

**Interstate Bakeries Corp. and Kirk Rammage**  
**Teamsters Local Union No. 523, affiliated with Inter-**  
**national Brotherhood of Teamsters and Kirk**  
**Rammage.** Cases 17–CA–023404 and 17–CB–  
 006146

January 10, 2014

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA  
 AND HIROZAWA

On March 28, 2013, Administrative Law Judge Bruce D. Rosenstein issued the attached supplemental decision. The Respondent Union filed exceptions.<sup>1</sup> The Acting General Counsel and Charging Party each filed an answering brief.

The Board has considered the supplemental decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions<sup>2</sup> and to adopt the recommended Order as modified and set forth in full below.

ORDER

The National Labor Relations Board orders that Respondent Interstate Bakeries Corp., Ponca City, Oklahoma, its officers, agents, successors, and assigns, and Respondent Teamsters Local Union No. 523, affiliated with International Brotherhood of Teamsters, its officers, agents, and representatives, shall jointly and severally make Kirk Rammage whole by paying him \$46,360.45,<sup>3</sup>

<sup>1</sup> In its answer to the compliance specification, Respondent Employer asserted that it filed for bankruptcy in January 2012. It is well established, however, that the institution of bankruptcy proceedings does not deprive the Board of jurisdiction or authority to entertain and process an unfair labor practice case to its final disposition. See, e.g., *Cardinal Services*, 295 NLRB 933, 933 fn. 2 (1989), and cases cited therein. Board proceedings fall within the exception to the **automatic stay** provisions for proceedings by a governmental unit to enforce its police or regulatory powers. See *id.* and cases cited therein; see also *NLRB v. 15th Avenue Iron Works, Inc.*, 964 F.2d 1336, 1337 (2d Cir. 1992); *Ahrens Aircraft, Inc. v. NLRB*, 703 F.2d 23 (1st Cir. 1983).

<sup>2</sup> Some of Respondent Union's exceptions imply that the judge's rulings, findings, and conclusions demonstrate bias. On careful examination of the judge's decision and the entire record, we are satisfied that the Union's contentions are without merit.

Respondent Union has excepted to some of the judge's evidentiary rulings. It is well established that the Board will affirm an evidentiary ruling of an administrative law judge unless that ruling constitutes an abuse of discretion. See *Aladdin Gaming, LLC*, 345 NLRB 585, 587 (2005), petition for review denied sub nom. *Local Joint Executive Board of Las Vegas v. NLRB*, 515 F.3d 942 (9th Cir. 2008). After a careful review of the record, we find no abuse of discretion in any of the challenged rulings.

<sup>3</sup> In agreement with Respondent Union, we decline the Acting General Counsel's request to include in our Order the costs of the prepaid mortgage interest (\$215.75) and hazard insurance (\$760.80) incurred by Rammage in the purchase of his new home. These two items are more properly regarded as costs of homeownership prepaid at closing than as

plus interest accrued to the date of payment as prescribed in *New Horizons*, 283 NLRB 1173 (1987), and *Kentucky River Medical Center*, 356 NLRB 6 (2010), minus tax withholdings required by Federal and State laws.<sup>4</sup>

*Charles T. Hoskin, Esq.*, for the Acting General Counsel.

*Gregory D. Ballew, Esq.*, of Kansas City, Missouri, for the Respondent Employer.<sup>1</sup>

*John C. Scully, Esq.*, of Springfield, Virginia, for the Charging Party.

*Steven R. Hickman, Esq.*, of Tulsa, Oklahoma, for the Respondent Union.

SUPPLEMENTAL DECISION AND ORDER

STATEMENT OF THE CASE

BRUCE D. ROSENSTEIN, Administrative Law Judge. This matter arises out of a compliance specification and notice of hearing issued by the Regional Director for Region 17 on November 26, 2012, against Interstate Bakeries Corp. (Respondent Employer or Interstate) and Teamsters Local Union No. 523, affiliated with International Brotherhood of Teamsters (Respondent Union or Local 523).

Pursuant to notice, I conducted a trial in Tulsa, Oklahoma, on January 31, 2013, at which all parties were afforded full opportunity to be heard, to examine, and cross-examine witnesses, and to introduce evidence.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Acting General Counsel (AGC), the Charging Party, and Respondent Union,<sup>2</sup> I find as follows.

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closing costs Rammage incurred because of his relocation. Cf. 41 CFR § 302-11.202(c), (d) (prepaid interest and insurance excluded from closing costs reimbursable to involuntarily transferred federal employees).

