct. By order dated February 27, 2008, the Board denied General Counsel’s motion, ruling that Respondent’s affirmative defense that the parties had entered a non-Board settlement agreement raised material issues of fact that prevented summary judgment. The Board remanded this proceeding to the Region which then scheduled the instant hearing.

Although properly served with notice of the hearing, and having previously been served with the compliance specification and General Counsel’s motion for summary judgment, no representative of the Respondent appeared at the May 27 hearing. The Respondent’s counsel who filed the August 17 answer withdrew from the case before the summary judgment motion. Thereafter, General Counsel directly served the Respondent at its place of business with all documents related to this case.

As noted previously, the newly appointed Chapter 7 bankruptcy trustee appeared at the hearing by counsel and requested a continuance on the basis that he needed time to secure labor counsel and prepare possible defenses and, if necessary, step into the shoes of the debtor, Respondent herein, to contest the compliance specification. I denied the request for a continuance based on my finding that the trustee, who is not a party to this proceeding and whose charge from the bankruptcy court was to liquidate the debtor’s assets for the benefit of the creditors, did not have standing to contest the compliance specification. I noted that the Respondent’s liability for the unfair labor practices has already been established through the Board’s Order enforced by the Court of Appeals. I also noted that, before filing for bankruptcy, the Respondent admitted that the General Counsel’s back pay calculations were correct. To allow the trustee to intervene now to delay these proceedings, without any substantive showing of harm, would amount to granting the automatic stay that courts have historically held does not apply to NLRB proceedings. *NLRB v. Evans Plumbing Co.*, 639 F.2d 291, 293 (5<sup>th</sup> Cir. 1981). See also *Nathanson v. NLRB*, 344 U.S. 25, 29-31 (1952).

Pursuant to Sections 102.35(a)(10) and 102.45 of the Board’s Rules and Regulations, I hereby certify the accuracy of the portion of the transcript, page 43, line 16 through page 48, containing my bench decision.<sup>4</sup> A copy of that portion of the transcript is attached to this decision as “Appendix A”.

Having found that the General Counsel’s calculations are correct and that no non-Board resolution of the dispute that would effectuate the Act existed, I issue the following recommended<sup>5</sup>

<sup>4</sup> The transcript, at page 45, lines 3-4, is hereby corrected to replace “independent stay” with *Independent Stave Co.*, 287 NLRB 740 (1987). The transcript at page 45, line 5 is corrected to add the correct citation for *American Pacific Pipe Co.*, 290 NLRB 623 (1988).

<sup>5</sup> 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.

Continued

ORDER

5 The Respondent, Nichols & Wright Paving, Inc., Huntington, West Virginia, its officers,  
agents, successors and assigns, shall make the following payments in accordance with the  
National Labor Relations Board's Decision and Order at 349 NLRB No. 39, as enforced by the  
Court of Appeals, plus interest on the back pay amounts as computed in *New Horizons for the*  
*Retarded*, 283 NLRB 1173 (1987), and interest on the fringe benefit fund contributions to be  
determined in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216, fn. 7 (1979):

	<u>Funds</u>	<u>Dues</u>
10 International Union of Operating Engineers, Local No. 132, AFL-CIO	\$47,664.00	\$4,952.00
15 Laborers' District Council, Charleston, West Virginia, Laborers' Local Union No. 543	\$25,950.00	\$2,111.00

Employees

20 Wetzel Fulks	\$ 390.00
Harold Maynard	\$14,092.00
William Mann	\$ 411.00
Alan Burrus	\$ 1,110.00
Billy Watts	\$ 113.00
25 Marvin Robertson	\$ 8,515.00
Anthony Salmons	\$12,228.00
Roland Hively	\$13,892.00
Ron Lambert	\$ 1,478.00
30 Donald Spence	\$ 459.00

35 Dated, Washington, D.C., July 1, 2008.

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Michael A. Marcionese  
Administrative Law Judge

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102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed  
waived for all purposes.

## APPENDIX A

5 All right, having - normally I would take some time to consider the matter before  
rendering a Bench Decision, but since there is no opposing evidence to contradict anything that  
the General Counsel has offered and although Respondent Nichols and Wright Paving, Inc. was  
10 certainly served with Notice of the hearing and had filed an Answer to the Compliance  
Specification and well aware of these proceedings has chosen not to attend. In essence this is  
the nature of a default judgment at this point we have no contradictory evidence.

