Latino Express, Inc. *and* Carol Garcia *and* Pedro Salgado *and* International Brotherhood of Teamsters, Local 777. Cases 13–CA–046528, 13–CA–046529, and 13–CA–046634

December 18, 2012

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS GRIFFIN AND BLOCK

Because of the Board's unique role in determining how best to remedy violations of the National Labor Relations Act, it is incumbent on us to periodically revisit and revise the Board's remedial strategies, drawing on enlightenment gained from its experience.[1] We do so today.

On July 31, 2012, the Board issued a Decision and Order in these cases finding, inter alia, that the Respondent violated Section 8(a)(3) and (1) of the National Labor Relations Act by discharging employees Carol Garcia and Pedro Salgado. 358 NLRB No. 94. We ordered, inter alia, that Garcia and Salgado be made whole for any loss of earnings or other benefits suffered as a result of the discrimination against them. We severed two remedial issues and invited all interested parties to file briefs regarding the question of whether the Board, in connection with an award of backpay, should routinely require a respondent to: (1) submit the appropriate documentation to the Social Security Administration (SSA) so that when backpay is paid, it will be allocated to the appropriate calendar quarters, and/or (2) reimburse a discriminatee for any additional Federal and State income taxes the discriminatee may owe as a consequence of receiving a lump-sum backpay award covering more than 1 calendar year.

We adopt both proposed remedies, after full briefing in response to our invitation.[2] As we explain, reimbursement of excess income taxes paid and reporting of the backpay allocation to the SSA better serve the remedial policies of the National Labor Relations Act by ensuring that discriminatees are truly made whole for the discrimination they have suffered.[3]

I. THE ACT'S REMEDIAL SCHEME

Section 10(c) of the Act states that the Board shall order those found to have committed an unfair labor practice "to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies" of the Act. The Board has "broad discretionary" authority under Section 10(c) to fashion appropriate remedies that will best effectuate the policies of the Act.[4] The underlying policy of Section 10(c) is "a restoration of the situation, as nearly as possible, to that which would have obtained but for [the unfair labor practice]."[5]

This is particularly the case with regard to backpay for victims of unlawful discrimination, because "[a] backpay order is a reparation order designed to vindicate the public policy of the statute by making employees whole for losses suffered on account of an unfair labor practice."[6] Accordingly, the Board has revised and updated its remedial policies from time to time to ensure that victims of unlawful conduct are actually made whole (and for other reasons).[7] In providing for Social Security reporting and tax compensation as remedies for unfair labor practices, then, we follow a well-marked path.

II. REPORTING THE BACKPAY ALLOCATION TO THE SOCIAL SECURITY ADMINISTRATION

Under the Board's longstanding remedial policies, backpay is computed on the basis of separate calendar

[1] *NLRB v. Seven-Up Bottling Co. of Miami*, 344 U.S. 344, 346 (1953).

[2] In addition to briefs filed by the Acting General Counsel and the Respondent, amicus briefs were filed by the Service Employees International Union and the American Federation of Labor and Congress of Industrial Organizations. A joint amicus brief was filed by Casa de Proyecto Libertad, the Community Justice Project, Legal Aid of Northwest Texas, and the National Employment Law Project. The Acting General Counsel and amici support both remedies. The Respondent acknowledges the appropriateness of social security reporting; it takes no specific position on tax compensation, but notes that that remedy could be affected in some cases by discriminatees' receipt of collateral benefits such as unemployment compensation.

[3] This case involves the appropriate remedies for discrimination in violation of Sec. 8(a)(3). Our reasoning, however, applies equally to other violations of the Act that result in make-whole relief, e.g., unilateral changes in terms and conditions of employment in violation of Sec. 8(a)(5).

[4] *NLRB v. J. H. Rutter-Rex Mfg.*, 396 U.S. 258, 262–263 (1969) (quoting *Fibreboard Paper Products v. NLRB*, 379 U.S. 203, 216 (1964)).

[5] *Trustees of Boston University*, 224 NLRB 1385, 1385 (1976), enfd. 548 F.2d 391 (1st Cir. 1977) (quoting *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941)).

[6] *Kentucky River Medical Center*, 356 NLRB No. 8, slip op. at 3 (2010), quoting *NLRB v. J. H. Rutter-Rex Mfg.*, supra at 263.

