UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ART'S WAY VESSELS, INC.

Respondent,

and **Case 33-CA-15771**

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO

Charging Party.

ACTING GENERAL COUNSEL'S REPLY BRIEF TO RESPONDENT'S ANSWERING BRIEF

Introduction

Respondent's claimed deductions to the Acting General Counsel's (General Counsel) properly calculated and reasonable backpay figures should be rejected. If Respondent's deductions to backpay were accepted, it would fail to remedy the Respondent's unfair labor practices. Throughout its Anwering Brief claiming it is entitled to three deductions, Respondent Art's Way Vessels, Inc. conflates the instant case with later-filed unfair labor practice charges. First, the "bridge time" granted during collective bargaining was separate from the backpay liability in the instant case. Second, the settlement agreements signed by two discriminatees were separate from the instant backpay compliance specification. Third, Respondent has failed to prove it is entitled to any deductions based on holiday backpay or vacation backpay as it failed to adduce any evidence at hearing. Because Respondent has failed to prove it is entitled to any

deductions, the Compliance Specification's figures for backpay owed to employees should be adopted.[1]

ARGUMENT

I. Awarding Additional Vacation Time in an Effort to Offset Backpay is Improper as a Matter of Law

Respondent argues the parties' intent in resolving the paid time off claims is immaterial because the "effect" of bargaining was to resolve the paid time off claims. Respondent's use of the term "effect" must mean "legal effect" because if the parties' intent is immaterial, then Respondent must make a legal argument that awarding vacation time as a substitute for backpay is appropriate. However, Respondent's legal argument fails. Rather than addressing extant Board law adverse to Respondent holding that substituting one type of benefits for another is an improper deduction to backpay, Respondent makes broad generalizations and pontificates about the merits of collective bargaining. (Respondent's Answering Brief, p. 2-3) The purpose of backpay is to make employees whole for losses due to Respondent's unfair labor practices. *Continental Ins. Co.*, 289 NLRB 579, 583 (1988). However, substituting one type of benefits for another fails to remedy the unfair labor practice and fails to return employees to the *status quo ante*. *Schwickert's of Rochester*, 349 NLRB 687, 690 (2007) (citations omitted).

None of Respondent's cited cases are sufficient to meet its burden of proof that it is entitled to an offset for granting "bridge time" through the collective bargaining process. For example, in citing *Continental Insurance Company*, 289 NLRB 579, 583 (1988), Respondent states that the employer is entitled to an offset when it compensates employees for losses "in some manner." This is incorrect. In *Continental Insurance Company*, the Board affirmed the

[1] As stated in its Exceptions Brief, General Counsel contends backpay continues to run for Brandon Yutzy, Jesse Mumm, Dustin Kopp, and Toby Hicks because they continue to be underpaid according to the current wage rates in effect under the Collective Bargaining Agreement.

ALJ's finding that certain payments given to employees could reduce backpay liability. 289 NLRB at 583-84. Here, Respondent claims a deduction against backpay due and owing for vacation time — an amorphous future benefit — granted to employees during collective bargaining. The Board has long held that it will not allow an employer's deduction from backpay when it substitutes one type of benefits for another. *Schwickert's of Rochester, Inc.*, 349 NLRB 687, 690 (2007); *Manhattan Eye, Ear and Throat Hosp.*, 300 NLRB 201 (1990).

Further, Respondent conflates two separate settlements by using the term "settlement" to refer to both the collective bargaining process and a settlement of the backpay liability. (Resp.'s Ans. Brief, p. 3) As Respondent's own witness, Patrick O'Neill, makes clear, "bridge time" was "used in the negotiation process to try to get a resolution of the contract." (TR 142, *emphasis added*) It was not used as a settlement of the backpay liability. (TR 173) Using the term "settlement" to refer to two separate processes is Respondent's attempt to mislead the Board.

Moreover, Respondent's cited cases regarding settlement are in applicable. In Section 1 of its brief, Respondent's cited cases only address instances in which all parties agreed to a settlement and the General Counsel objected. *See e.g., Metro Mayaguez, Inc. d/b/a Hosp. Perea*, 356 NLRB No. 150, slip op. 1-2 (April 29, 2011). For example, in *Metro Mayaguez*, the Board found that the settlement of the unfair labor practice charge served to effectuate the remedial purpose of the Act because both parties agreed to the non-Board settlement despite General Counsel's objection that the employer had engaged in numerous other unilateral changes. 356 NLRB No. 150 at sl. op. 1-2. Similarly, in *Gourmet Toast Corp.*, an ALJ Decision only, the parties agreed to the settlement, but the General Counsel objected. 2011 WL 2433351 (June 16, 2011). Likewise, in *Central Cartage Co.*, the parties agreed to the settlement, but the General Counsel objected. 206 NLRB 337, 338 (1973). Here, both the Union and the General Counsel

are objecting to any compromise to the backpay liability. Thus, Respondent's cited cases allowing Respondent to ruminate about the merits of collective bargaining are inapplicable.

