

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

**Atlas Refinery, Inc. and Local 4-406, United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied, Industrial and Service Workers International Union, AFL-CIO.** Case 22-CA-28403

December 29, 2011

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS BECKER  
AND HAYES

On January 15, 2010, the two sitting members of the Board issued a Decision and Order in this proceeding, which is reported at 354 NLRB No. 120.<sup>1</sup> On June 17, 2010, the United States Supreme Court issued its decision in *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635, holding that under Section 3(b) of the Act, in order to exercise the delegated authority of the Board, a delegee group of at least three members must be maintained.

On August 9, 2011, the Acting General Counsel requested, in view of the Court's decision in *New Process Steel*, that a duly constituted Board review this case on the grounds that the Respondent has not complied with some of the affirmative relief ordered by the administrative law judge and adopted by the two sitting Board members. The Acting General Counsel alleges that the Respondent has failed to reinstate four locked-out employees whom it was ordered to reinstate and has hired two new employees at a time when there are still four locked-out employees. The Acting General Counsel's motion is unopposed.

The Board has considered the judge's decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order to the extent and for the reasons stated<sup>2</sup> in the decision reported at

<sup>1</sup> Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the powers of the National Labor Relations Board in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Thereafter, pursuant to this delegation, the two sitting members issued decisions and orders in unfair labor practice and representation cases.

<sup>2</sup> In adopting the provision in the decision deferring until compliance the Respondent's argument that restoration of the status quo would be unduly burdensome, (354 NLRB No. 120, slip op. at 1 fn. 4), we rely on *Noel Corp.*, 315 NLRB 905, 913 fn. 46 (1994). We find it unnecessary to additionally rely on *Texas Dental Assn.*, 354 NLRB No. 107 (2009).

354 NLRB No. 120 (2010), which is incorporated by reference.<sup>3</sup>

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified in 354 NLRB No. 120 and orders that the Respondent, Atlas Refinery, Inc., Newark, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Dated, Washington, D.C. December 29, 2011

---

Mark Gaston Pearce, Chairman

---

Craig Becker, Member

---

Brian E. Hayes, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

---

<sup>3</sup> In adopting the judge's conclusion that the parties had not reached impasse, Member Hayes agrees with the position taken by former Member Schaumber that the Respondent failed to show that further bargaining would be futile at a critical stage of the bargaining process. The parties had not yet discussed important provisions in the Respondent's final proposal, including a 5-year contract term and new wage rates for a proposed third tier of employees, or the Union's June 2, 2008 proposal to cut wages, proffered on the day of the purported impasse. Further, there was no evidence substantiating the Respondent's claim to the Union that it needed to implement its final offer upon the expiration of the current contract for financial reasons. In addition, Member Hayes agrees with the D.C. Circuit that a case-by-case analysis is required to determine if an affirmative bargaining order is appropriate. He finds that imposing a bargaining order here is appropriate under that analysis. We do not otherwise incorporate the personal statements of former Chairman Liebman and former Member Schaumber included in the two-member decision.