

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ATLANTIC SCAFFOLDING COMPANY

AND

UNITED BROTHERHOOD OF CARPENTERS AND  
JOINERS OF AMERICA, LOCAL 502

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CASE 16-CA-26108

**RESPONDENT’S MOTION FOR RECONSIDERATION  
OF THE BOARD’S DECISION AND ORDER**

Respondent Atlantic Scaffolding Company (“Atlantic”) moves for reconsideration of the Board’s March 18, 2011 Decision and Order.

**I.  
SUMMARY OF THE MOTION**

Two material errors warrant the Board’s reconsideration.<sup>1</sup> First, Atlantic respectfully urges the Board to reconsider its finding that Atlantic violated Section 8(a)(1) of the Act when it issued separation notices to certain employees on March 19, 2008. The violation found by the Board materially differs from the 8(a)(1) allegations in the charge and the complaint, was never entertained by the Administrative Law Judge, does not comport with the theory of the case litigated by the General Counsel, and was not argued by the General Counsel at the hearing, in his briefs, or at any other stage in the proceedings. In short, the Board’s finding of an 8(a)(1) violation deprived Atlantic of important due process rights because it was based on an alternate theory of unlawful discharge that was not fully or fairly litigated.

Second, to the extent that the Board’s remedial order could be read to definitively require reinstatement of employees or backpay for periods after the end of the maintenance turnaround,

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<sup>1</sup> Atlantic’s decision to move for reconsideration of only these issues is not—and should not be construed as—a concession by Atlantic that all other issues have been rightly decided. Atlantic reserves and does not waive its right to seek review of the Board’s Decision and Order by an appropriate federal court.

Atlantic asks the Board to reconsider its decision to award those remedies. Resolution of the appropriateness of those remedies should be left to the compliance process, where that issue may be fully litigated.

## **II. RELEVANT BACKGROUND**

The Carpenters Local Union 502 filed the unfair labor practice charge underlying this case on March 20, 2008. The charge alleges that “[o]n March 17, 2008,” Atlantic discharged a number of employees “for engaging in a collective protest of their wage rates” in violation of Section 8(a)(1) of the Act. At the time of their protest, the employees were assigned to work on an eight-week maintenance turnaround at the ExxonMobil refinery in Beaumont, Texas.

The General Counsel filed a complaint in August 2008. Consistent with the charge, paragraphs 7 and 8 of the complaint allege that:

- “[o]n or about March 17, 2008,” certain Atlantic employees engaged in a protected concerted work stoppage; and
- “[o]n or about March 17, 2008”—the same day as the work stoppage—Atlantic fired those employees in violation of Section 8(a)(1).

The complaint was tried at a three-day evidentiary hearing before Administrative Law Judge Margaret Brakebusch in May 2009. As the hearing transcript and post-hearing briefs reflect, the General Counsel’s only theory for establishing the alleged 8(a)(1) violation was that Atlantic unlawfully discharged certain employees on March 17 because the events during that day reasonably caused the employees to believe that they had been discharged.<sup>2</sup>

After receiving post-hearing briefs, the judge dismissed the complaint on multiple grounds. One of the grounds for dismissal was her finding that the General Counsel had failed to

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<sup>2</sup> All dates are within 2008 unless otherwise indicated.

prove “that Respondent terminated the employees on March 17, 2008, as alleged.” (ALJ Decision, p. 21, lines 31-33).

The General Counsel filed numerous exceptions to the judge’s decision and submitted a supporting brief to the Board. In those filings, the General Counsel offered the same arguments and theory of the case that he had presented to the judge—that Atlantic violated Section 8(a)(1) through its March 17 actions, which the striking employees supposedly believed indicated that they were fired. Nothing in the General Counsel’s exceptions or supporting brief claimed—even as an alternative argument—that Atlantic violated Section 8(a)(1) through anything other than its actions on the day of the work stoppage (March 17). To the contrary, the second of the General Counsel’s two questions presented in his brief to the Board clearly defined the scope of the issues litigated: “Whether the ALJ erred in finding that Respondent did not discharge the employees on March 17 in retaliation for their protected activity.” (GC Brief in Support of Exceptions, p. 2; *see also id.*, pp. 30-37).

Atlantic filed an answering brief with the Board in response to the General Counsel’s exceptions. There, Atlantic argued that the General Counsel’s exceptions were without merit and that the judge correctly dismissed the complaint because Atlantic’s actions on the day of the March 17 work stoppage did not reasonably lead any striking employees to believe that they had been fired. As already described, the purported March 17 discharge was the only theory of violation alleged in the charge, in the complaint, at the hearing, in the General Counsel’s post-hearing brief, and in the General Counsel’s exceptions to the judge’s decision.