Contrary to his colleagues, Chairman Pearce would adopt the judge's award of these expenses to discriminatee Rammage. These were costs assessed at closing, as part of a move that occurred only because of the Respondent's unfair labor practices. In the Chairman's view, what the federal government reimburses in cases of involuntary transfers is markedly distinct from situations—like here—where the move was the direct result of the Respondent's unlawful conduct.

<sup>4</sup> We modify the judge's recommended Order to remove the requirements that the Respondents file a report with the Social Security Administration allocating Rammage's backpay to the appropriate calendar quarters and compensate Rammage for the adverse tax consequences of his backpay award. These remedies were not included in the Board's Order in the unfair labor practice case. See 357 NLRB 15 (2011), *affd.* 488 Fed. Appx. 280 (10th Cir. 2012), cert. denied 133 S.Ct. 1458 (2013). Because the Board's Order has already been enforced by the Tenth Circuit, and the Supreme Court has denied certiorari, we no longer possess jurisdiction to modify that Order. See *Grinnell Fire Protection Systems Co.*, 337 NLRB 141, 142 (2001).

<sup>1</sup> Attorney Ballew, by statement dated January 30, 2013, notified all parties that he would not be participating in the subject hearing on behalf of the Respondent Employer (GC Exh. 1 F).

<sup>2</sup> The Respondent Union argues, pursuant to *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), that the current Board has no authority to issue the compliance proceeding or hold the subject hearing. That argument is rejected as a properly constituted Board in 357 NLRB 15 (2011), found that the Respondent Union had violated the Act, and the

These proceedings stem from a June 30, 2011, Decision and Order of the National Labor Relations Board (the Board) reported at 357 NLRB 15, finding that the Respondent Employer and Respondent Union violated Section 8(a)(1) and (3) and Section 8(b)(1)(A) and (2) of the National Labor Relations Act (the Act), and directing Respondents to, inter alia, jointly and severally make discriminate Kirk Rammage (Rammage) whole for any losses suffered as a result of the discrimination against him. Thereafter, on July 5, 2012, the United States Court of Appeals for the Tenth Circuit entered its judgment enforcing, in full, the provisions of the Board's Order.<sup>3</sup>

The Board specifically ordered the Respondents to cease and desist from its unlawful conduct and to credit Rammage with unit seniority based on the length of his employment with the Respondent Employer. Interstate was ordered to give Rammage the opportunity that he did not have when the units merged to bid on a route based on that seniority, and award Rammage the route to which he would have been entitled by his bid. The Respondent Union was ordered to notify Rammage and the Respondent Employer in writing that it has no objection to the dovetailing of Rammage's seniority based on the length of his employment with the Respondent Employer, to allowing Rammage to bid on a route based on that seniority, or to awarding Rammage the route to which he would have been entitled by his bid. Additionally, the Order required the Respondents to make Rammage whole for any losses suffered as a result of the discrimination against him including backpay and any other rights and privileges to which he would have been entitled absent the discrimination against him. There is no dispute that the backpay period began on January 16, 2006, and ended on June 22, 2007.

The December 17, 2012 answer of the Respondent Employer notes that on January 11, 2012, Interstate filed for bankruptcy in the United States District Court for the Southern District of New York and on November 21, 2012, the bankruptcy court approved a motion for the orderly wind down of Interstate's business and the sale of assets.

Since the claimed make whole remedy is a pre-petition claim that is subject to bankruptcy rules and procedures including rules relating to proof of claim procedures, and particularly noting the AGC's admission that the Board did not file a proof of claim with the bankruptcy court, it is highly suspect that Rammage will be able to recover any losses suffered as a result of the discrimination taken against him by Interstate. The AGC asserts, however, that it will pursue all avenues against Interstate in an attempt to recover backpay or any other rights and privileges that Rammage would have been entitled absent the discrimination against him.

#### Legal Parameters

The applicable legal precepts are well established. The objective in compliance proceedings is "to restore, to the extent feasible, the status quo ante by restoring the circumstances that

would have existed had there been no unfair labor practices." *Alaska Pulp Corp.*, 326 NLRB 522, 523 (1998), citing *Phelps-Dodge Corp. v. NLRB*, 313 NLRB 177, 194 (1941). In seeking to objectively reconstruct backpay amounts as accurately as possible the General Counsel may properly adopt elements from the suggested formulas of the parties. *Performance Friction Corp.*, 335 NLRB 1117 (2001), citing *Hill Transportation Co.*, 102 NLRB 1015, 1020 (1953).

