

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
SUBREGION THIRTY-THREE

ART'S WAY VESSELS, INC.

and

Case 33-CA-15771

INTERNATIONAL ASSOCIATION OF  
MACHINISTS AND AEROSPACE  
WORKERS, AFL-CIO

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S EXCEPTIONS  
TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**

Counsel for the Acting General Counsel, pursuant to Section 102.46 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, files Exceptions to the Decision of Administrative Law Judge Earl E. Shamwell, Jr., issued on February 10, 2012 as follows:

1. Counsel for the Acting General Counsel ("General Counsel") excepts to Administrative Law Judge Earl E. Shamwell, Jr.'s ("ALJ") application of an incorrect legal standard in analyzing whether negotiating additional paid time off in response to a different unfair labor practice charge should be used to offset backpay in this proceeding. The ALJ erroneously used equitable principles and reduced backpay due to employees by subtracting the dollar value of vacation time. As grounds for this exception, General Counsel asserts that the ALJ's decision and reasoning is in direct conflict with extant Board precedent holding that specific fringe benefits cannot be substituted for substantially equivalent benefits in a compliance proceeding. *Schwickert's of Rochester*, 349 NLRB 687, 690 (2007). In addition, extant Board precedent also finds that benefits negotiated during collective bargaining may not be used to offset backpay. *Laidlaw Corp.*, 207 NLRB 591, 593 (1973). Moreover, the parties never intended for vacation time to offset backpay due to employees as a part of this proceeding.

2. General Counsel excepts to the ALJ's finding and conclusion that two discriminatees, Robert Dolter and Jesse Maas, signed a release that purported to release all claims when the Union, which filed the failure to bargain charge and was the sole entity with standing to release that claim, did not intend to release their claims under this charge. (ALJD pp.11-15) As grounds for this exception, General Counsel asserts that the agreements are ambiguous as to what they purport to release. As a result, evidence about what was intended at the time of the drafting should be relied upon in determining whether the parties intended to release these claims. In addition, the discriminatees did not have standing to release claims under this charge because the Union filed the failure to bargain charge under Section 8(a)(5) of the Act. Allowing the Respondent to negotiate directly with the employees in releasing all or part of a charge under Section 8(a)(5) has the air of direct dealing and is in violation of extant Board precedent. *Insta-Print*, 343 NLRB 368, 368 n.2 (2004).

3. General Counsel excepts to the ALJ's finding of what each discriminatee is owed. The ALJ simply used the Respondent's calculations rather than the Compliance Officer's calculations despite the strong presumption that the Compliance Officer's calculations are reasonable unless Respondent demonstrates evidence rebutting that presumption. Respondent has failed to meet this burden. Therefore, the ALJ's finding is in violation of extant Board precedent.

DATED at Peoria, Illinois this 27th day of April 2012.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that on this 27th day of April 2012 I electronically filed the foregoing COUNSEL FOR THE ACTING GENERAL COUNSEL'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION with the National Labor Relations Board using the NLRB; E-Filing System.

I hereby certify that a copy of the foregoing COUNSEL FOR THE ACTING GENERAL COUNSEL'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION was served by e-mail to the following parties:

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