

NOT INCLUDED IN
BOUND VOLUMES

PBH
Bronson, MI

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

DOUGLAS AUTOTECH CORPORATION

and

Case 07-CA-051428

**INTERNATIONAL UNION, UNITED
AUTOMOBILE, AEROSPACE AND
AGRICULTURAL IMPLEMENT WORKERS
OF AMERICA (UAW), AFL-CIO,
AND ITS LOCAL 822**

**ORDER DENYING MOTION FOR RECONSIDERATION, REHEARING,
AND TO REOPEN THE RECORD**

On November 18, 2011, the National Labor Relations Board issued a Decision and Order in this proceeding¹ finding that the Respondent violated Section 8(a)(3), (5) and (1) of the National Labor Relations Act by discharging approximately 146 employees following an economic strike. The Board found that the strike was unlawful due to the Union's failure, before the strike, to file a notice with the Federal Mediation and Conciliation Service (FMCS), as required by Section 8(d)(3) of the Act. Thus, pursuant to the loss-of-status provision in Section 8(d)(4), the strikers lost their protected status as "employees" under the Act. The Board further found, however, that the strikers regained their status as protected employees when the Respondent "reemployed" them by, among other things, locking them out in support of its bargaining position and repeatedly assuring the Union that the former strikers could return to work once the parties reached agreement on a new labor contract. The Board consequently found that the Respondent violated Section 8(a)(3) and (1) of the Act by subsequently

¹ 357 NLRB No. 111.

discharging all of the unit employees based on the unlawful strike and violated Section 8(a)(5) by refusing to bargain with the Union over their terms and conditions of employment. The Board additionally found, under a separate rationale, that the Respondent unlawfully discharged 33 unit employees who did not participate in the strike. To remedy the unfair labor practices, the Board ordered the Respondent to cease and desist and to take certain affirmative action, including to reinstate the discriminatees to their former jobs, to make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, and to bargain with the Union on request. However, the Board stated that the Respondent's backpay and/or reinstatement obligations would be adjusted if, during compliance, the Respondent introduced evidence establishing that, even in the absence of its unfair labor practices, the lockout would have persisted; or establishing the date on which the parties would have bargained to an agreement ending the lockout and the terms of the agreement that would have been negotiated; or establishing the date on which the Respondent would have bargained to good-faith impasse and implemented its own proposals, and the terms that it would have implemented.

On December 15, 2011, the Respondent filed a Motion for Reconsideration, Rehearing, and to Reopen the Record. On December 22, the Acting General Counsel and the Charging Party each filed a response in opposition to the motion.

Having duly considered the matter, we find that the Respondent's motion fails to present "extraordinary circumstances" warranting reconsideration under Section 102.48(d)(1) of the Board's Rules and Regulations.²

² Member Hayes adheres to the views expressed in his dissent in this case, and concurs only in finding that the Respondent has not established grounds warranting reconsideration of the Board's decision under Sec. 102.48(d)(1) of the Board's Rules and Regulations.

The Respondent primarily contends that the Board erred in determining that the Respondent “reemployed” the former strikers within the meaning of Section 8(d) by locking them out in support of its bargaining position and repeatedly assuring the Union that the former strikers would be allowed to return to work once the parties reached agreement on a new labor contract. In support, the Respondent cites cases in which the Board used the term “reemployed” in the context of employees returning to work at the conclusion of a lockout.³ The Respondent contends that the Board’s decision in this case, which finds that the former strikers were “reemployed” even though they had not resumed their labor for the Respondent, is inconsistent with that precedent. The Respondent also contends that the Board’s decision cannot be reconciled with *Boghosian Raisin Packing Co.*, 342 NLRB 383 (2004), where, the Respondent asserts, the Board rejected the theory that the employer “reemployed” workers who struck in violation of Section 8(d)’s notice requirements by locking them out.⁴ The Respondent additionally argues that it could not have reemployed the strikers in the absence of an express agreement to do so.

