

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 17**

INTERSTATE BAKERIES CORP.

and

**Cases 17-CA-023404
17-CB-006146**

**TEAMSTERS LOCAL UNION NO. 523,
AFFILIATED WITH INTERNATIONAL
BROTHERHOOD OF TEAMSTERS**

and

KIRK RAMMAGE

**ACTING GENERAL COUNSEL'S ANSWERING BRIEF
TO RESPONDENT UNION'S EXCEPTIONS**

Counsel for the Acting General Counsel submits this answering brief to Respondent Union's Exceptions to the honorable administrative law judge's supplemental decision and recommended order of March 28, 2013. Effectuating the Board's Order in 357 NLRB No. 4 (2010), the ALJ found that Respondent's liability for unlawfully entailing Kirk Rammage included, inter alia, the backpay, expenses and interest as provided for in the Compliance Specification. For the reasons set forth herein, Respondent Union's exceptions should be rejected and the Board should adopt the ALJ's supplemental decision and recommended order in full.

I. Respondent's *Noel Canning* Defense is Meritless (Exception No. 1)

Respondent, relying on *Noel Canning Division of Noel Corp. v. NLRB*, 705 F3d 490 (D.C. Cir. 2013) contends that the Board is powerless to act on this case, and presumably any case before it, because the Board is not "properly constituted."

Respondent Union's effort to cripple the Board is unsupported by law and is bad public policy. It is correct that in *Noel Canning* the D.C. Circuit held that that the President's January 2012 appointments to the Board were not valid. However, the Board has publicly stated that it disagrees with the D.C. Circuit's *Noel Canning* decision, and on March 12, 2013, the Board announced that it, in consultation with the Department of Justice, intends to file a petition for certiorari with the United States Supreme Court seeking review of the D.C. Circuit's decision. Furthermore, in *Belgrove Post Acute Care Center*, 359 NLRB No. 77, slip op. 1, fn.1 (Mar. 13, 2013), the Board took note that in *Noel Canning*, the D.C. Circuit Court itself recognized that its conclusions concerning the Presidential appointments had been rejected by the other circuit courts to address the issues. Compare *Noel Canning v. NLRB*, Nos. 12-1115, 12-1153, 2013 WL 276024, at *14-15, 19 (D.C. Cir. Jan. 25, 2013) with *Evans v. Stephens*, 387 F.3d 1220, 1226 (11th Cir. 2004) (en banc); *United States v. Woodley*, 751 F.2d 1008, 1012-13 (9th Cir. 1985) (en banc); *United States v. Allocco*, 305 F.2d 704, 709-15 (2d Cir. 1962). Thus in *Belgrove*, the Board concluded that because the "question [of the validity of the recess appointments] remains in litigation," until such time as it is ultimately resolved, "the Board is charged to fulfill its responsibilities under the Act."

Accordingly, Respondent Union's efforts to stop the Board from deciding this and the hundreds of cases before it must fall short.

II. The ALJ Acted Properly and All parties Were Heard (Exception No. 2)

Respondent Union spent considerable time on brief and at the hearing lambasting the ALJ for his evidentiary rulings and other aspects of his management of the proceedings. (See, e.g., 95-96; 97:18-19; 105:7-25; 106:1-5; 107:3-25; 108:1-8; 116:5-25; 236:17-25; 237:1-3).

However, Respondent Union fails to cite anything on the record which demonstrates that the ALJ prejudged the issues. Rather, the record reflects the ALJ's well reasoned disagreement with Respondent Union as to certain of its arguments and rejection of its offers of proof. (See, e.g., 105-111; 202:25; 203:1-4). Indeed, as discussed below, the ALJ afforded Respondent Union wide latitude to make its arguments and offers of proof, notwithstanding that the Union's efforts in that regard were completely misplaced. The ALJ's patience with Respondent Union is reflected particularly in the excerpt from the transcript below, where the ALJ stated to Union's counsel:

I respectfully disagree with that argument based on my reading of 357 NLRB 4, but I will let you make your case and if you want to continue to argue that, you certainly may do so and you can continue to argue that as far as necessary to protect the sanctity of your case." (202:25; 203:1-5).