15 Essentially based on the Compliance Specification and the testimony and evidence that  
I've seen here today I would grant a Summary Judgment Motion by the General Counsel and  
20 find that the backpay owed by Nichols and Wright Paving, Incorporated under the terms of the  
Board's Order as enforced by the Court of Appeals would be the amount set forth in the  
Compliance Specification.

25 I note that the initial Answer filed, and there's been no subsequent Answer or  
Amendment of that Answer admitted all of those calculations, so there has been from the  
30 beginning no dispute about the amounts in question in this proceeding. The only issue raised,  
which gave the Board pause on the Summary Judgment filed with the Board was the issue of  
whether the matter had been resolved in a non-Board agreement between the parties.

35 While, General Counsel, I think you're correct that the burden would be on the  
Respondent to present whatever evidence there would be to establish that, in fact, there has  
40 been a non-Board resolution that satisfies the standards that the Board applies and would  
effectuate the policy of the Act. In this case, certainly, there has been enough evidence offered  
here today from Mr. Williams' testimony that whatever agreement was reached certainly does  
45 not meet the standards of the Board. Not only in an independent stay, but the case the Board  
cited American Pacific Concrete Pipe Company, Incorporated, which dealt specifically with a  
50 non-Board settlement of a Compliance matter, where there had already been a Board Order.  
Therefore, you would think less of a risk of litigation.

The Board approved that non-Board resolution in American Pacific Concrete Pipe, but that there was evidence that it was an individual's claim for backpay, that there was no fraud, coercion or duress. That it was reasonable in light of the risks involved in that litigation which involved issues of interim earnings and willful loss, which we don't have in a case of this nature here.

Looking at those standards certainly we don't have a situation here where the Charging Party, the Respondent and the Discriminatee or affected employees have all agreed to be bound. In fact, even assuming that the Respondent - it would only be the Respondent - it isn't even the Charging Party that agree to be bound, but it was the Funds that entered into that settlement agreement with the Respondent. The Unions themselves who have a claim for unpaid dues were not a party to that agreement that Mr. Williams described. Certainly, none of the employees who had lost wages that they were entitled to.

General Counsel has never been a party to those discussions and has opposed approval of the settlement. In terms of the stage of the litigation and the risks involved we're dealing with a Compliance proceeding where there's already been a finding of an unfair labor practice.

We don't have an issue of individual lost wages where there's been a backpay period where the employees are required to mitigate. Here the employees were apparently continuing to work for the Employer, but receiving a lesser wage. So, there's little risk on their part in terms of if they went to hearing whether the amount claimed would be reduced.

So, certainly, in light of all the circumstances I agree with General Counsel that even if there was an agreement reached between the Funds and the Respondent it would not effectuate the policies of the Act to approve it and to accept that in lieu of the backpay claims that have been made under the terms of Board's Order.

Okay, in light of that I will grant the Summary Judgment request. What I will do is upon receipt of the transcript I will issue a written decision that will certify the portions of the transcript

that contain my ruling and my decision here. Then that will be served, a copy will be served, on the Parties, as well as the Trustee will be served a copy even though not formally a Party to these proceedings at this point. Anyone who takes exception to any of my rulings or my decision in this matter has a right to file exceptions with the Board. The Statement of Procedures will explain how to go about doing that. Then the Board will consider any exceptions that are made before making a final Order in this case.

Now, anything further before we adjourn?

MR. TAYLOR: Yes, Your Honor, very briefly. Counsel for General Counsel would ask that in your recommended Order that you include interest and until the date of payment.

JUDGE MARCIONESE: All right, that would be standard, I guess, in any Board Order on a backpay or compliance proceeding. What I will do is I will - my Decision will certify the portions of the transcript that contain my ruling here today. Plus, it will contain a proposed Order recommended to the Board which will set forth these specifics in terms of the amounts required to be paid to each. We have the Unions, the Funds and the individual employees.

Then at that point, as I think we talked about earlier, I will leave it to General Counsel to collect in any way, if that's possible, under the terms of the Bankruptcy Court and the matter will then be resolved through the Bankruptcy proceedings in terms of whether there are any assets and, if so, what priority any of these claims might have.

All right, if there's nothing further, then this hearing will be closed and thank you all very much and look forward to seeing you again in the future.

MR. TAYLOR: Thank you, Judge.

(Whereupon, the hearing in the above entitled matter was adjourned at 2:49 p.m.)