³ *Tidewater Construction Co.*, 333 NLRB 1264 (2001), order vacated sub nom *International Union of Operating Engineers, Local 147, AFL-CIO v. NLRB*, 294 F.3d 186 (D.C. Cir. 2002); *Oshkosh Ready-Mix Co.*, 179 NLRB 350, 358 (1969), enf. sub nom *Inland Trucking Co. v. N.L.R.B.*, 440 F.2d 562 (7th Cir. 1971), cert denied 404 U.S. 858 (1971); *Great Falls Employers’ Council, Inc.*, 123 NLRB 974, 982-83 (1959); *Triplett Electrical Instrument Co.*, 5 NLRB 835, 849-50 (1938).

⁴ The Respondent’s contention that the Board rejected this theory in *Boghosian Raisin* lacks merit. The Respondent relies on a portion of the General Counsel’s brief to the administrative law judge in *Boghosian Raisin*, in which the General Counsel argued, among other things, that the union made repeated unconditional offers to return to work and that after the initial offer, “the employees were . . . in essence locked out by the Respondent.” This language, however, does not amount to an argument that the employer “reemployed” the strikers by locking them out, and no such argument was made to the Board on exceptions or addressed in the judge’s or the Board’s decision. The Board therefore did not consider whether the employer “reemployed” the strikers by imposing a lockout.

All of these arguments were previously considered and rejected by the Board. See *Douglas Autotech*, 357 NLRB No. 111, slip op. at 6 (finding that the Respondent's interpretation of *Boghosian Raisin* is not supported by the facts of that case); *id.*, slip op. at 7 (rejecting the dissent's argument that, under extant Board precedent, locked-out employees are not reemployed until they resume their labor for the employer); *id.*, slip op. at 6 (rejecting argument that the Respondent could not have reemployed the former strikers in the absence of an express agreement to do so). See also the Board's rationale for placing the burden on the Respondent to produce affirmative evidence as to whether the lockout would have persisted and the terms and conditions on which the employees would have returned to work. *Id.*, slip op. at 11. The Respondent has failed to identify any extraordinary circumstances or offer any facts or legal authority warranting reconsideration of those determinations. The Respondent's motion merely expresses its disagreement with the majority's findings, which clearly is not a ground for reconsideration.

The Respondent also contends that the Order and notice to employees are inconsistent with the Board's decision in this case. The Respondent points out that the Order and notice provide full reinstatement and make-whole remedies, and it argues that they should be modified to reflect the Board's holding that the Respondent's reinstatement and/or backpay obligations may be adjusted if it introduces evidence in a compliance proceeding establishing that the lockout would have persisted and/or that the employees would have returned to work under different terms and conditions of employment. *Id.*, slip op. at 11. We disagree. The Order and notice fully comport with the Board's decision. The Order and Notice require the Respondent to offer the discriminatees "full reinstatement" "within 14 days from the date of the Board's Order." *Id.*, slip op. at 17, 42. If, as the Respondent maintains, the lawful status quo is a

lockout, then that is the status to which the discriminatees must be reinstated. In other words, reinstatement to the status of locked-out employees may be “full reinstatement” in the circumstances of this case.⁵ As explained in the decision, locked-out workers are statutory employees within the meaning of Section 2(3) of the Act (61 Stat. 137, 29 U.S.C. Sect. 152(3)), even though they are not actively laboring for the employer. *Id.*, slip op. at 8.

The Order and notice also require the Respondent to make the discriminatees whole for “any loss of earnings and other benefits” resulting from their unlawful discharges. *Id.*, slip op. at 12, 17. We are persuaded that this remedy is appropriate, notwithstanding the fact that the Respondent will be permitted to introduce evidence in a compliance proceeding to reduce its backpay liability. See, e.g., *Abilities and Goodwill*, 241 NLRB 27, 29, 32 (1979), enf. denied on other grounds 612 F.2d 6 (1st Cir. 1979) (Board found that the respondent unlawfully discharged strikers and ordered it to reinstate the strikers and to make them whole, subject to the respondent demonstrating in compliance that the strikers would not have returned to work even in the absence of its unlawful conduct; however, the order and notice provided, without qualification, that the respondent shall offer the strikers “immediate and full reinstatement” and make them whole). See also *Larry Geweke Ford*, 344 NLRB 628, 629-630 (2005) (Board found that the respondent violated 8(a)(5) by unilaterally changing the unit employees’ insurance plan and ordered the respondent to restore the plan, subject to the respondent demonstrating in compliance

⁵ We express no view on the issue of whether the lockout would have persisted even in the absence of the Respondent’s unlawful conduct.