The Board ultimately issued a Decision and Order in which it “agree[d] with the judge, for the reasons she cites, that the Respondent did not terminate any employees on March 17.” (Slip Op., p. 2 n. 8). Nevertheless, the Board reversed the judge’s dismissal of the complaint and

found—different from the General Counsel’s only theory of violation—that Atlantic violated the Act when, on March 19, it issued separation notices to certain employees who had engaged in the work stoppage and not returned to work over the following days. (*Id.* at 2, 4). The Board’s remedial order covered 54 employees and required that they be: (1) offered “full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions;” and (2) made “whole for any loss of earnings and other benefits suffered as a result of the discrimination against them.” (*Id.* at 5). Atlantic now seeks reconsideration of the Board’s Decision and Order for the reasons set forth below.

### **III.** **ISSUES FOR RECONSIDERATION**

1. Whether Atlantic’s due process rights were infringed when the 8(a)(1) violation found by the Board was based on a theory of violation that was not entertained by the judge and was not argued or alleged by the General Counsel at any stage of the proceedings.

2. Whether the appropriateness (or lack thereof) of the remedies of reinstatement and backpay for periods beyond the end of the maintenance turnaround are issues that should be resolved upon a full evidentiary record developed during the compliance stage.

### **IV.** **ARGUMENT**

#### **A. The Board’s Finding that Atlantic Violated Section 8(a)(1) Deprived Atlantic of Due Process Because the Board’s Theory of Violation Was Never Litigated**

The Board’s finding that Atlantic violated Section 8(a)(1) when it sent separation notices to employees on March 19 deprived Atlantic of its due process rights and, therefore, is material error. “Due process requires that a party be on notice of the General Counsel’s contentions.” *Int’l Baking Co.*, 348 NLRB 1133, 1134 (2006); *see Conair Corp. v. NLRB*, 721 F.2d 1355, 1372 n. 60 (D.C. Cir. 1983) (“Each party is entitled to know what is being tried . . . . Notice remains a

first-reader element of procedural due process, and trial by ambush is not . . . favored.”). To determine whether the respondent’s due process rights have been violated, the Board considers “the scope of the complaint and any representations by the General Counsel concerning the theory of violation, as well as the differences between the theory litigated and the judge’s [or Board’s] theory.” *Buonadonna Shoprite, LLC*, 356 NLRB No. 115, slip op. at 2 (Mar. 18, 2011). The respondent must have a “full and fair opportunity” to litigate the theory of violation on which the decision rests. *Lamar Advertising of Hartford*, 343 NLRB 261, 265 (2004). Here, the Board should reconsider its finding that Atlantic violated Section 8(a)(1) because that finding is based on a theory that was neither litigated before the judge nor brought to the Board for review.

**1. The Violation Found By the Board Differs From the Complaint Allegations and Does Not Comport with the Limited Theory of Violation Litigated by the General Counsel**

**a. The Complaint Allegations**

The charge and the complaint both allege that the striking employees were unlawfully discharged as a result of Atlantic’s actions on the same day as the work stoppage—March 17. The violation found by the Board materially differs from the complaint because it rests upon different actions taken by Atlantic (issuing separation notices to employees) two days later—on March 19. (Slip Op., p. 2 n.8); *see Enloe Med. Ctr.*, 346 NLRB 854, 855 (2006) (holding that, while not dispositive, differences between the violation found and the violation alleged in the complaint are relevant to the due process inquiry).

The Board’s Decision and Order seeks to reconcile the differences between the violation found and the complaint allegations by pointing out that the references in the complaint to March 17 are prefaced with “on or about.” (Slip Op., p. 2 n.8). Atlantic understands that the General Counsel (or the Board) may sometimes rely upon “on or about” language to avoid technical inaccuracies with respect to dates because, for example, a charging party is unable to pinpoint

exactly when a particular action or event occurred. But that is not the case here, as the dates of the relevant events are well known and generally undisputed. Instead, the Board’s Decision and Order appears to have exploited the “on or about” language for a different and much less benign purpose—to act as a conduit to: (1) impose liability on Atlantic for a different set of actions than those occurring on the dates literally alleged in the complaint, and (2) allow the Board to rely on a different theory of violation than the one litigated by the General Counsel.<sup>3</sup> In other words, the Board is using the “on or about” language not to preserve flexibility as to the date of a discrete action, but to wedge the Board’s new theory of violation into the case at the last minute. Atlantic respectfully contends that using the “on or about” language for this purpose is inconsistent with Atlantic’s due process rights and should be reconsidered.