As the Board recognized in *Alaska Pulp Corp.*, supra at 523, "Determining what would have happened absent a respondent's unfair labor practices is often problematic and inexact. Several equally valid theories may be available, each one yielding a somewhat different result. Accordingly, the AGC is allowed a wide discretion in picking a formula." See also *Moran Printing*, 330 NLRB 376, 376377 (1999). The Region has the burden of establishing only that the gross backpay amounts contained in a backpay specification are a reasonable and not an arbitrary approximation. *Virginia Electric Co. v. NLRB*, 219 U.S. 532, 544 (1984); *Performance Friction Corp.*, 335 NLRB 1117 (2001); *Atlantic Limousine*, 328 NLRB 257, 248 (1999); *Hacienda Hotel & Casino*, 279 NLRB 601, 603 (1986).

Once the AGC has arrived at such amounts, the burden shifts to the respondent to establish affirmative defenses that would mitigate its backpay liability. *Atlantic Limousine*, supra at 258; *Hacienda Hotel & Casino*, supra at 603. Any uncertainties in the amount of backpay due should be resolved in favor of the backpay claimant rather than the respondent, who is responsible for the underlying unfair labor practices that have led to the uncertainties. *United Aircraft Corp.*, 330 NLRB, 204 NLRB 1068 (1973); *Alaska Pulp Corp.*, supra at 522. Indeed, to hold otherwise would effectively punish backpay claimants for the respondent's illegal conduct against them.

Thus, the general overriding issue is whether calculations contained in the AGC's final backpay specification should be deemed reasonable and therefore accepted, objections from the Respondent Employer and the Respondent Union to certain portions thereof notwithstanding.

#### Background

Interstate manufactured and distributed bakery products under various names, including Dolly Madison, Hostess, and Wonder Bread. Until late 2005, Interstate's sales routes were structured along product lines. Some of the route representatives were assigned to sell and deliver only Dolly Madison products, while others were assigned Hostess and Wonder Bread products.

Rammage had been a Dolly Madison sales representative for Respondent Employer for about 15 years before it purchased the Wonder Bread/Hostess product lines. Rammage sales route consisted of delivering Dolly Madison cake products until in or around December 2005 when Interstate consolidated and restructured all of its routes. Prior to the restructuring of the routes, there were four independent routes in Ponca City, three of which delivered Wonder and Hostess products (bread) and one route that delivered cake products. Employees Terry Tyler, Mark Pritchard, and Ricky Maupin were assigned to the bread routes while Rammage delivered cakes on his designated route. Pursuant to the restructuring of the routes, Respondent Em-

Regional Director who issued the subject compliance specification was not appointed to his position by the current Board.

<sup>3</sup> The Respondent Union's petition for writ of certiorari to the U.S. Supreme Court was denied. *Teamsters Local 523 v. NLRB*, U.S., No. 12-517 (2013).

ployer and Respondent Union agreed that one of the four routes would be eliminated.

Rammage, who previously was not included in any collective-bargaining unit and was unrepresented by any labor organization, was entailed by a joint agreement of Local 523 and Interstate to the bottom of the seniority list. Tyler, whose route was to be eliminated, exercised his contractual option to bump Rammage in accordance with his union seniority. Rammage continued working in Ponca City until around January 13, 2006, when Interstate gave him the option of working as a sales representative out of the Bartlesville terminal. Otherwise, Rammage would no longer have a job with the Respondent Employer. Rammage accepted the Bartlesville position and reported to his newly assigned location on January 16, 2006.

Since Rammage continued to reside in Ponca City, when he reported to his new position, it was necessary for him to commute 73 miles each day for a roundtrip of 146 miles. In order to start his route early on Monday morning, his normal routine was to arise at 11:30 p.m. on Sunday and depart for Bartlesville. On arriving on Monday morning at the warehouse, it was necessary to spend 2 hours pulling stock from the shelves and loading it on his delivery truck to commence his assigned route between 5 and 6 a.m. From approximately February–October 2006, Rammage on Monday evenings stayed at an inexpensive motel in Bartlesville to avoid excess travel during the week, and to ensure that he had time to adapt to his new route. Other than staying in the motel on Monday evenings during the 8-month period, he regularly commuted round trip to Ponca City on Tuesday through Saturday. After 17 months of enduring this grueling schedule, and particularly noting the wear and tear in addition to having no free time outside of his work schedule, Rammage and his wife decided to sell their Ponca City residence and purchase a new home in Dewey, Oklahoma (GC Exh. 7).