II. Respondent Confuses Two Separate Issues in Arguing the Settlement Agreements to Settle Cases 33-CA-16196 and 33-CA-16220 Were Intended to Compromise the Instant Backpay Amount

To obfuscate the parties' true intent in signing settlement agreements addressing two open grievances and two wholly unrelated and new unfair labor practices, Respondent again conflates two separate issues. (Resp.'s Ans. Brief, p. 4-6) At the time Respondent's counsel drafted the settlement agreements and the parties signed them, there was an unfair labor practice hearing pending in Cases 33-CA-16196 and 33-CA-16220 just three days later. (TR 202) Separately, the Region was attempting to secure Respondent's compliance with the Eighth Circuit-enforced Board order in the instant case. (*See, generally*, TR 46-61) While the settlement agreements were executed before the compliance hearing began, it is not logical to assume that those agreements, also executed before the Compliance Specification issued, were intended to settle any claim to backpay. (GC Ex. 1(c), p. 11) It defies common sense that two discriminatees would compromise a claim at a time when they did not know its full value, given that the Compliance Specification had not yet issued.

Respondent cites to *Independent Stave*, 287 NLRB 740 (1989), suggesting that the General Counsel countenances this particular settlement. In a recent decision, the Board addressed the *Independent Stave* analysis in determining whether a clause in a non-Board settlement prohibiting two employees from engaging in union activity related to their employer was repugnant to the Act. *Goya Foods, Inc.*, 358 NLRB No. 43 (May 17, 2012). To determine whether a non-Board settlement would effectuate the purposes of the Act, the Board considers:

> (1) whether the charging party, the respondent, and any of the individual discriminatees have agreed to be bound, and the position taken by the General

> Counsel regarding the settlement; (2) whether the settlement is reasonable in light of the violations alleged, the risks inherent in litigation, and the stage of litigation; (3) whether there has been any fraud, coercion, or duress by any of the parties in reaching the settlement; and (4) whether the respondent has engaged in a history of violations of the Act or has breached previous settlement agreements.

Goya Foods, Inc., 358 NLRB No. 43, slip op. at 2.

While Counsel for the Acting General Counsel maintains that the non-Board settlements between Respondent and Jesse Maas and Robert Dolter were not intended to settle the compliance proceeding, it is clear, in any event, the *Independent Stave* factors militate against finding the non-Board settlement agreements effectuate the purpose of the Act. First, both the Union and the Counsel for the Acting General Counsel object to using the settlement agreements to settle the instant compliance proceeding as that is not what the parties intended at the time the parties signed the agreements.

Second, the settlements were not reasonable at the particular stage of litigation during which they were signed. The Region had not yet issued a Compliance Specification by June 10, 2011. The Region issued the Compliance Specification on July 29, 2011. (GC Ex. 1(c)) Clearly, the Union and employees would not compromise their backpay claim before it had been finalized. Moreover, by early June 2011, the underlying Board order had already been enforced by the Eighth Circuit. It does not make sense that after three years of litigation, the Union and employees would compromise their backpay claim before the parties even knew how much they would be getting in the compliance proceeding.

Third, while there is no explicit evidence of fraud, coercion, or duress in signing the settlement agreements, it appears from the parties' communication at the time the settlements were signed, that the agreements were not intended to settle the backpay claims. (GC Ex 11; TR 201-203) Respondent's counsel drafted the broad release language. To now claim that the

settlement agreements also settled the instant compliance proceeding is Respondent's deliberate attempt to mislead the Board and the parties.

Fourth, while Respondent states it has no history of breaching prior settlement agreements, Respondent is silent regarding its history of violations of the Act. Respondent is silent because the Region issued a Complaint because of Respondent's later conduct in continuing to make unilateral changes without bargaining with the Union. The later conduct causing the Region to issue a Complaint was the subject of the settlement agreements in Cases 33-CA-16196 and 33-CA-16220.

Given the *Independent Stave* factors, it is evident that the settlement should not be approved because it is repugnant to the remedial purpose of the Act in restoring employees to the *status quo ante*. Accordingly, Respondent has failed to prove that it is entitled to a deduction for Jesse Maas, Cody Walen, or Robert Dolter by virtue of their having signed settlements resolving their grievances.

III. In Section 3 of its Answering Brief Respondent Attempts for the First Time to Explain its Deduction for Vacation Backpay and Holiday Backpay and then Uses it to Double Count its Deduction for "Bridge Time"

Neither at the compliance hearing nor in its post-compliance hearing brief to the ALJ has Respondent offered an explanation of its backpay figures. Now that the case is before the Board, Respondent attempts to provide an eleventh hour explanation with no supporting evidence. Indeed, the entirety of Section 3 of Respondent's brief is devoid of any citations to the record evidence to support its argument that it is entitled to a deduction for vacation or holiday pay.[2] Respondent has failed in its burden to produce evidence to mitigate its liability. On that basis alone, therefore, Respondent's backpay figures should be rejected. *See, e.g. Colorado Forge*

[2] Respondent only citation to any evidence to support its position is to a March 14, 2011, letter to Compliance Officer Greg Ramsay. That letter is not in the record evidence.