**b. The General Counsel’s Limited Theory of Violation**

In addition to differing from the complaint allegations, the violation found by the Board falls outside of the limited theory of violation actually litigated by the General Counsel. *See Sierra Bullets, LLC*, 340 NLRB 242, 242-43 (2003) (finding due process denied when the violation found by the ALJ, although encompassed by the complaint, exceeded the limited theory of violation proffered at the hearing and in post-hearing briefs). The hearing transcript and subsequent briefing in this case made clear that the General Counsel’s only theory of violation was that—under *Flat Dog Productions* and similar cases—Atlantic violated Section 8(a)(1) because its actions on the day of the work stoppage “reasonably led the strikers to believe that they were discharged.” *Flat Dog Prods., Inc.*, 331 NLRB 1571, 1571 (2000); (*see* GC Post-Hearing Brief to ALJ, pp. 25-28; GC Brief in Support of Exceptions, pp. 30-37). Counsel for the

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<sup>3</sup> It is not enough to say that the Board and the General Counsel’s separate theories both deal with a termination. As detailed further below, the General Counsel’s theory of violation relies upon an entirely separate analysis based on different facts and a different line of cases (including *Flat Dog Productions*) than does the Board’s theory (relying on *L. B. & B. Associates*, among others). *Compare* GC’s Brief in Support of Exceptions at 35, *with* Slip Op. at 4.

General Counsel clearly outlined this narrow theory of violation in his opening remarks at the hearing before the judge:

Based on these concerns, the employees engaged in a peaceful, concerted work stoppage [on March 17, 2008] to bring these issues to management's attention, including presenting their concerns in writing to their managers. In response to this protected activity, Respondent swiftly retaliated against the employees' protected activity by immediately discharging them. Now, although Respondent may content [sic] that they never formally used the words, Discharged, the evidence shall show that the message was clearly conveyed to them that they indeed had been discharged. (Tr. 16:25-17:10).

The General Counsel did not argue at the hearing that Atlantic's actions on March 19, 2008 violated the Act. Nor did the General Counsel even seek to enter into evidence the March 19 separation notices that form the basis of the Board's finding that Atlantic violated Section 8(a)(1). Consistent with these inactions at the hearing, the General Counsel also did not argue in his post-hearing brief that Atlantic violated Section 8(a)(1) when it issued separation notices to the employees on March 19 after they did not return to work for multiple days. Instead, the General Counsel's brief presented only one theory of violation under Section 8(a)(1)—that Atlantic's actions on the day of the strike led the strikers to believe that they had been discharged on that day. (*See generally* GC Post-Hearing Brief, pp. 25-28).

All of these factors demonstrate that the violation found by the Board was an alternate theory of unlawful discharge that was neither fully nor fairly litigated.<sup>4</sup> *See Sierra Bullets*, 340 NLRB at 242-43 (finding that General Counsel's opening remarks at hearing, post-hearing brief, and fact that parties did not introduce evidence relevant to alternate theory of violation relied on by judge were factors that demonstrated due process denial); *Buonadonna Shoprite*, 356 NLRB No. 15, slip. op. at 2 (holding that respondent was denied due process when 8(a)(1) violation

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<sup>4</sup> The Board need not address, under *Pergament United States* and *Desert Aggregates*, whether the violation found was closely related to the violation alleged by the General Counsel because Atlantic has demonstrated that the issues regarding the found violation were not fully and fairly litigated. *Enloe Med. Ctr.*, 346 NLRB at 855; *see also Desert Aggregates*, 340 NLRB 289, 292-93 (2003); *Pergament United States*, 296 NLRB 333, 334 (1989).

found by ALJ exceeded scope of General Counsel's representations at hearing regarding specific theory of violation litigated). Moreover, there is nothing in the record to uncontrovertibly demonstrate that Atlantic could not have prevailed in this case under the Board's theory of violation had the General Counsel actually litigated it. *See Conair Corp.*, 721 F.2d at 1372 (rejecting argument that respondent has burden to show how it "could have adduced facts or altered its presentation to defeat" unlitigated theory of violation and holding, instead, that where record "does not reveal uncontrovertibly that [respondent] could not have prevailed" if afforded due process," prejudice exists and requires reversal). Accordingly, Atlantic contends that the violation found by the Board should be reconsidered because it deprived Atlantic of due process by exceeding the limited theory of violation actually litigated by the General Counsel.