#### Compliance Computations

The AGC, in the subject compliance specification, as an appropriate measure to make Rammage whole as a result of the discrimination against him considered (a) increased mileage costs, (b) increased commuting time, (c) lodging, (d) moving expenses, and (e) loss of pay.

In figuring the increased mileage costs, the AGC compared Rammage's traditional roundtrip commute to work in his Ponca City assignment prior to the unlawful transfer to Bartlesville. Mileage reimbursement due Rammage was established by multiplying the difference in his roundtrip commute, 146 miles, by the number of times he actually made the extended roundtrip commute during each pay period in each calendar quarter during the make-whole period. That result was then multiplied by the relevant reimbursement rate, the mileage rate in effect at the time to compensate Federal employees for their use of private automobiles while on Government business to find the amount due. In sum, the Respondents owe Rammage \$19,080 in reimbursement for mileage costs as set forth in Appendix A of the compliance specification. *C.J.R. Transfer, Inc.*, 298 NLRB 579, 593 (1990).

With respect to increased commuting time, the AGC determined that Rammage's commute increased by about 2.75 hours

per day postdiscrimination. Consequently, to make Rammage whole, his increased travel time was multiplied by 1/40 of his pre-discrimination weekly salary, \$7.88, to establish the amount owed for each pay period. Those calculations establish that the Respondents owe Rammage approximately \$6415 in reimbursement for lost time as shown in Appendix A of the compliance specification. See *C.F.R. Transfer, Inc.*, supra.

Regarding lodging, Rammage provided hotel receipts for the majority of his Monday evening stays at the Travelers Motel (GC Exh. 9). In sum, the Respondents owe Rammage \$1260 reimbursement for lodging expenses as set forth in appendix A of the compliance specification.

As it concerns moving expenses, the settlement documents associated with the sale of Rammage's Ponca City residence and the purchase of a new home in Dewey were introduced into the record and establish that Respondents owe Rammage \$9524 for costs associated with the move as summarized in appendix A (GC Exh. 7).

Lastly, the AGC computed the loss in earnings suffered related to Rammage's transfer to Bartlesville. To ascertain these amounts, a comparison was undertaken compared to what he would have earned if he had remained on his Ponca City route versus what he actually earned on his new route in Bartlesville. To accomplish this, the AGC compared the earnings of Tyler on a per day period with those of Rammage within each calendar quarter as summarized in appendix A.

In sum, appendix C shows Rammage's gross backpay, interim earnings, net backpay, interim expenses, and expenses for each calendar quarter as well as the total amount of backpay and reimbursement due Rammage is \$47,337.

#### Discussion

A respondent may mitigate his backpay liability by showing that a discriminatee "willfully incurred" loss by a clearly unjustifiable refusal to take desirable new employment, but this is an affirmative defense and the burden is on the respondent to prove the necessary facts.

The Respondent Union through testimony and the Respondent Employer by its answer to the compliance specification, argue that Rammage's declination of an open route in Ponca City on November 6, 2006,<sup>4</sup> should have been accepted, and would have substantially reduced any claims for increased mileage, increased commuting time, loss of pay, and would have totally eliminated any claim for moving expenses that were incurred in June 2007. To sustain this argument, Respondent Union and Respondent Employer principally rely on a November 9, 2006 email sent by Interstate District Manager Randy Fisher to Human Resources Supervisor Susan Rada (GC Exh. 1F, attachment A).<sup>5</sup>

<sup>4</sup> On October 28, 2006, Pritchard accepted a non-union represented management position thus creating an opening in Ponca City in November 2006.

<sup>5</sup> The email states:

Susan-Through the grape vine, I heard that Kirk Rammage may be interested in the open route in Ponca City #1535. I sent a bid sheet to Kirk on the open route. He never faxed it to me. So I called him Monday, 11/6/06, to ask if he would be interested. He said not at this time, but to keep him in mind if other routes come open. He

