JD–24–14
Harrisburg, PA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

PENNYSLVANIA STATE CORRECTIONS
OFFICERS ASSOCIATION

and

Cases 04–CA–37648
04–CA–37649
04–CA–37652

BUSINESS AGENTS REPRESENTING STATE
UNION EMPLOYEES ASSOCIATION

David Rodriguez, Esq.
for the General Counsel.
Michael McAuliffe Miller, Esq.
(Eckert, Seamans, Cherin & Mellott)
for the Respondent.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

ROBERT A. GIANNASI, Administrative Law Judge. The hearing in this compliance matter was held on April 14, 2014, in Philadelphia, Pennsylvania. The compliance specification, as revised, sets forth alleged monies due former employees Lee Dyches, Shawn Hood, Patricia Hurd, John Miller and Bill Parke (hereafter the claimants) under the *Transmarine*[1] backpay remedy ordered in the Board's underlying decision in this case reported at 358 NLRB No. 19 (March 23, 2012). The compliance specification states that the Board's order directed Respondent to bargain with the Charging Party Union (hereafter the Union or BARSUEA) over the effects of its decision to discharge[2] the claimants and to pay them normal wages they would have earned commencing five (5) days after the issuance of the order until the earliest of the following conditions:

> (1) the date that Respondent bargained to agreement with the Union over the effects of the layoffs; (2) the date a bona fide impasse in effects bargaining occurred; (3) the failure of the Union to request bargaining within five business days after receipt of the Board's Order, or to commence negotiations within five business days after receipt of Respondent's notice of its desire to bargain with the Union; or (4) the Union's subsequent failure to bargain in

[1] *Transmarine Navigation Corp*., 170 NLRB 389 (1968).
[2] The specification erroneously refers to the terminations as layoffs.

> good faith. The Board further ordered that, in no event, would the sum paid to any of the claimants exceed the amount that any of them would have earned as wages from the date of their layoffs to the time they each secured equivalent employment; nor would the sum paid to the complaints be less than they would have earned for a two week period as their normal wages when they last were in Respondent's employ, plus interest.

The compliance specification lists the claimants' bi-weekly earnings at the time of their discharges as follows: Dyches—$3,099.48; Hood—$3,194.52; Hurd—$3,145.25; Miller—$2860.57; and Parke—$3,158.12. The specification also alleged that the claimants were on leaves of absence from their corrections officers jobs with the Commonwealth of Pennsylvania (the Commonwealth) while they were employed by Respondent. By agreement with the Commonwealth, a portion of their pay was paid by the Commonwealth and the remainder was paid directly by Respondent, but Respondent reimbursed the Commonwealth for the portion it paid. Their bi-weekly earnings set forth above include both portions of pay.

The compliance specification further alleges that none of the conditions specified in the Board order occurred and that the back pay period ran 26 weeks from March 28, 2012 (5 days after the Board order issued) until September 28, 2012, the approximate date on which the Union that represented the claimants became defunct and was no longer able to bargain. As revised at the hearing, the specification sets forth the gross backpay amounts for each claimant, less interim earnings, resulting in a net back pay amount for each. The total amounts to some $57,000, plus interest.[3]

Respondent filed an answer alleging that it had lawfully bargained to an impasse over the amounts due, thus satisfying one of the key requirements of the Board's order. It also asserted that the Union was "essentially defunct and disclaimed any bargaining obligation prior to September 28, 2012." The answer admitted the bi-weekly earnings of the claimants set forth in the compliance specification. It also admitted the portion of the specification set forth above dealing with the pay of the claimants while they were on leaves of absence from their former jobs. With specific reference to claimant Parke, the answer alleged that he voluntarily declined to return to his former position as a correctional officer for the Commonwealth of Pennsylvania, which he originally left to become an employee of Respondent, even though that opportunity was available to him, as it was to other claimants who returned to their former positions. The answer thus asserts that any backpay for him should be cut off as of the date he declined to return to his former position.

