

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.

Domsey Trading Corporation, Domsey Fiber Corporation and Domsey International Sales Corporation, a Single Employer and International Ladies' Garment Workers Union, AFL-CIO and Local 99, International Ladies' Garment Workers Union, AFL-CIO Cases 29-CA-14548, 29-CA-14619, 29-CA-14681, 29-CA-14735, 29-CA-14845, 29-CA-14853, 29-CA-14896, 29-CA-14983, 29-CA-15012, 29-CA-15119, 29-CA-15124, 29-CA-15137, 29-CA-15147, 29-CA-15323, 29-CA-15324, 29-CA-15325, 29-CA-15332, 29-CA-15393, 29-CA-15413, 29-CA-15447, and 29-CA-15685

December 30, 2011

FOURTH SUPPLEMENTAL DECISION AND ORDER REMANDING

BY CHAIRMAN PEARCE AND MEMBERS BECKER AND HAYES

On September 30, 2007, the National Labor Relations Board issued its Supplemental Decision and Order in this proceeding.¹ The Board affirmed certain of the findings in the judge's supplemental decision, reversed others, and remanded the case to the Region for a recalculation of backpay, and to the judge to consider, in light of the Supreme Court's decision in *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137 (2002), whether certain discriminatees were lawfully authorized to work in the United States during the backpay period and entitled to receive backpay.²

On August 16, 2010, the Board issued a second supplemental decision and Order.³ The Board then sought enforcement in the Second Circuit and the Respondent cross-petitioned for review. On February 18, 2011, the court denied the Board's application for enforcement, granted the Respondent's cross-petition, and remanded

¹ 351 NLRB 824.

² In *Domsey Trading Corp.*, 310 NLRB 777 (1993), enf'd, 16 F.3d 517 (2d Cir. 1994), the Board found, inter alia, that the Respondent failed to make a valid offer of reinstatement to former unfair labor practice strikers and ordered that the discriminatees be reinstated and made whole. On October 4, 1999, the administrative law judge issued a supplemental decision in which he found that the Respondent owed \$1,075,614.30, plus interest, in backpay.

³ 355 NLRB No. 89. That decision reaffirmed a second supplemental decision issued by the two-member Board in 2008 (353 NLRB 86), before the Supreme Court issued its decision in *New Process Steel v. NLRB*, 130 S.Ct. 2635 (2010), holding that a two-member group may not exercise delegated authority when the membership of the group falls below three.

the case to the Board for further proceedings consistent with its opinion.⁴

In its decision, the court explained that while the judge made his immigration-related evidentiary rulings based on pre-*Hoffman* Second Circuit and Board law that deemed immigration status to be irrelevant to backpay eligibility, it is clear post-*Hoffman* that immigration status, when properly pleaded, is relevant to the question of backpay eligibility because the Supreme Court held in that case that discriminatees who lack work authorization are ineligible for backpay under the NLRA. *NLRB v. Domsey Trading Corp.*, 636 F.3d at 38. The court therefore found that it was an abuse of discretion for the Board in its 2007 decision to ignore Domsey's objection to the judge's evidentiary rulings. The court remanded the case to the Board to correct these errors.

The Board has considered the court's decision and has decided to remand the case for further proceedings consistent with that decision, which we have accepted as the law of the case.

ORDER

IT IS ORDERED that this proceeding is remanded to Administrative Law Judge Michael A. Marcionese for further appropriate action as set forth above.

IT IS FURTHER ORDERED that the judge shall afford the parties an opportunity to present evidence on the remanded issue subject to those limits generally approved by the court and shall prepare a supplemental decision setting forth credibility resolutions, findings of fact, conclusions of law, and a recommended Order. Copies of the supplemental decision shall be served on all parties, after which the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

Dated, Washington, D.C. December 30, 2011

Mark Gaston Pearce, Chairman

Craig Becker, Member

Brian E. Hayes, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

⁴ *NLRB v. Domsey Trading Corp.*, 636 F.3d 33.