Reliance on this document is problematic for a number of reasons. First, Respondent Union called Fisher as a witness who testified that independent of the email, he did not have any memory or an independent recollection of placing a telephone call to Rammage about an opening in Ponca City in November 2006. Second, Rammage testified that he did not have a telephone conversation with Fisher in November 2006 nor does he recall ever receiving a bid sheet for the open Ponca City position previously held by Pritchard. Third, Fisher could not independently remember sending a bid sheet to Rammage, and if it was sent it was never returned to him. Fourth, the lack of clarity from both witnesses persuades me that there was never a specific, unequivocal or unconditional job offer made to Rammage for the opening in Ponca City. *Holo-Krome Co.*, 302 NLRB 452, 454 (1991). Rather, Interstate was merely gauging Rammage's interest in the position.<sup>6</sup> Lastly, even assuming that the email could be considered a job offer for Pritchard's former Ponca City position, it did not provide Rammage with seniority based on the length of his employment at Interstate nor did it permit him to bid on a route based on that seniority. In this regard, the route set forth in the bid sheet historically had been held by the employee with the least seniority. Moreover, the route had a number of undesirable characteristics including being the longest route, a substandard truck, and did not service a Wal-Mart with large scale deliveries. Pursuant to the Board's decision in the subject case, Rammage should have been able to bid on the route that was assigned to Tyler in January 2006 that contained the majority of his former customers, and even after the restructure of the routes still had more cake deliveries than bread. Significantly, both Rammage and former Interstate employee Jody Tapp who bid on and received Pritchard's open route, testified that the route did not have the sales volume or earned compensation in comparison to the other routes, and that Pritchard's former route required longer hours to complete when compared with the other two routes.

For all of the above reasons, I find that the Respondents did not conclusively establish that Rammage was offered the open Ponca City route in November 2006. I further find that even if he was offered the open Ponca City route he was not required

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said he was not interested in Marks old route because he has been on it before and it's too many hours. He would rather haul more cake than bread and that Marks route was more bread than cake. I mentioned to Kirk, that there would be a good chance the route would change down the road to a more combo type route, at least more than it is now, but he was still not interested.

<sup>6</sup> The parties' collective-bargaining agreement in effect at the time (R. U. Exh. 5) states at art. 10 (seniority), B.2: In the event a route becomes open, an employee may, in the order of his/her seniority bid on such opening. *Unitog Rental Services*, 318 NLRB 880 (1995) (an invitation to bid on a job is not an unconditional offer of reinstatement).

to accept the offer as it was not substantially equivalent to his former position. Therefore, Rammage had no obligation to mitigate damages suffered as a result of the discrimination against him.

Throughout the course of the hearing and in its post-hearing brief, Respondent Union challenged the underpinnings of the Board's decision and its finding that it had violated Section 8(b)(1)(A) and (2) of the Act by demanding that Interstate entitle Rammage on the unit seniority list, allowing him to be bumped from his job at the Ponca City facility,<sup>7</sup> and permitting Rammage to be transferred to a job at the Bartlesville facility based on his placement on the unit seniority list. Additionally, Respondent Union argues that the parties' collective-bargaining agreements prior to and after the merger of the two units (R. U. Exhs. 6 and 7) authorized the entailing of Rammage in conjunction with the parties' side agreement of November 16, 2005 (R. U. Exh. 7). In effect, Respondent Union is attempting to relitigate the same arguments that it presented to the Board in the underlying unfair labor practice decision,<sup>8</sup> a position that is now foreclosed by the finality of that decision and its subsequent enforcement by the United States Court of Appeals for the Tenth Circuit. *Schorr Stern Food Corp.*, 248 NLRB 292 (1980).

Lastly, the Respondent Union challenged the expenses incurred by Rammage's purchase of a new home in Dewey in June 2007, and the attendant expenses being assessed to Local 523. While the settlement statement shows that the mortgage on the new home was greater than the mortgage for the Ponca City residence, the expenses of the move are the end product of the Respondent Union's unlawful conduct and must be reimbursed as part of the remedy in this matter.

#### Conclusion

For all of the above reasons, I accept the final backpay specification in all respects.

[Recommended Order omitted from publication.]

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<sup>7</sup> The Board's decision states:

In mid-December 2005, Interstate's Division Manager Rodney Roberts, Rammage's supervisor, informed him that Interstate and the Union had decided to use "union seniority" for route bidding and vacation scheduling. Roberts told Rammage that the route of one of the Ponca City sales representatives, Terry Tyler, was to be eliminated and that Tyler had exercised his contractual option to bump Rammage in accordance with "union seniority."

<sup>8</sup> Respondent Union continues to assert that after the restructuring of the routes former Dolly Madison employees could only obtain available cake routes if they were available using their seniority. If an individual did not have the seniority to bid on a cake route, the employee could then use seniority for a bread route. In summary, Respondent Union asserts that Rammage followed the work as there was nothing for him available in Ponca City and his seniority only permitted him to accept a cake route in Bartlesville.