The parties filed post-hearing briefs which I have read and considered.

[3] The parties stipulated that the back pay calculations for Dyches, Hood, Hurd and Miller set forth in the revised compliance specification are properly calculated. Respondent disputes the calculation as to Parke because it contends that Respondent did not mitigate his back pay liability when he declined to return to his former correction officer's position. Respondent, however, agrees that, if its contention as to Parke, is rejected, the back pay calculation for Parke is accurate.

The Facts

Respondent represents some 11,000 corrections officers employed by the Commonwealth of Pennsylvania. Respondent employs some 18 individuals who were represented by the Union. Some of those individuals, including claimants, were former corrections officers. When they were employed by Respondent, the claimants were on leaves of absences from their corrections officer jobs. By agreement with the Commonwealth, a portion of their pay was paid by the Commonwealth and the remainder was paid directly by Respondent, but Respondent reimbursed the Commonwealth for the portion it paid. The claimants also accrued pension and leave credits from the Commonwealth during their employment with Respondent. Tr. 35-36, 64-65.

After their discharge by Respondent, all the claimants received letters, dated August 20, 2010, directing them to return to their original correctional institutions to resume their employment there. Work was available for those individuals at their original correctional institutions. Jt. Exh. 7. Parke was the only claimant who did not return to his former position as a corrections officer. He voluntarily retired from his former position and accepted either a pension or a lump sum settlement both from the Commonwealth and from Respondent. He did, however, obtain other employment in another industry.[4]

Parke testified that when joined Respondent he left his corrections officer position in Houtzdale, Pennsylvania, and moved to Mechanicsburg, Pennsylvania, nearer to his work site with Respondent in Harrisburg. That was some two and a half hours drive away from Houtzdale. He also testified that, before deciding to retire, he did not request a transfer from his former corrections position to one closer to his home than his work site at Respondent. Such transfers are readily available and permitted under the applicable collective bargaining agreement. Tr. 47-58.

On April 4, 2012, representatives of Respondent met with Larry Sonnie, the president of the Union, to engage in effects bargaining pursuant to the Board's decision of March 23, 2012. This was the parties' only face to face bargaining meeting. This meeting was initiated by Respondent, whose representative contacted Sonnie. The Union apparently had no knowledge of the Board's decision and had not attempted to initiate effects bargaining. Tr. 19.

Respondent's position was set forth in a letter to Sonnie, dated April 4. It offered to pay the claimants two weeks pay without deductions for interim earnings, less one week's pay claimants received at the time of their discharge for time they did not work for Respondent. Those amounts would then, according to Respondent, be considered a credit against monies allegedly received by claimants for improper mileage reimbursements during their employment. Respondent has sued for the return of such mileage reimbursements in civil lawsuits against Claimants Dyches, Hurd and Miller. Those lawsuits are still pending.[5]

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[4] The parties agree that, under the collective bargaining agreement between Respondent and the Union, as well as pursuant to past practice, claimants were entitled to return to their former positions as corrections officers. Tr. 15-16.

[5] Respondent's claims of invalid mileage reimbursement included an amount for Hood, but, according to the stipulation of the parties, no lawsuit was filed against Hood to recover the mileage amounts he apparently owed. The parties also stipulated that Parke was not accused of collecting invalid mileage reimbursements.

Union Vice President Lawrence Blackwell mailed a counteroffer to Respondent on April 10, 2012. The counteroffer was as follows: 2 weeks' severance pay and all unused vacation or leave paid back for Dyches, Hurd, Miller and Parke; and 2 weeks' severance pay, 70 vacation days, unpaid phone charges and 6 weeks' of mileage reimbursement for Hood. Blackwell also rejected the set off for mileage reimbursement because he contended that there was no proof that it was invalidly claimed.

