

The Charging Party International Brotherhood of Electrical Workers Local 36, by its attorneys, Blitman & King LLP, pursuant to the Board's Rules and Regulations, moves for clarification, and reconsideration, of the Board's August 16, 2010 Decision and Order. The following points are made in support of the Union's Motion.¹

Clarification.

1. The administrative law judge found that the “[u]se of the company vehicle was considered income by Respondent and was represented to prospective employees and relied upon by some of those taking involved jobs, as being part of their total compensation.” Slip decision at page 11; see also pages 6-7. Accordingly, he ordered that the affected employees be made whole. Slip decision at 14. In so concluding, the judge specifically cited the Board's decision in Kiro, Inc., 317 NLRB 1325 (1995). In Kiro, the Board found an effects bargaining violation when the employer made the non-mandatory bargaining decision to broadcast a news show over an unaffiliated and independent television station. Id. at 1325-1326. From an effects standpoint, the decision resulted in “material, substantial, and significant” “changes in working conditions” that “[c]onsequently . . . were mandatory subjects of bargaining.” Id. at 1327. Under the circumstances, the Board ordered the employer to engage in effects bargaining, and to “make whole any employee who suffered losses resulting from its unlawful conduct”. Id. at 1329 (Amended Remedy, and Order paragraph 2(b).)

In its decision in this case, the Board did not disavow the administrative law judge's reliance on Kiro. The circumstances in Kiro compelling the make-whole remedy

¹ The Board may modify or set aside its findings or orders at any time before the record is filed with a court. NLRB Rules & Regs. § 102.49; see 29 U.S.C. § 160(d). In this case, RG&E on August 19, 2010 transmitted for filing a petition for review with the U.S. Court of Appeals for the D.C. Circuit, but the record has not yet been filed with that court. Thus, the Board has full authority to address the present motion.

are similar to those in this case, in that there is measurable (but not inevitable) loss (compensation was directly affected) and it is a mandatory subject of bargaining. Such a remedy would not implicate the Board's finding that Respondent could eliminate the vehicles without bargaining over that decision.

2. The Board was presented with a situation involving similar issues in The Fresno Bee, 339 NLRB 1214 (2003). Although the Board found the underlying decisions (to implement a corporate-wide computerized employee benefits system and a new printing system) to be a non-mandatory subjects of bargaining, id., changes in lunch period and shift scheduling "were not inevitable consequences of [them], but were the effects of [them], and as such, were mandatory subjects of bargaining." Id. at 1215. The Board ordered the employer to make the affected employees whole, id. at 1216, with back pay for losses incurred as a result of the changes. Id. at 1223.

3. A similar situation was presented in Comar, Inc., from the standpoint that a non-mandatory bargaining decision was made to relocate operations without bargaining over the effects on transferring employees. Id. at 913. The terms and conditions of the transferring employees at the new location having not been bargained, the employees were ordered made whole. Id. at 914. In addition, the Board ordered the full Transmarine² remedy as to the same employees. Comar, supra at 903.

4. The Administrative Law Judge in this case directed the employer to make employees whole and to engage in effects bargaining. This is consistent with the above Board decisions, and reflects the unique circumstances of this case where the effects bargaining failure caused a direct but not inevitable impact on a critical mandatory subject of bargaining, i.e., compensation.

² Transmarine Navigation Corp. 170 NLRB 389 (1968).

5. The Board's Decision and Order leaves uncertainty as to whether the "monetary value" make whole relief is still part of the Order. In the Board's decision, its discussion of the remedy is limited to the order to engage in effects bargaining, as to which the Board opined that a modified Transmarine remedy was necessary. The Board's order includes the requirement to bargain as to effects (paragraph 2(a)), as well as to pay each employee the monetary value of his or her vehicle benefit with interest (paragraph 2(b)). The Board's notice to employees (slip decision at 4) requires effects bargaining in one paragraph, and in the next paragraph requires that the respondent "pay each low-voltage TM&R employee the monetary value of his or her vehicle benefit, with interest."

6. There is sufficient ambiguity in the Board's discussion of the remedy issue to warrant an explicit statement that the Transmarine effects bargaining remedy is in addition to the "monetary value" remedy.

Reconsideration.

7. In the event that the Board did intend to provide a modified Transmarine remedy as the sole monetary remedy, the Board should reconsider its decision based on the above points and for the following reasons, and modify the remedy to provide make whole relief and a full Transmarine remedy.

8. In addition to the make whole issue discussed above, the watered-down version of the Transmarine remedy in the Order is ineffective as a means to incentivize effects bargaining.