The Board has held that even "the total rejection of an opposed view cannot of itself impugn the integrity or competence of a trier of fact." *Control Services*, 315 NLRB 431, 432 (1994); and *R.E.C. Corp.*, 296 NLRB 1293, 1294 fn 1 (1989) (both quoting *NLRB v. Pittsburgh Steamship Co.*, 337 U.S. 656, 659 (1949)). Here, the ALJ's could have rejected Respondent Union's attempts to relitigate the issue, but instead patiently allowed Respondent Union to make a record.

Respondent Union also claims that the ALJ erred in finding that all parties were afforded the opportunity to be heard because Respondent Employer, which filed for bankruptcy protection in January 2012 and ceased operations in November 2012, did not participate in the proceedings. (Exception No. 2; 9:5-13). However, it is well settled that the Board is exempt from a federal bankruptcy court's automatic stay. *Ahrens Aircraft, Inc. v. NLRB*, 703 F.2d 23, 24 (1st Cir. 1983); *NLRB v. E.D.P. Med. Computer Sys., Inc.*, 6 F.3d 951, 957 (2d Cir. 1993); *NLRB v. 15th Ave. Iron Works, Inc.*, 964 F.2d 1336, 1337 (2d Cir. 1992); *NLRB v. Evans Plumbing Co.*, 639

F.2d 291, 293 (5th Cir. 1981); *NLRB v. Edward Cooper Painting, Inc.*, 804 F.2d 934, 941 & n.6 (6th Cir. 1986) (quoted with approval in *United States v. Nicolet, Inc.*, 857 F.2d 202, 209 (3d Cir. 1988)); *NLRB v. P*I*E Nationwide, Inc.*, 923 F.2d 506, 512 (7th Cir. 1991); *NLRB v. Continental Hagen Corp.*, 932 F.2d 828, 832-33, 834 (9th Cir. 1991). The Board may prosecute an unfair labor practice case, proceed to a final decision, and liquidate the backpay amount, as long as it does not seek collection outside the bankruptcy court. *NLRB v. Continental Hagen Corp.*, 932 F.2d at 834, 835 (“mere *entry* of a money judgment by a governmental unit is not affected by the automatic stay”) (quoting *Penn Terra Ltd. v. Dept. of Env. Resources*, 733 F.2d 267, 275 (3d Cir. 1984) (*emphasis in original*)). Liquidation of backpay and expenses owed a discriminatee is precisely what is at issue in this matter.

Moreover, Respondent Employer did not raise the automatic stay as a bar to the proceedings. Rather, it cited the bankruptcy and the cessation of its operations as the reason it “chooses not to participate in the hearing...” (GC Ex. F.1, *emphasis supplied*). Counsel for the Acting General Counsel was clear in his position at trial, i.e., that Respondent Employer’s choice constituted a waiver of its right to appear and present evidence. (7:4-12). That this choice burdens Respondent Union is irrelevant.

III. Respondent Union’s Effort to Relitigate the Merits Should be Rejected (Exception Nos. 3, 4, 6, 7, 8, 10)

The ALJ properly rejected at trial Respondent Union’s repeated and zealous attempts to relitigate the issue of whether “Tyler bumped Rammage.” (210: 8-25; 218: 2-19; 221:17-25; 230:7-15; 231:2-11; 235: 6-15). In the underlying ULP proceeding, the Board specifically found:

[Terry] Tyler had exercised his contractual option to bump [Kirk] Rammage in accordance with “union seniority.”

That is, Respondents’ unlawful end-tailing of Rammage had the specific effect of allowing the lower seniority Tyler bumping Rammage, the highest seniority employee, out of his Ponca City position. Rammage was left with no choice but to take the position in Ponca City. Not surprisingly the Board in the underlying case on the merits ordered Respondents to cease and desist:

(c) Discriminatorily endtailing Rammage on the unit seniority list, permitting Rammage to be bumped from his job at the Ponca City facility, **and transferring Rammage to a job at the Bartlesville facility**, because he was not previously represented by the Union. 357 NLRB No. 4, Slip Op. at 7 (emphasis supplied).