[7] See, e.g., *F. W. Woolworth Co.*, 90 NLRB 289, 292–293 (1950) (backpay computed on quarterly basis); *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962) (interest on backpay awards), enf. denied on other grounds 322 F.2d 913 (9th Cir. 1963); *Transmarine Navigation Corp.*, 170 NLRB 389, 390 (1968) (limited backpay remedy as part of remedy for unlawful plant closing); and *Kentucky River Medical Center*, supra, slip op. at 5-6 (interest on backpay awards compounded daily).

quarters or portions thereof but paid in one lump sum.[8] Because backpay is considered "wages" within the meaning of the Social Security Act,[9] a respondent must withhold Social Security taxes from a discriminatee's backpay award and remit that money to the Government together with the Social Security tax owed by the respondent.[10] As we explain below, in order to ensure that a discriminatee will be made whole, backpay must be attributed to the proper periods for Social Security purposes.[11] Unfortunately, even when backpay covers multiple years, it is posted to the employee's Social Security earnings record in the year it is received—unless the employer or employee files with the SSA a separate report allocating backpay to the appropriate periods.[12]

When backpay is not properly allocated to the years covered by a backpay award, a discriminatee may be disadvantaged in three ways.[13] First, in order to qualify for old-age Social Security benefits, an individual must receive at least 40 Social Security credits; an individual can earn a maximum of four credits per calendar year.[14] Unless a discriminatee's multiyear backpay award is allocated to the appropriate years, she will not receive appropriate credit for the entire period covered by the award, and could therefore fail to qualify for any old-age Social Security benefit.

Second, if a backpay award covering a multi-year period is posted as income for one year, it may result in SSA treating the discriminatee as having received wages in that year in excess of the annual contribution and benefit base—the amount above which wages are not subject to Social Security taxes.[15] When the contribution and benefit base is exceeded, the employer and employee do not pay Social Security taxes on the excess, reducing the amount paid on the employee's behalf. As a result, the discriminatee's eventual monthly benefit will be reduced, because participants receive a greater benefit when they have paid more into the system.

Third, Social Security benefits are calculated using a progressive formula: although a participant receives more in benefits when she pays more into the system, the rate of return diminishes at higher annual incomes.[16] Therefore, a retiring discriminatee can receive a smaller monthly benefit when a multi-year award is posted to one year rather than being allocated to the appropriate periods, even if Social Security taxes were paid on the entire amount.[17] Permitting a discriminatee to suffer these disadvantages contravenes our "desire to avoid prejudice[ing] the employee's rights under other social legislation designed to preserve the continuity and stability of labor remuneration."[18] If an employee continues to suffer the effects of unlawful discrimination throughout retirement, she has not been made whole and the respondent has not restored the situation, as nearly as possible, to that which would have obtained but for the commission of the unfair labor practice.[19]

For these reasons, we shall now routinely require the filing of a report with the SSA allocating backpay awards to the appropriate calendar quarters. The burden of filing this report is not a heavy one. Indeed, the Respondent in this case referred to the proposed remedy as "simply a matter of correspondence."[20] As between the parties, it is appropriate to place the burden for filing the

[8] *F. W. Woolworth Co*., supra at 292–293.

[9] See *Social Security Board v. Nierotko*, 327 U.S. 358, 364–365 (1946).

[10] There is one exception to this general rule: backpay owed by a respondent that has never been an employer of the discriminatee is not considered wages for FICA purposes, so there is no withholding obligation and no employer contribution is payable. See *Teamsters Local 249 (Lancaster Transportation Co.)*, 116 NLRB 399, 400 (1956), enfd. 249 F.2d 292 (3d Cir. 1957). Accordingly, part II of this decision applies only to backpay payable by a current or former employer of the discriminatee, including by an employer respondent that is subject to joint and several liability with a nonemployer respondent.

[11] As the Supreme Court held in *Nierotko*, above, backpay "should be allocated to the periods when the regular wages were not paid as usual." 327 U.S. at 370. See also *F. W. Woolworth*, supra at 293.

[12] See *I.R.S., Reporting Back Pay and Special Wage Payments to the Social Security Administration 2*, Pub. 957 (May 2010), available at http://www.irs.gov/pub/irs-pdf/p957.pdf.

[13] We focus here on old-age benefits, but similar effects can occur with respect to the disability component of the social security program.

[14] See generally S.S.A. Federal Old-age, Survivors and Disability Insurance, 20 C.F.R. pt. 404 (2012). In 2013, employees will receive one credit for every $1160 of social security-covered wages they earn, up to the maximum four credits. Cost-of-Living Increase and Other Determinations for 2013, 77 Fed. Reg. 65,754, 65,755 (Oct. 30, 2012).

[15] In 2013, the annual contribution and benefit base will be $113,700. Id. at 65,754.

[16] See 42 U.S.C. Sec. 415(a) (2012) (describing calculation of the Primary Insurance Amount, one factor used in calculating the monthly benefit).