The purpose of the limited back pay component of the Transmarine remedy differs significantly from that of the Board's usual back pay remedy. The latter is designed to make employees whole for wages and benefits lost as a result of the unlawful conduct. Although the Transmarine back pay remedy is "designed both to make whole

the employees for losses suffered as a result of the violation and to recreate in some practicable manner a situation in which the parties' bargaining position is not entirely devoid of economic consequences for the respondent," Transmarine, supra at 390, of the two goals, restoring the union's bargaining strength is the more important objective. O.L. Willis, Inc., 278 NLRB 203, 205 (1986). Similarly, the courts have recognized that the primary purpose of the Transmarine remedy is to "create an incentive for the company to bargain in good-faith." Nathan Yorke v. NLRB, 709 F.2d 1138, 1145 (7th Cir. 1983). In Yorke, the court upheld the Board's authority to grant such a remedy, stating: "ensuring meaningful bargaining comports with the primary objective of the Act." Id. See also NLRB v. Emsing's Supermarket, 872 F.2d 1279 (7th Cir 1989); First National Maintenance Corp. v. NLRB, 452 U.S. 666, 681-82 (1981) ("Under Section 8(a)(5), bargaining over the effects of a decision must be conducted in a meaningful manner and at a meaningful time, and the Board may impose sanctions to insure its adequacy.")

The Board's modification of Transmarine's back pay component in the instant case renders the remedy ineffective. There are eight employees involved in this case. Slip decision at 5. Assuming for argument only that the value of the loss of the vehicle per worker is \$20.00 per day (value is discussed at slip decision at 6-7), that amounts to \$160.00 per day to incentivize bargaining and is plainly adequate for that purpose.

Further, to tie the Transmarine remedy to the value of the economic loss is contrary to Board law. The Board has previously rejected the contention that the remedy is tied to "palpable loss". In Live Oak Skilled Care & Manor, 300 NLRB 1040 (1990), the administrative law judge found that a Transmarine remedy was not required because the employees suffered no "palpable loss" by the employer's failure to engage in effects bargaining. The Board disagreed, holding that backpay was appropriate, irrespective of

loss, because the union, with its bargaining power intact, may have secured additional benefits if the employer had engaged in timely effects bargaining. Thus, the Board established that it is not an employee's loss that is the appropriate focus, but rather the union's loss of leverage. "[T]he Union can hardly hope to obtain the same benefits from bargaining had effects bargaining taken place at the time required by law." *Id.* at 1040 (citations omitted). In *Comar, supra*, an effects bargaining case, employees who refused to transfer with the relocated operations because of unilaterally changed working conditions, were found to have been constructively discharged and were ordered to be made whole. Other employees who did accept transfer under unilaterally reduced wages and benefits at the new location were also ordered to be made whole. The Administrative Law Judge declined to provide an additional Transmarine remedy on the basis that it would be a "windfall". *Comar, supra* at 914. The Board disagreed, and provided the Transmarine remedy for discharged and transferring employees alike in addition to the make whole back pay, in order to "remedy the effects bargaining violation." *Id.* at 903. See *Comar II*, 349 NLRB 342 (2007), at 342-343 (make whole back pay and effects bargaining back pay). In the instant case, as in *Comar*, the reduction in compensation should be remedied, and the real Transmarine remedy provided in order to incentivize effects bargaining.

The language of the Transmarine remedy itself leads to the conclusion that focusing on "palpable loss" is inconsistent with the remedy. The remedy provides that the employer must pay backpay, and interest, until one of four specified conditions are met, less interim earnings, "provided, however, that in no event shall this sum be less than these employees would have earned for a 2-week period at the rate of their normal wages." In this last proviso, the Board guarantees a right to a sum equivalent to two-

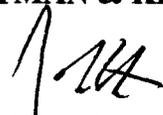
weeks backpay irrespective of interim earnings. See Van's Packing Plant, 211 NLRB 692 n.3 (1974), describing the remedy as "guarantee[ing] . . . at least 2 weeks' back pay." The Board's selection of the word "sum" also illustrates that it was concerned with finding a minimum amount of money an offending employer must pay. In contrast, a normal back pay remedy is awarded by quarters which determines an employee's gains and losses over a period of time. By not tying the minimum Transmarine remedy to a period of time, the Board indicated that it did not intend the minimum to be tied to an employee's financial gain or loss. Rather, the Board wanted to incentivize employers to timely effects bargain by mandating a minimum sum they would have to pay if they failed to meet that obligation.

WHEREFORE, the Union requests that the Board grant this Motion for Clarification and Reconsideration, and modify its Order to explicitly provide appropriate remedies.

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Respectfully submitted,

BLITMAN & KING LLP

By: 

James R. LaVaute, of Counsel
Attorneys for the Charging Party
Office and P. O. Address
Franklin Center, Suite 300
443 North Franklin Street
Syracuse, New York 13204
Telephone: (315) 422-7111

TO: (Via Electronic Filing)

Lester A. Heltzer, Executive Secretary
National Labor Relations Board

Counsel for the General Counsel
National Labor Relations Board, Region 3
Linda.leslie@nlrb.gov

James S. Gleason, Esq.
Counsel for Respondent
jgleason@hhk.com

Rochester Gas & Electric Corp.
Thomas.Cammuso@energyeast.com
Sheri.Lamoureux@energyeast.com