

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ROCHESTER GAS & ELECTRIC CORP.,

and

LOCAL 36, INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, AFL-CIO

**MEMORANDUM
OF LAW**

Case No.: 03-CA-25915

PRELIMINARY STATEMENT

The General Counsel of the National Labor Relations Charge brought this compliance specification to determine the period of time Rochester Gas and Electric Corporation (“Rochester Gas”) should be required to pay a modified *Transmarine* remedy. The only issue in dispute is when the remedy should begin. Rochester Gas asserts that the *Transmarine* remedy begins on July 1, 2014, the date the United States Supreme Court denied certiorari. The General Counsel seeks to impose the remedy on Rochester Gas starting five days after the Board’s August 16, 2010 decision (August 22, 2010). Because of the procedural history of this case (including an appeal and an application for certiorari), the General Counsel’s start-date for the calculation will result in Rochester Gas paying over \$100,000.00 in a case involving eight take-home vehicles. *See* Exhibit “A”, Appendix 2. The General Counsel’s start date would impermissibly punish Rochester Gas for appealing when there were debatable issues of law and Rochester Gas’s only means of obtaining review was to refuse to bargain.

There are no material questions of fact. Rochester Gas now moves for summary judgment because the start date for the remedy should begin on July 1, 2014, and continue through August 22, 2014 (the date on which the Regional Director determined the Union had not responded to Rochester Gas’ request that effects bargaining commence). Alternatively,

Rochester Gas submits the time enforcement of the Board's decision was stayed by the Second Circuit Court of Appeals must be excluded from the remedy calculation.

RELEVANT FACTS

IBEW Local Union 36 brought an unfair labor practice charge in 2006 alleging Rochester Gas failed to bargain about the effects of requiring certain company vehicles to be garaged at the Rochester Gas facility during non-working hours. Rochester Gas, relying on case law from the D.C. Circuit Court of Appeals, denied the allegations in the charge and asserted that the issue was either covered by the collective bargaining agreement, or that the union had clearly and unmistakably waived the right to bargain about the issue because of the collective bargaining agreement and past bargaining history.

On August 16, 2010, the Board issued its Decision finding in favor of the Union, but awarding a different remedy than the Union had requested. The Board affirmed the ALJ's award of a modified *Transmarine* remedy requiring Rochester Gas to pay the "value of the vehicle benefit"¹ to the employees until one of four occurrences:

- (1) the Respondent bargains to agreement with the Union on the effects of discontinuing the benefit;
- (2) the parties reach a bona fide impasse in bargaining;
- (3) the Union fails to request bargaining within 5 business days after receipt of this Decision and Order, or to commence negotiations within 5 business days after receipt of the Respondent's notice of its desire to bargain with the Union; or
- (4) the Union subsequently fails to bargain in good faith.

See Ex. C, Decision, p. 2.

Rochester Gas timely appealed the Board's decision to the D.C. Circuit Court of Appeals. The Union timely appealed the Board's decision to the Second Circuit Court of Appeals. The appeals were consolidated in the Second Circuit. *See* Ex. "D". Briefs were filed in accordance

¹ In all other respects, the remedy is a typical *Transmarine* remedy.

with the Court's scheduling order, and oral argument was held on November 15, 2011. *See* Ex. "E", Notice of Oral Argument. More than a year later, on January 13, 2013, the Second Circuit issued its Decision denying both appeals and enforcing the Board's order in all respects. *See* Ex. "F", Decision of the Second Circuit with Errata Sheet.

Rochester Gas filed a motion to stay the Court's mandate while it sought certiorari from the Supreme Court. The motion to stay was granted on February 8, 2013 (*see* Ex. "G", Second Circuit's Order Staying Mandate). Subsequent motions by the Board and the Union for reconsideration of the decision to stay were denied. *See* Ex. "H", Second Circuit's Order Denying Reconsideration.

Rochester Gas filed its petition for certiorari in March 2013. *See* Ex. "I", Petition for a Writ of Certiorari. The Union and the Solicitor General on behalf of the Board filed opposing briefs in August 2013.² Rochester Gas filed its reply on August 8, 2013. Almost a year later, on July 1, 2014, the Supreme Court denied certiorari. *See* Ex. "J", Decision of the Supreme Court and Ex. "K", Mandate of the Second Circuit.

On July 9, 2014, Rochester Gas Labor Relations Manager Charis Zembek sent an e-mail to President of Local 36, Jeff Sondervan advising that in light of the Supreme Court Decision, Rochester Gas was ready to bargain. Ms. Zembek offered dates of July 14 or July 15. Thereafter, Ms. Zembek provided additional information to the Union and additional dates for bargaining. *See* Ex. "L", Acting Regional Director Determination Letter.

The Region subsequently determined the time for the *Transmarine* remedy concluded on August 22, 2014. *See* Ex. "L", Acting Regional Director Determination Letter.

² The Solicitor General, on behalf of the Board, requested and received multiple extensions of time for the filing of the Board's brief.