[17] This effect can be demonstrated by using the S.S.A.'s Online Benefits Calculator, available at http://www.ssa.gov/retire2/AnypiaApplet.html. Compare two employees who both were: (1) born in 1950; (2) began work in 1975; (3) earned $15,000 in 1975 with annual $100 raises; and (4) retired in 2010 after 35 years of work. In 1985, Employee B received a 4-year backpay award as a result of an unlawful discharge and regular wages following her reinstatement; Employee A received the regular wage throughout. At full retirement age, Employee A is eligible for a $1391 monthly benefit, while Employee B is entitled only to a $1314 monthly benefit.

[18] See *F. W. Woolworth Co*., supra at 293 (internal quotation marks omitted).

[19] See *Trustees of Boston University*, supra, 244 NLRB at 1385.

[20] In this regard, we request the Acting General Counsel to develop a standard form that will simply and efficiently elicit the information the SSA requires, thereby reducing the cost of compliance and minimizing error.

report on the respondent. In fashioning a proper remedy, we are guided by the principle that the wrongdoer, rather than the victim of wrongdoing, should bear the consequences of its unlawful conduct.[21] But for the unlawful discrimination, the employer would have allocated wages to the appropriate periods as part of its annual wage reporting to the Internal Revenue Service (IRS).

Finally, we find it appropriate to apply our new policy retroactively. The Board's usual practice is to apply new policies and standards "to all pending cases in whatever stage."[22] The "propriety of retroactive application is determined by balancing any ill effects of retroactivity against 'the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles.'"[23] Pursuant to this principle, the Board applies a new rule retroactively to the parties in the case in which the new rule is announced and to parties in other cases pending at that time as long as this would not work a "manifest injustice."[24]

There is no basis here for departing from the Board's usual practice. We are deciding a remedial issue, not adopting a new standard concerning whether certain conduct is unlawful.[25] The complaint put the Respondent on notice that Social Security reporting was sought as a remedy, and the Respondent concedes that this remedy is appropriate. As noted above, the burden of complying with the new requirement is minimal. Accordingly, in all pending and future cases, the Board's make-whole remedy shall include a requirement that the respondent file a report with the SSA allocating backpay to the appropriate calendar quarters.

III. COMPENSATING EMPLOYEES FOR EXCESS INCOME TAX LIABILITY

As stated above, backpay is computed on a quarterly basis, but payable in one lump sum. The IRS considers a backpay award to be income earned in the year the award is paid, regardless of when the income should have been received.[26] Because of the progressive nature of Federal and some State income taxes, an employee who receives a lump-sum backpay award covering more than 1 calendar year may be pushed into a higher tax bracket, and consequently may owe more in income taxes than if she had received her wages when they were or would have been earned. The result is that the discriminatee is disadvantaged a second time. The purpose of the tax compensation remedy we announce today is, like the Social Security reporting requirement, to ensure that an employee who receives lump-sum backpay rather than regular income is truly made whole.

In 1984, the Board considered this problem but found that it was solved by the availability of income averaging.[27] But non-farm income averaging was eliminated in 1986.[28] Thus, the Board's rationale for denying a tax compensation remedy has not existed for more than 25 years.

In addressing the need to compensate employees for the heightened tax burdens they face as a result of discrimination against them, we note that both courts[29] and administrative agencies have ordered such relief, essentially for the same reasons we find it appropriate here.[30] When, for example, the Third Circuit first approved a district court's imposition of a tax compensation remedy, it observed that a principal remedial purpose of employment statutes is "to make persons whole for injuries suffered on account of unlawful employment discrimination,"[31] and that in exercising discretion in fashioning remedies, district courts should endeavor "to restore the employee to the economic status quo that would exist but for the employer's conduct."[32] The court held that without this type of equitable relief in appropriate cases, it would not be possible to fully restore the employee to the economic status quo.[33] Although the court was fashioning a remedy for discrimination under the Americans

[21] See *NLRB v. Remington-Rand, Inc.,* 94 F.2d 862 (2d Cir. 1938); *Transmarine Navigation Corp*., supra, 170 NLRB at 389.

[22] *Aramark School Services*, 337 NLRB 1063, 1063 fn. 1 (2002) (quoting *Deluxe Metal Furniture Co*., 121 NLRB 995, 1006–1007 (1958)).

[23] Id. (quoting *Securities & Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 203 (1947)).

[24] *Pattern Makers (Michigan Model Mfrs.)*, 310 NLRB 929, 931 (1993).

[25] See *Kentucky River Medical Center*, supra, slip op. at 5.

[26] See I.R.S. Rev. Rul. 78–336, 1978–2 C.B. 255 (1978); *I.R.S. Rev. Rul*. 89–35, 1989–1 C.B. 280 (1989); see also *U.S. v. Cleveland Indians Baseball Co*., 532 U.S. 200, 203 (2001).