Corp., 285 NLRB 530, 538 (1987), *quoting NLRB V. Mercy Peninsula Ambulance Service*, 589 F.2d 1014, 1017 (9th Cir. 1979) (it is Respondent's burden to produce evidence to mitigate its liability once the General Counsel has established the amount of backpay due employees).

However, to bolster its evidentiary failure to prove it is entitled to a deduction, Respondent claims a legal standard that applies to the General Counsel by stating that the Respondent's "calculation is acceptable as long as it is not unreasonable or arbitrary." (Respondent's Answering Brief, p. 8) Respondent is wrong on even the most basic concept of burden of proof in a compliance proceeding. The Board has long held that it is the calculation of the General Counsel the Board accepts so long as it is not "unreasonable or arbitrary." *Boyer Ford Trucks*, 270 NLRB 1133, 1138 (1984), *enf'd. as modified* 757 F.2d 961, 118 LRRM 3171 (8th Cir. 1985); *Am Del Co., Inc.,* 234 NLRB 1040, 1042 (1978). If the Board's standard were in Respondent's formulation, it would allow the wrongdoer to profit. Therefore, it is the Respondent as the wrongdoer, which must prove it is entitled to any deductions. *Woonsocket Health Centre*, 263 NLRB 1367 (1982); *Great Lakes Chemical Corp.*, 323 NLRB 749, 756 (1997). Respondent has failed to meet its burden of proof. Therefore, its claims should be rejected.

Not only has Respondent failed to meet its burden of proof or provide a coherent explanation, but looking more specifically at its figures in its spreadsheet accompanying its post-compliance hearing brief shows it is attempting to double count vacation pay and its deduction for "bridge time." Respondent also suggests Counsel for the Acting General Counsel fails to comprehend its calculations. It takes no leap in logic to understand why there is a lack of comprehension. For the first time in its Answering Brief, in Section 3, Respondent explains that it deducted the amount of overtime backpay from its column titled "Less Backpay Amounts

Already Paid by Art's Way" in its "Backpay Calculation Summary" accompanying its post-hearing brief. This puzzling subtraction of overtime backpay from the "Less Backpay Amounts Already Paid by Employer"[3] accounts for the entire discrepancy between the same columns on the Compliance Specification and Respondent's spreadsheet.

Respondent then baldly suggests, for the first time in its answering brief, that it is entitled to a deduction for vacation pay and holiday pay. Also for the first time in its answering brief, Respondent provides an explanation for its column titled, "Less Overtime/Holiday/Vacation Backpay." Without a prior explanation, General Counsel was attempting to navigate Respondent's figures without a map. As a matter of law, Respondent's explanation is insufficient. *See, e.g., Intermountain Rural Electric Assn.*, 317 NLRB 588, 590-591 (1995), *enf'd* 83 F.3d 432, 152 LRRM 2320 (10th Cir. 1996) (finding that any ambiguities, doubts, or uncertainties are resolved against the wrongdoer).

Now, in its shell game, Respondent seems to be suggesting that vacation and holiday backpay was resolved in collective bargaining. This is the same argument it advances in deducting "bridge time." This is an invalid deduction as explained above. *See, e.g. Schwickert's of Rochester*, 349 NLRB 687, 690 (2007) (citations omitted). Respondent's next step is to double count the "bridge time" as somehow resolving the vacation and holiday backpay issue. This is improper and should be rejected.

Even more perplexing, Respondent's spreadsheet sets in stone the total interest accrued. But, this is patently wrong. Interest on a backpay award continues to run until the day backpay is paid. *New Horizons for the Retarded*, 283 NLRB 1173, 1174 (1987); *Kentucky River Medical*

[3] Respondent named its column "Less Amounts Already Paid by Art's Way." The Compliance Specification named the same column "Less Amount Already Paid by Employer."

Center, 356 NLRB No. 8 (2010). Because backpay has not been paid in full for several employees, interest continues to accrue.

In addition, Respondent's final two columns in its spreadsheet accompanying its post-compliance hearing brief "Less Value of Bridge Pay in Excess of CBA" and "Less Amount Released Per Settlement" should be rejected for the reasons explained above. Accordingly, all of Respondent's deductions should be rejected.

CONCLUSION

In its Answering Brief, Respondent has failed to explain – factually or legally – why it is entitled to certain deductions. Respondent's calculations can only be adopted by ignoring the record evidence and extant Board law. Therefore, the Respondent's claimed deductions and the ALJ's backpay calculations based on Respondent's claimed deductions should be rejected and the Compliance Specification's figures should be adopted.

Dated at Peoria, Illinois this 25th day of May 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of May 2012 I electronically filed the foregoing ACTING GENERAL COUNSEL'S REPLY BRIEF TO RESPONDENT'S ANSWERING BRIEF with the National Labor Relations Board using the NLRB; E-Filing System.

I hereby certify that a copy of the foregoing ACTING GENERAL COUNSEL'S REPLY BRIEF TO RESPONDENT'S ANSWERING BRIEF was served by e-mail to the following parties:

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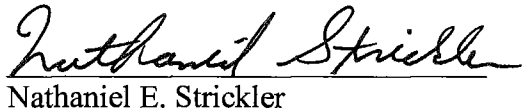

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