The plain language of the Board’s order is lost on Respondent Union, but was not lost on the ALJ. (207:7-25; 208:1-22). Respondent Union would have the Board side-step this all together and conclude that no backpay or expenses are owed Rammage on the basis that Rammage would have ended up in Ponca City even in the absence of Respondents’ unfair labor practices.

The matter is *res judicata*. Respondent Union had ample opportunity to argue in the underlying ULP proceeding that Rammage would have ended up in Ponca City regardless of whether he was unlawfully stripped of his seniority. Respondent Union’s arguments were unavailing to the Board (twice), the 10th Circuit (twice) and to the United States Supreme Court¹. The ALJ properly rejected Respondent Union quest for **another** “bite at the apple” to make its claim on the merits, particularly because this case is now at the *compliance* stage. *Willis Roof Consulting, Inc.*, 355 NLRB No. 48, Slip Op. 1, fn. 1 (2010) (issues decided in an unfair labor practice proceeding may not be litigated in a compliance proceeding); and *Task Force Security & Investigations*, 323 NLRB 674, 674 fn. 2 (1997).

¹ *Teamsters Local 523 v. NLRB*, 133 S.Ct. 1458 (Mem.) (2013)

Moreover, Respondent Union's argument rests on a willingness of the Board to suspend its understanding of the facts and accept as fact Respondent Union's fiction. Thus, Respondent Union would have the Board find that had Respondent Union not unlawfully end-tailed Rammage, he would have been lawfully dove-tailed and would have ended up being bumped to Ponca City (or Tulsa) anyway. Such an assertion ignores the reality that Respondents unlawfully end-tailed Rammage, directly resulting in his displacement from Ponca City to Tulsa, eroding his earning, increasing his expenses and ultimately causing him to relocate his family to a new home. Respondents are liable for the damages flowing from the Act. *La Favorita, Inc.*, 313 NLRB 902 (1994) ("where an unfair labor practice has occurred, some backpay is owed.")

IV. Respondent Union's Liability For its Unlawful Action Includes Paying Rammage's Moving Expenses, and Closing Costs. (Exception Nos. 5, 8, 9 and 10).

Respondent Union's actions ultimately led Rammage to uproot his family and move to Bartlesville. (152:5-21). Respondent Union now complains that it is unfairly responsible for Rammage's choice of a "fancy house." (Union Exceptions, No. 8). In fact, the closing and moving costs sought by the General Counsel are quite reasonable. (GC Ex. 1-A, Appendix A)

The Board has found that closing costs that would not have been borne by a discriminatee but for violations of the Act are compensable interim expenses. *Seattle Seahawks*, 292 NLRB 899, 932 (1989) citing *Sioux Falls Stock Yard Company*, 236 NLRB 543, 561-562 (1978). As noted, the Board already found in the underlying order that Respondents caused Rammage to take a position Bartlesville, located approximately 75 miles away from his home in Ponca City. Contrary to Respondent Union's claim at exception No. 5, Rammage's testimony at trial demonstrated that immense burden such a commute imposed on him caused him to relocate his family to Dewey, a town located near Bartlesville. (152:5-13). Respondents are therefore responsible for costs associated with the move, sale of the Ponca City home and purchase of the

Dewey home. As to the size of the house, Board law does not cap Rammage's recovery based on a particularly square footage or price. Any doubts as to the reasonableness of Rammage's purchases should be resolved against the wrongdoers, not against Rammage. Moreover, contrary to the representation made by Respondent Union in its exception No. 9, Rammage did not merely "want" a bigger house. Rather, Rammage's testimony was that he needed a bigger house because he was uprooting his family away from friends and extended family in Ponca City who had graciously allowed him space to store certain of his belongings, including his motorcycle, for free. (182:17-25; 183:1-7).

V. The ALJ Properly Found that Respondents Owe Rammage for his Loss of Earnings (Exception No. 10)

Respondent excepts to the ALJ's finding that, as set forth in the Compliance Specification, Rammage is due backpay for the earnings he lost as a result of his unlawful displacement from Ponca City to Bartlesville. Again, Respondent Union's entire argument rests on the Board's willingness to entertain Respondent Union's desire to relitigate the merits of the case. As discussed above, the Board should reject this attempt. Significantly, Respondent Union failed to except to any of the ALJ's findings and conclusions as to Rammage's lost earnings in the event the Board declines Respondent Union's invitation to revisit the underlying merits.

VI. Rammage was Not Required to Mitigate based on the Supposed Job Offer of November 2006. (Exception Nos. 11, 12, 13, 15 and 16).

The supposed "job offer" of November 2006 was no "offer" at all, and certainly not an "offer" for mitigation purposes under Board law. Respondent Union concedes at exception No. 13 that the email of November 9, 2012, was no job offer. (GC Ex. 1-F, Respondent Employer's

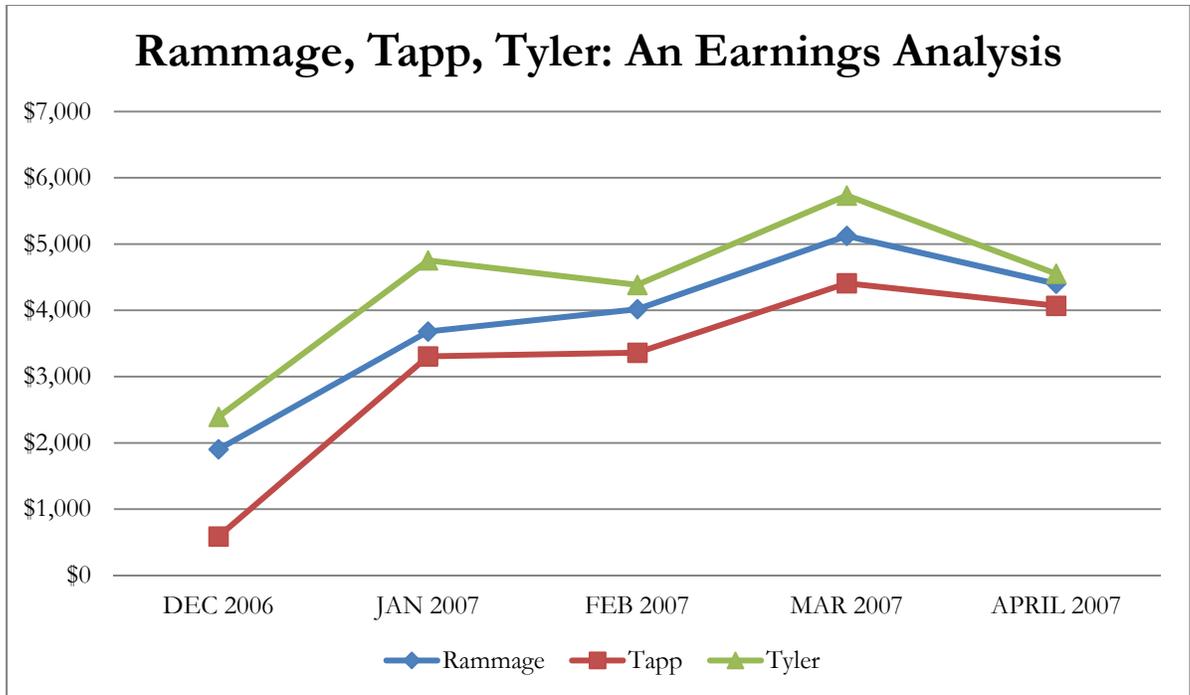
Answer Exhibit A)². The record supports the ALJ's finding that "there was never a specific, unequivocal or unconditional job offer made to Rammage for the opening in Ponca City." (ALJD p. 5, lines 30-40; 154:2-5; 156:19-25; 157:1-2; 190:13-23; 191:18-22; 198:15-20; 194:12-15). The "offer" falls well short of the Board's standard for an offer of reinstatement, because there is no evidence that it or any other contemporaneous written communications to Rammage advised him unequivocally of an offer specific position on a date certain. *Sunol Valley Golf Club*, 310 NLRB 357, 375 (1993); *Holo-Krome Co.*, 302 NLRB 452, 454 (1991) (cited by the ALJ in the instant case). Rather, the email was at most an invitation to be among the pool of employees to bid on the position, the start date, seniority and expected earners for which were not defined. *Unitog Rental Services, Inc.*, 318 NLRB 880 (1995) (cited by the ALJ in the instant case). This is significant because the Board has held that a discriminatee does not fail to mitigate when he refuses to accept a position, the offer of which itself is insufficient to constitute a valid offer of reinstatement. *Wonder Markets, Inc.*, 249 NLRB 294 (1980) ("Clearly, if a discriminatee is under no obligation to take a different job from the same employer because the offer thereof does not constitute a valid offer of reinstatement, he is certainly not required to take that job in order to mitigate lost wages and thereby reduce the employer's backpay obligation.")

The "offer" is inadequate to trigger a mitigation duty on Rammage's part for another related reason: it was not an offer to a comparable position. *Arlington Hotel*, 287 NLRB 851, 855 (1987) ("it is well established that a discriminatee's obligation to mitigate an employer's backpay liability requires only that the discriminatee accept substantially equivalent employment.") Compliance Officer Huckell's analysis revealed that the route in question, which

² Respondent Union, at exception No. 13, inadvertently referred to the email as "Union Exhibit 1." In fact, Union Exhibit 1 was never offered into evidence, though it was to be the email in question. (70:1-22). Rather, the email in question was attached to Respondent Employer's Answer to the Compliance Specification and, as noted, is found at GC Ex. 1-F.

was ultimately filled by employee Tapp, consistently underperformed the route operated by Tyler, Rammage’s comparator for the loss of earnings analysis. (GC Ex. 8). Tapp also earned less than Rammage earned in Bartlesville. (Id.) General Counsel’s Exhibit 8, reproduced below, is instructive:

Figure 1: General Counsel’s Exhibit 8



Huckell’s analysis was corroborated by the testimony of Rammage and Tapp, whose first hand detailed observations demonstrated, as Rammage put it, that the route in question was “the crappiest route.” (160:21). Respondent Union would require Rammage to abandon his Bartlesville job in January 2007, after spending a year building it up, to take job in Ponca City where he would make less money, be out earned by his peers, stand lowest in seniority and operate a sub-standard delivery truck. (154:12-21; 155; 156:1-16). To call this a comparable position is simply unreasonable. *Midwest Personnel Services*, 346 NLRB 624, 624-625 (2006) (offer of reinstatement that included lower rate of pay and seniority was not a substantially

equivalent position); and *Oregon Steel Mills*, 300 NLRB 817, 822 (1990) (lower rate of pay a factor in non-equivalency finding). So, even assuming the Ponca City job was an “offer,” it was not a valid offer of reinstatement because it was not to a substantially equivalent position, and therefore Rammage was not obligated to take the offer in order to mitigate damages under *Wonder Markets*, supra.

Finally, any analysis of whether Rammage “mitigated” Respondents’ liability must observe the fact that Rammage, in fact, mitigated *from the beginning*. It was Rammage who faced a choice, as a direct result of Respondents’ unlawful discrimination, of unemployment or taking a job in Bartlesville. Rammage chose to work, thereby plainly reducing Respondents’ liability. Rammage’s efforts at mitigation are obvious and reasonable, not lacking.

VII. Conclusion

For the reasons set forth herein, Counsel for the Acting General Counsel respectfully request the Board reject Respondent’s exceptions and adopt the underlying supplemental decision and recommended order of the ALJ in full.

Respectfully Submitted,

Date: May 9, 2013

/s/ Charles T. Hoskin, Jr.

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STATEMENT OF SERVICE

On this 9th day of May 2013, Counsel for the Acting General Counsel, by the undersigned, filed a copy of Acting General Counsel's Answering Brief to Respondent Union's Exceptions with the Board, via the NLRB's electronic filing system, and served a copy of said brief on the parties by *electronic mail* as follows:

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