**2. The Board's Theory of Violation Was Not Addressed by the Judge and Was Not Part of the General Counsel's Exceptions**

Atlantic further contends that due process has been denied because the theory of violation on which the Board relied was not properly placed before the Board for its consideration. In her thorough decision, the judge did not address the Board's theory of violation relating to the events of March 19, presumably because the issue was not litigated by the parties. *See Conair Corp.*, 721 F.2d at 1372 ("The ALJ, who did not even mention the issue in an otherwise exhaustive set of findings and conclusions, evidently did not perceive that the question had been tried . . ."). Nor did the General Counsel raise the issue through exceptions. Specifically, the General Counsel asserted no exception to: (1) the judge not entertaining the alternate theory of violation ultimately adopted by the Board; or (2) the judge not finding a violation based on the issuance of the separation notices on March 19. Instead, the General Counsel limited the issues for review to what was actually litigated: "Whether the ALJ erred in finding that Respondent did not discharge

the employees on March 17 in retaliation for their protected activity.” (GC Brief in Support of Exceptions, p. 2).

It was error for the Board to find a violation not considered by the ALJ and for which the General Counsel had filed no specific exception. The Board, “acting as an appellate body, should have rendered its decision in conformity with the issue as framed and resolved by the ALJ”—*i.e.*, whether Atlantic terminated the employees on March 17, as alleged. *Conair Corp.*, 721 F.2d at 1372-73 (internal quotations omitted); (*see* ALJ Decision, p. 21, lines 31-33). By doing otherwise, the Board changed the theory of violation to one that had not been litigated by the General Counsel. This was not permissible and deprived Atlantic of due process. *See Lamar Advertising*, 343 NLRB at 265 (“[A]n agency may not change theories in midstream without giving respondents reasonable notice of the change.”); *see also United Mine Workers*, 338 NLRB 406, 406 (holding that ALJ “should not undertake to decide an issue which he alone interjected into the hearing”) (internal quotations omitted). Atlantic respectfully contends that, by entertaining the alternate theory of violation on which it based its 8(a)(1) finding, the Board committed error that requires reconsideration.

**B. To the Extent that the Board’s Order May Suggest to the Contrary, Issues Related to Reinstatement and Entitlement to Backpay Beyond the End of the Turnaround Should Be Resolved through Compliance**

It is not clear to Atlantic whether the Board’s remedial order indicates that the Board has definitively decided that the employees must be offered reinstatement or backpay beyond the end of the ExxonMobil maintenance turnaround. (*See* Slip Op., p. 5). Regardless, Atlantic contends that it would error for the Board to issue such final orders at this stage. Resolution of a party’s reinstatement and backpay obligations “is best left to the compliance process,” where those issues may be fully litigated upon a complete record. *Dean Gen. Contractors*, 285 NLRB 573, 573 (1987). This is particularly important in cases, such as this one, where the nature of the

alleged discriminatees' employment may render some traditional remedies (like reinstatement) inappropriate. *See id.*; *Harmony Corp.*, 301 NLRB 578, 580 (1991) (permitting reinstatement and duration of backpay issues to be resolved at compliance stage where respondent asserted that employee's turnaround job was temporary and, therefore, reinstatement and open-ended backpay were not appropriate remedies).

Here, the employees' jobs were completed upon the end of the eight-week turnaround at ExxonMobil, and most (if not all) of their respective employments with Atlantic would have ended at that time. Under these circumstances, Atlantic contends that reinstatement and backpay beyond the end of the turnaround are not proper "make-whole" remedies—rather, they would create a windfall for the employees at Atlantic's expense. As the record is not complete on these issues because they were not litigated at the complaint hearing, Atlantic simply requests (or seeks clarification) that it have the opportunity to fully litigate and have these issues resolved at the compliance stage. *See Harmony Corp.*, 301 NLRB at 580. To the extent that this request is not consistent with the Board's remedial order, reconsideration of that order is warranted.

## **V. CONCLUSION**

For the foregoing reasons, Atlantic respectfully requests that the Board reconsider its findings and conclusions of law that Atlantic violated Section 8(a)(1) of the Act as alleged by the General Counsel and affirm Judge Brakebusch's rulings, findings, and conclusions in their entirety. In the event that the Board declines to do so, Atlantic respectfully requests that the Board permit any issue of the employees' right to reinstatement or entitlement to backpay beyond the end of the turnaround to be fully litigated and resolved through the compliance process.

Dated: April 15, 2011

Respectfully submitted,

*/s/ G. Mark Jodon*

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**CERTIFICATE OF SERVICE**

I hereby certify that on April 15, 2011, a true and correct copy of RESPONDENT'S MOTION FOR RECONSIDERATION OF THE BOARD'S DECISION AND ORDER was filed or served on the following persons

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