In its motion, the Respondent requests that we reopen the record to admit evidence concerning the parties’ negotiations after the close of the hearing in this case. The Respondent contends that the proffered evidence establishes that the lockout has persisted to date and, therefore, the discriminatees should be returned to lockout status without any backpay. We deny the request to reopen the record. Consistent with our decision in this case, we leave to compliance proceedings all questions concerning the effect, if any, of the parties’ negotiations after the close of the hearing on the Respondent’s reinstatement and make-whole obligations.

that it would be unduly burdensome; however, the order and notice provide, without qualification, that the respondent shall “on request of the union . . . restore the insurance furnished under the 2003 Blue Cross plan before the change.”); *Eby-Brown Company L.P.*, 328 NLRB 496, 496 fn. 4, 501, 578 (1999) (Board found that employer violated 8(a)(5) by unilaterally transferring unit work and ordered the respondent to restore the work to the original facility, subject to the respondent demonstrating in a compliance proceeding that restoration would be unduly burdensome; however, the order and notice unconditionally state that the employer is to restore the work and, “within 14 days of the Board’s order,” offer each employee who was transferred to the new facility reinstatement to the job held before his transfer, with moving expenses).⁶

The Respondent additionally contends that the Board committed material error by ordering it to pay backpay with interest compounded on a daily basis in the manner prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), instead of backpay with simple interest. Specifically, the Respondent argues that the retroactive application of the new policy announced in *Kentucky River*, supra, of compounding interest on a daily basis would work a “manifest injustice” in this case. We disagree. The Board in *Kentucky River* expressly rejected the notion that it would be manifestly unjust to apply the new remedial policy retroactively, emphasizing that “[w]e are deciding a remedial issue, not adopting a new standard concerning whether certain conduct is unlawful.” 356 NLRB No. 8, slip op. at 5. The Respondent has not shown that retroactive application of the new policy in the instant case will cause a particular injustice.

Finally, the Respondent claims that the Board committed material error by requiring that the Notice to Employees be posted electronically, in accord with *J. Picini Flooring*, 356 NLRB

⁶ As in these cases, the Board’s decision here placed the burden on the Respondent to demonstrate in compliance that its backpay liability should be reduced. (357 NLRB No. 111, slip op. at 11). See also *Planned Building Services*, 347 NLRB 670, 675 (2006).

No. 9 (2010). The Respondent contends that electronic posting is an “extraordinary remedy” that should be reserved for cases involving egregious unfair labor practices or recidivist violators of the Act. In *J. Picini*, in response to the arguments of the dissent and amicus curie that electronic posting is an “extraordinary remedy,” the Board explained:

[O]nly respondents that customarily communicate with employees or members by electronic means will be required to post remedial notices electronically. Accordingly, our decision does not impose extraordinary or onerous burdens on respondents. Indeed, respondents who customarily communicate with employees or members electronically have chosen to do so because it is the most efficient and cost effective way to disseminate important information.

356 NLRB No. 9, slip op. at 4. The posting provision in this case specifically states that the Respondent shall distribute the Notice to Employees electronically “if the Respondent customarily communicates with its employees by such means.” 357 NLRB No. 111, slip op. at 12. Moreover, to the extent the Respondent is contending that electronic posting is inappropriate in the particular circumstances of this case, that argument is premature. As the Board made clear in *J. Picini*, “[a]ny issues as to whether electronic notice and which type of electronic notice is appropriate in a particular case should be resolved in compliance proceedings.” 356 NLRB No. 9, slip op. at 2.

IT IS ORDERED, therefore, that the motion for reconsideration, rehearing, and to reopen the record is denied.

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

Mark Gaston Pearce, Chairman

Craig Becker, Member

Brian E. Hayes, Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD