

**BEFORE THE NATIONAL LABOR RELATIONS BOARD
FIRST REGION**

TD BARTON FOODS LLC
d/b/a C-TOWN SUPERMARKET

and

UNITED FOOD AND COMMERCIAL
WORKERS UNION, LOCAL 328, AFL-CIO-CLC

CASES 01-CA-061241
01-CA-063902
01-CA-067404
JD(ATL)-09-12

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S
BRIEF IN SUPPORT OF THE EXCEPTION TO THE DECISION
OF THE ADMINISTRATIVE LAW JUDGE**

Respectfully submitted by:

Elizabeth A. Vorro, Esquire
Counsel for the Acting General Counsel
National Labor Relations Board
First Region
Thomas P. O'Neill Jr. Federal Bldg.
10 Causeway Street
Boston, MA 02222-1072

I. STATEMENT OF THE CASE

This case was heard before Administrative Law Judge Robert A. Ringler in Cranston, Rhode Island on December 13, 2011. Attorney Christopher Bijesse appeared for Respondent, and Attorney Betsy Ehrenberg appeared for the Charging Party, United Food and Commercial Workers, Local 328 (“Union”).

On March 7, 2012, the Administrative Law Judge issued his Decision in the above captioned case, in which he made certain findings of fact and conclusions of law and recommended that Respondent be ordered to take certain affirmative actions to effectuate the purposes of the Act.

The Administrative Law Judge correctly decided, *inter alia*, that Respondent had violated Section 8(a)(1) and (5) of the Act by unilaterally reducing unit employees’ hours of work. (ALJD 9: 18-24) However, Counsel for the Acting General Counsel respectfully submits that the Administrative Law Judge inadvertently failed to order a remedy for this violation, omitting any reference to it from his Conclusions of Law, Remedy, and recommended Order.

This brief is submitted in support of this single exception to the Administrative Law Judge’s decision.

II. EXCEPTION

The Administrative Law Judge properly found that Respondent unlawfully reduced employees’ work hours, but inadvertently omitted the violation from his Conclusions of Law, Remedy, and Order.

The Administrative Law Judge determined that Respondent committed a plethora of unfair labor practices in violation of Sections 8(a)(5), (3), and (1) of the Act. In particular, the Administrative Law Judge found that Respondent refused to furnish

information to the Union (ALJD 8:14-15); failed to notify the Union about the impending sale of its supermarket and to bargain over the effects of the sale (ALJD 8:42-43); unilaterally reduced the work hours of unit employees (ALJD 9:18); unilaterally laid off nine unit employees (ALJD 9:30-31); failed to adhere to its contractual obligations regarding layoffs (ALJD 10:18-19); failed to remit dues and initiation fees to the Union (ALJD 11:7-8); refused to bargain with the Union for a successor contract (ALJD 11:35-36); withdrew recognition of the Union as the unit's exclusive collective-bargaining representative (ALJD 11:34-35); and discriminatorily laid off three union activists (ALJD 12:12-13).

Having found that Respondent unlawfully reduced the work hours of unit employees, however, the Administrative Law Judge made no mention of this violation in his Conclusions of Law, Remedy, or recommended Order. This omission appears to be simple oversight, as each of the other violations is mentioned and remedied in these sections of the decision.

The Administrative Law Judge's Conclusions of Law, Remedy, and Order should be amended to include the Board's customary remedy for an unlawful unilateral reduction in hours in violation of the Act.

The Board's normal remedy for a unilateral reduction in hours is a make whole remedy: restoration of the lost hours and back pay. See, e.g., *Sheraton Hotel Waterbury*.¹ However, as the Administrative Law Judge noted in his remedy for Respondent's other violations, the supermarket has been sold, and reinstatement to employees' former work hours is therefore not available here. (ALJD 15:fn 31) Nevertheless, Respondent can

¹ 312 NLRB 304, 307-308 (1993).

and should be ordered to provide back pay to employees whose hours were reduced, in keeping with well-settled Board law. Otherwise, this violation will go unremedied.

The Administrative Law Judge correctly concluded that Respondent unilaterally reduced several employees' work hours between August 2011² and the sale of the market in November, and that it implemented these changes without notifying or bargaining with the Union (ALJD 9:18-23). In so finding, he relied on the Board's decision in *Sheraton Hotel Waterbury, supra*, in which the employer was ordered to provide back pay for hours lost as a result of its unlawful unilateral conduct. Similarly, Respondent should be ordered to pay back pay to those employees who were harmed by its unilateral actions.³ In short, the recommended Remedy should have included full back pay for employees whose hours were reduced between August and November, with interest to be computed in accordance with *F.W. Woolworth Co.*,⁴ plus interest as computed in *New Horizons for the Retarded*,⁵ compounded daily as prescribed in *Kentucky River Medical Center*⁶

Based on the foregoing, the decision of the Administrative Law Judge should be amended in the following ways: the Conclusions of Law should include a statement that Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally reducing the work hours of unit employees; the Remedy section should include full back pay as described above; and the Order should include both a cease and desist order and an affirmative order directing Respondent to provide back pay to unit employees whose work hours

² All dates are in 2011 unless otherwise indicated.

³ The actual number of hours lost and back pay amounts will be determined in the compliance stage.

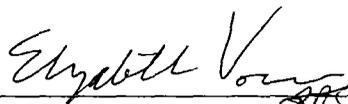
⁴ 90 NLRB 289 (1950).

⁵ 283 NLRB 1173 (1987).

⁶ 356 NLRB No. 8 (2010) enf. denied on other grounds sub nom. *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011).

were unilaterally reduced between August and November 2011, in the manner set forth in the amended Remedy section.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Elizabeth Vorro". The signature is written in black ink and is positioned above a horizontal line.

Elizabeth A. Vorro
Counsel for the Acting General Counsel
National Labor Relations Board
First Region
Thomas P. O'Neill Jr. Federal Building
10 Causeway Street, Sixth Floor
Boston, Massachusetts 02222-1072

Dated at Boston, Massachusetts
this 4th day of April, 2012