“The Union failed to commence effects bargaining within 5 business days after receipt of the Respondent’s notice of its desire to bargain and Respondent’s provision, on August 15, of all the information ordered by the Board. For all the foregoing reasons, I have concluded that the *Transmarine* make-whole remedy tolls on August 22, 2014.”

On appeal by the Union, the General Counsel’s office affirmed the Regional Director’s decision stating “the Employer has met its obligation of requesting that effects bargaining commence, but the Union has not responded to the request.” *See* Ex. “M”, Decision of the General Counsel on Appeal. The Union thereafter requested review of the General Counsel’s decision by the Board. By Order dated September 2, 2015 the Board denied the Union’s request for review. *See* Ex “N”, Order of the National Labor Relation Board.

After discussing the remedy with the Region, Rochester Gas agreed to the Region’s method of calculating the modified *Transmarine* remedy with one exception—the date the remedy should begin. The Region takes the position that the *Transmarine* remedy began 5 days after the Board’s initial order (August 16, 2010), despite delays caused by courts, despite a stay by the Second Circuit Court of Appeals, and despite Rochester Gas’s good faith appeal of the order. The Region’s calculation would result in a fine of \$101,559.07 to Rochester Gas. *See* Ex. “A”, Appendix 2. The General Counsel’s position punishes RGE for its appeal, is inconsistent with Board law regarding bargaining orders, and does not serve the purpose of the *Transmarine* remedy.

By contrast, Rochester Gas submits that in this unusual case, the remedy should on the date the Supreme Court denied certiorari³. In any event, the time the case was stayed by the

³ This would amount to a monetary remedy of \$3,599.68 for the period from July 1, 2014 through August 22, 2014. *See* Ex “B”, Answer to Compliance Specification, Exhibit “A”.

Second Circuit Court of Appeals must be excluded from any calculation because the Board's order was stayed during that time.

ARGUMENT

POINT I.

THE TRANSMARINE REMEDY SHOULD RUN FROM 5 DAYS AFTER THE SUPREME COURT DENIED CERTIORARI

The Board has not directly addressed the issue of when the *Transmarine* remedy begins to run in an effects bargaining case where the Respondent employer appeals. The Seventh Circuit Court of Appeals did address the issue in *Yorke v. NLRB*, 709 F.2d 1138 (7th Cir. 1983). In *Yorke*, the Seventh Circuit examined the purpose behind the *Transmarine* remedy, and determined that where the legal issues are debatable and where there is no evidence the Respondent appealed solely to delay the remedy, the *Transmarine* remedy runs from 5 days after the Court decision enforcing the Board's order. *Id. at 1145-46*. In so holding, the Court recognized that to decide otherwise would be to "penalize the employer for challenging a *Transmarine* order in good faith." *Id. citing NLRB v. Food Store Employees Local 347 (Heck's Inc.)*, 417 U.S. 1 (1974); *United Steelworkers v. NLRB*, 430 F.2d 519, 522 (D.C. Cir. 1970). That Court subsequently reaffirmed its position. *See Emsing's Supermarket*, 307 N.L.R.B. 421 (1992), *affirmed* 872 F.2d 1279 (7th Cir. 1988) (holding remedy should run from 5 days after Board order because no debatable issues of law were raised).

In this case, there is no question the issues raised by Rochester Gas on appeal were "debatable". At the time Rochester Gas appealed, there was a split between D.C., Seventh, and First Circuits and Board law. The Second Circuit recognized that its decision created a split among the circuit courts and stayed its own mandate to allow Rochester Gas to seek certiorari from the Supreme Court. In staying the action, the Second Circuit implicitly found that there

was a “substantial question” of law concerning whether Rochester Gas was required to bargain under the circumstances. *See* Fed. R. App. P. 41(d)(2)(A) (stay only granted where there is a “substantial question” of law).

Further, there is no evidence of desire to delay by Rochester Gas. Rochester Gas filed its appeal quickly. It filed its briefs in a timely fashion, never requesting an extension from a court. Rochester Gas filed its petition for certiorari a little over a month after it received the Second Circuit’s decision. Rochester Gas had no control over the delay by the Second Circuit while it was wrestling with these legal issues (over a year) or the delay by the Supreme Court while it considered whether or not to grant certiorari (approximately a year).⁴

Notably, Rochester Gas had no choice but to refuse to comply with the Board’s order in order to obtain court review. To have bargained immediately following the Board’s order would have meant Rochester Gas’s appeal would be denied for mootness.

In the analogous situation of a newly certified union, the Board has declined to award a remedy back to the time of the Board’s order where there were debatable issues regarding certification holding “[w]here the wrong in refusing to bargain is, at most, a debatable question, though ultimately found a wrong, the imposition of a large financial obligation on such a respondent may come close to a form of punishment for having elected to pursue a representation question beyond the Board to the court.” *Ex-Cello-Corp.*, 185 N.L.R.B. 107, 109 (N.L.R.B. 1970), *affirmed after remand* 449 F.2d 1058 (D.C. 1971); *see also United Steelworkers v. N.L.R.B.*, 430 F.2d 519, 522 (D.C. Cir. 1970) (affirming Board decision refusing to award additional damages where the employer “desired only to obtain an authoritative determination of the validity of the Board’s decision.”).

⁴ Rochester Gas also had no control over the Solicitor General’s requests for extensions of time to file the Board’s opposition to certiorari.

The purpose of the *Transmarine* remedy is not to punish the employer, but to ensure meaningful bargaining takes place and to restore some leverage to the party seeking to bargain.⁵ See *Rochester Gas and Electric*, 355 NLRB No. 386 (2010); see also *Yorke*, 709 F.2d at 1144-45, quoting *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 9-11 (1940) (Noting the Board’s remedy “must not punish the employer for its violations”). A remedy that runs from the date certiorari was denied until Rochester Gas offered to bargain with the Union (or until, as in this case, the Union refused to bargain), restored incentive for Rochester Gas to promptly offer to bargain—as it did. Requiring Rochester Gas to pay what amounts to a massive fine because it chose to appeal under circumstances where there was unsettled law does not advance the purpose of the Act or the *Transmarine* remedy. It is punitive in every respect.

POINT II.

IN THE ALTERNATIVE, THE TIME THE CASE WAS STAYED BY THE SECOND CIRCUIT MUST BE EXCLUDED FROM THE CALCULATION AS THE BOARD’S ORDER WAS STAYED DURING THAT TIME

“Board orders are not self-executing. ‘A party can . . . violate the order with impunity. To put teeth into one of its orders the Board must persuade a court of appeals to enforce the order.’” *E.I. du Pont de Nemours & Co. v. NLRB*, 682 F.3d 65, 71 (D.C. Cir. 2012) (Randolph, J., Concurring); see also *Mitchellace, Inc. v. NLRB*, 90 F.3d 1150, 1159 (6th Cir. 1996) (finding Board must seek enforcement to have a binding order).

Even if the Board finds the remedy begins 5 days after the Board’s order, the remedy must exclude the time that enforcement of the order was stayed by the Second Circuit. On

⁵ In this case, it is debatable whether the Union needs any leverage. This is not a typical *Transmarine* case where the employer has either closed a plant or transferred away work and the Union no longer has employees to represent. Local 36 continues to represent Rochester Gas’s employees, and thus, has leverage from its position as their bargaining representative.

February 8, 2013, the Second Circuit granted Rochester Gas's motion to stay execution of its decision pending Rochester Gas's filing a petition for certiorari with the Supreme Court. That stay remained in place until the decision denying certiorari was granted. While the Second Circuit's decision enforcing the Board's order was stayed, the Board's order was also stayed. The time between February 8, 2013 and July 1, 2014 must be excluded from any calculation of the remedy.

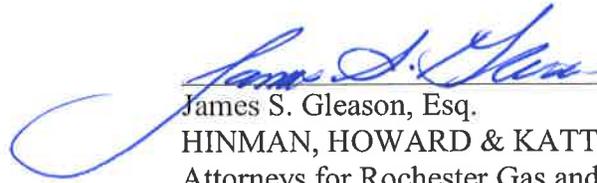
CONCLUSION

This case is unique in many respects. Very few cases will find themselves sitting at the Supreme Court for nearly a year waiting for a decision on certiorari. Further, Rochester Gas does not suggest that a *Transmarine* remedy can never run from 5 days after the Board's decision. However, as both the Board and the Courts have recognized, there are times when a party makes a legitimate challenge to a Board's decision, not for the purpose of delaying enforcement, but to seek a ruling on a novel issue of law or one that is unsettled. Here, the issue of whether effects bargaining was required in this case was certainly unsettled at the time of Rochester Gas's appeal. There had never been a case that involved similar facts and circumstances with an effects bargaining order and *Transmarine* remedy. There was an active split between several circuit courts and the Board. The Second Circuit had not ruled on the issue, and after it did rule, it granted a stay of its mandate to allow the Supreme Court to weigh in.

That Rochester Gas was ultimately unsuccessful does not mean it should pay over a hundred thousand dollars as a penalty for pursuing its legal rights. Such a position is contrary to Board law, to the law as set out by the Courts, and to basic principles of fairness.

The Board should grant summary judgment determining that there were debatable issues that justified Rochester Gas' appeal and that the *Transmarine* remedy begins to run from July 1, 2014 when certiorari was denied.

Dated: January 27, 2016
Binghamton, New York



James S. Gleason, Esq.
HINMAN, HOWARD & KATTELL, LLP
Attorneys for Rochester Gas and Electric Corp.
Office and Post Office Address
Hinman, Howard & Kattell, LLP
80 Exchange Street
P.O. Box 5250
Binghamton NY 13902-5250
[Telephone: (607) 723-5341]
jgleason@hhk.com