On April 11, 2012, Respondent rejected the Union's counteroffer, giving reasons in support of its position. It also stated that impasse in bargaining had occurred. The parties stipulated that Respondent and the Union reached an impasse on April 11, 2012. It was also stipulated that neither party made any other effort to contact the other to engage in further effects bargaining.[6]

Sonnie and Blackwell retained their positions in the Union until September 28, 2012, when all parties agree that the Union became defunct. Sonnie testified that he tried to reach out to the claimants to determine their positions on the Respondent's April 4 offer, but none of them returned his calls. He then turned the matter over to Blackwell, who apparently was able to make contact with at least one of the claimants. Tr. 26, 28, 39-40, 83. According to Sonnie, between April 2012 and September 2012, the Union was "in a holding pattern" because a petition to decertify the Union was filed with the Board's Philadelphia regional office. He testified that "nobody wanted to do anything because we didn't know whether we were going to be there or not." Tr. 37.

A petition to decertify the Union was filed on January 26, 2012, with the Region 4 of the Board in Philadelphia. Attached to the petition was a statement, signed by 11 of the 18 employees in the unit represented by the Union, that the signers no longer wanted the Union to represent them. R. Exh. 5. On March 7, 2012, while the underlying case was still pending before the Board, the regional director for Region 4 dismissed the decertification petition because of the then-existing 2010 bargaining agreement whose validity was at issue in the underlying case, "subject to reinstatement, if appropriate," upon conclusion of the underlying case. In fact, in the Board's March 23, 2012 decision, the 2010 contract was declared invalid. R. Exh. 7. But apparently no one asked for reinstatement of the decertification petition and no election was held. Furthermore, as indicated above, the Respondent dealt with the Union in effects bargaining in April 2012.

Discussion and Analysis

There are several issues in this case: (1) Did the back pay period end on April 11, 2012, when the parties were admittedly at impasse in their effects bargaining, as Respondent alleges, or September 28, 2012, when the Union became defunct, as the General Counsel alleges? The answer to that question turns on how one views Respondent's conditions for agreement—that its offer of 2 weeks' back pay be set off by an earlier week's pay to the claimants that was unearned and by any amounts due to Respondent because of improper mileage reimbursements to

[6] Respondent conceded that its position on mileage reimbursement, at least, was insisted upon to the point of impasse. Tr. 16-17.

claimants. The General Counsel asserts that these conditions were not mandatory subjects of bargaining. Respondent says that they were. (2) If Respondent's contention on the above question fails, did the back pay period end at some point before September 28, as Respondent contends, because the Union was essentially incapable of bargaining, mainly because of the filing of a decertification petition, which was not promptly acted upon by the regional office? (3) As to Parke, was Respondent's back pay liability tolled because Parke, alone among the claimants, voluntarily declined to return to his former position as a corrections officer, as Respondent contends?

It is settled that a lawful impasse cannot exist if a party insists that any agreement include a non-mandatory subject of bargaining—that is, a subject that does not "vitally affect" wages, hours or terms and conditions of employment. See *Cushman & Wakefield, Inc.,* 360 NLRB No. 10 (2013), slip op. 4, and cases there cited.

Here, it is clear that the parties were at impasse in bargaining over the effects of the decision to discharge the claimants. It is Respondent's position that the Board's order in the underlying case tolled back pay at the point that the parties were at lawful impasse. But it is also clear that the Board's order required a minimum of two weeks of back pay. Respondent offered two weeks of back pay, but required that there be a set off against that amount of an earlier payment of one week of pay that allegedly had been unearned and of whatever it alleged was improper mileage reimbursement to some claimants during their employment. These conditions were contrary to the minimum back pay remedy in the Board's order. Insistence to impasse on a position that derogates from a specific Board remedy amounts, in my view, to insistence on an illegal subject of bargaining. See Chapter 16 VI. B. of *The Developing Labor Law* (Sixth Edition, 2012). At the least, such a position does not constitute a mandatory subject, about which the other party must bargain. Accordingly, I find that the impasse of April 11 was not a valid impasse and the back pay period continued to run thereafter.[7]

Nor do I find that the Union was incapable of bargaining at any point before September 28, 2012, when it became defunct. Clearly, the Union was operative in April 2012 when Respondent engaged with it in effects bargaining. Thus, any contention that the decertification petition, which was filed in January 2012, made the Union incapable of bargaining must fail. No election was held and thus the Union was still a viable entity, at least insofar as carrying out the bargaining contemplated in the Board's order in the underlying case. Moreover, Respondent negotiated with the Union over effects bargaining, thus waiving any right to challenge its representative status. See *Fallbrook Hospital,* 360 NLRB No. 73 (2014), slip op. 1 (employer waived its right to challenge validity of a union's certification by entering into negotiations with that union).[8]

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[7] The briefs of the parties on this issue seem to joust on a separate point—whether seeking a set off for mileage reimbursement, particularly in light of pending lawsuits against some but not all of the claimants, amounts to a mandatory or permissive subject of bargaining. In view of my rationale for finding no lawful impasse, set forth above, I need not address this point. But the General Counsel seems to have the better of the argument since Respondent's set off is comparable to conditioning agreement on a general release of claims, which is a permissive, not a mandatory, subject of bargaining. See *Borden, Inc*., 279 NLRB 396, 398-399 (1986).

[8] As the General Counsel points out (Br. 15), the decertification petition was properly dismissed by the region pending the outcome of the underlying case. The petition was not reinstated thereafter, and

It is true that neither side requested a return to the bargaining table after April 11. But that was because Respondent poisoned the well by insisting on improper conditions that caused an impasse. Had it not wrongfully insisted on those conditions, contrary to the Board's order, the bargaining might well have gone forward. Thus, Respondent, like any wrongdoer, cannot profit from any lack of bargaining from mid-April until the September 2012 date the Union became defunct. I therefore reject the Respondent's position and agree with the General Counsel's position that the back pay period runs until September 28, 2012.

The above applies to the claims of Dyches, Hood, Hurd and Miller. Parke is different because I must consider the separate allegation that he failed to mitigate Respondent's back pay liability by not returning to his former employment with the Commonwealth of Pennsylvania, as did the other claimants. See *St. George Warehouse*, 351 NLRB 961, 963 (2007).

I agree with Respondent that Parke failed to mitigate the back pay obligation to him. He voluntarily retired from his former position and refused even to consider asking for a transfer to a position nearer his home that was likely available. I reject the General Counsel's attempt (Br. 18-20) to treat Parke's former corrections officer position as the usual kind of interim employment. That job was intrinsically intertwined with his position with Respondent. Parke's job as assistant grievance manager for Respondent was based to a great degree on his former experience as a corrections officer since Respondent represents corrections officers. Moreover, as indicated above, Parke was simply on leave of absence from his former position. Indeed, part of his compensation from Respondent was paid by the Commonwealth. He also accrued pension and leave credits from the Commonwealth during his employment with Respondent. And he had an absolute right to return to his former position after his leave of absence was over. To overlook these ties to his former position in determining the mitigation issue would provide Parke with a windfall he does not deserve. Thus, in the particular circumstances of this case, I find that Parke "willfully incurred" a loss by his "clearly unjustified" refusal to return to his former employment. *St. George Warehouse*, above, quoting from applicable authorities.

I do not believe, however, that Parke is entitled to no back pay, as Respondent seems to contend. He is entitled to the minimum 2 weeks of back pay set forth in the Board's order in the underlying case.

On these findings and conclusions, and on the entire record, I issue the following recommended[9]

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could not have been until after the Respondent's violation (failure to engage in effects bargaining) was appropriately remedied.

[9] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, its officers, agents, successors and assigns, shall pay the claimants the amounts specified after their names below, plus interest accrued to the date of payment, as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), minus tax withholdings required by Federal and State laws.

Lee Dyches	$9,646.25
Shawn Hood	$3,235.89
Patricia Hurd	$11,755.23
John Miller	$8,243.08
Bill Parke	$3,158.12

Dated, Washington, D.C., May 23, 2014

Robert A. Giannasi
Administrative Law Judge