[27] *Laborers Local 282 (Austin Co.),* 271 NLRB 878, 878 (1984).

[28] See 26 U.S.C. Secs. 1302–1305, repealed by the Tax Reform Act of 1986, Title I, Sec. 141(a), 100 Stat. 2117.

[29] See, e.g., *Sears v. Atchison, Topeka & Santa Fe Railway Co*., 749 F.2d 1451, 1456 (10th Cir. 1984), cert. denied 471 U.S. 1099 (1985) (Title VII of the Civil Rights Act of 1964); *O'Neill v. Sears, Roebuck & Co*., 108 F.Supp.2d 443, 447 (E.D. Pa. 2000) (Age Discrimination in Employment Act); *Powell v. North Arkansas College*, 08-CV-3042, 2009 WL 1904156 at *3 (W.D. Ark. 2009) (Family and Medical Leave Act).

[30] See, e.g., *Van Hoose v. Pirie*, No. 94–60050-N01, 2001 WL 991925 at *3 (EEOC Aug. 22, 2001); *Doyle v. Hydro Nuclear Services,* No. 99–041, 2000 WL 694384 at *8–10 (DOL Admin. Rev. Bd. May 17, 2000), revd. on other grounds sub nom. *Doyle v. Secretary of Labor*, 285 F.3d 243 (3d Cir. 2002), cert. denied 537 U.S. 1066 (2002).

[31] *Eshelman v. Agere Systems, Inc.,* 554 F.3d 426, 440 (3d Cir. 2009) (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1970)).

[32] Id. (quoting *In re Continental Airlines*, 125 F.3d 120, 135 (3d Cir. 1997)).

[33] Id. at 442.

with Disabilities Act, its reasoning applies with equal force to the vindication of rights under the NLRA.[34]

For these reasons, we shall henceforth routinely require respondents to compensate employees for the adverse tax consequences of receiving one or more lump-sum backpay awards covering periods longer than 1 year. We briefly define the contours of the tax compensation component: First, we only intend to remedy the effects of receiving a backpay award covering more than 1 calendar year in a different, shorter tax period. Second, we are concerned with the difference between the employee's tax liability when she receives a lump-sum award and the tax she would have paid if she had received her wages when they were or would have been earned. Third, it is the General Counsel's burden to prove and quantify the extent of any adverse tax consequences resulting from the lump-sum backpay award. Such matters shall be resolved in compliance proceedings, where we shall require that the amount sought be specifically pleaded in the compliance specification. If the General Counsel pleads a specific adverse tax consequence and supports that amount with evidence and a reasonable calculation, the burden will then shift to the respondent to rebut the General Counsel's evidence or calculations.[35]

Finally, as with the Social Security reporting requirement, we find it appropriate to apply the tax compensation policy retroactively. We find no manifest injustice in providing a tax compensation component in this and other pending cases not already in the compliance stage as of the date of this decision.[36] This is a remedial issue, and the complaint put the Respondent on notice that the Acting General Counsel was seeking a tax compensation remedy; as noted above, the Respondent does not oppose this remedy. Respondents will have the opportunity in compliance to fully litigate the propriety of a particular tax compensation remedy in each case where one is sought.[37]

[34] We adopt a tax compensation remedy as a matter of make-whole relief. We note, however, that enhanced monetary remedies also serve to deter the commission of unfair labor practices and encourage compliance with Board orders. See *Kentucky River Medical Center*, supra, slip op. at 4. In this respect, the new remedy aids in our statutory goal of preventing unfair labor practices. See Sec. 10(a) of the Act.

[35] See generally *Oil Capitol Sheet Metal, Inc*., 349 NLRB 1348, 1351 (2007) (describing the burden-shifting framework in compliance proceedings).

[36] See, e.g., *Rome Electrical Systems*, 356 NLRB No. 38, slip op. at 1, fn. 2 (2010).

[37] *Laborers Local 282 (Austin Co.)*, 271 NLRB 878 (1984); *Hendrickson Bros.*, 272 NLRB 438 (1985); and their progeny are overruled to the extent they are inconsistent with today's decision.

ORDER

The National Labor Relations Board reaffirms its Order set forth in 358 NLRB No. 94 (2012), except that the Respondent shall be required to file a special report with the Social Security Administration allocating Carol Garcia and Pedro Salgado's backpay to the appropriate calendar quarters and to compensate Carol Garcia and Pedro Salgado for any adverse income tax consequences of receiving their backpay in one lump sum.

Dated, Washington, D.C. December 18, 2012

Mark Gaston Pearce, Chairman

Richard F. Griffin, Jr., Member

Sharon Block, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD