

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ROCHESTER GAS & ELECTRIC CORP.

and

Case 03-CA-025915

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

**CHARGING PARTY IBEW LOCAL 36'S SUBMISSION IN SUPPORT OF GENERAL COUNSEL'S
MOTION FOR SUMMARY JUDGMENT, AND IN OPPOSITION TO ROCHESTER GAS
& ELECTRIC CORP.'S MOTION FOR SUMMARY JUDGMENT**

1. The Charging Party, Local 36, International Brotherhood of Electrical Workers, AFL-CIO (the "Union"), by its attorneys Blitman & King LLP, makes this submission in support of General Counsel's January 27, 2016 Motion for Summary Judgment and in opposition to Rochester Gas & Electric Corp.'s ("Rochester Gas") January 27, 2016 Motion for Summary Judgment.

2. By decision dated January 17, 2013, the Second Circuit Court of Appeals enforced the Board's August 16, 2010 Order "in its entirety" and denied Rochester Gas's petition for review. *Local 36 IBEW v. NLRB*, 706 F.3d 73, 79 (2d Cir. 2013). The Court of Appeals discussed in detail the Board's remedy modeled after *Transmarine*, particularly the twin purposes of making employees whole for their losses and supplying bargaining leverage to the union. *Id.* at 78-79 and notes 1 and 16. And the Court of Appeals expressly endorsed the commencement of this *Transmarine*-modeled remedy "five business days after the date of the Board's decision . . ." *Id.* at 90-91. The Court of Appeals "affirm[ed] the determination of the Board with regard to its chosen remedy." *Id.* at 91. Accordingly, the Compliance Specification

properly alleges the back pay period commenced August 23, 2010. (As explained in Exhibit L (at page 3) to Rochester Gas's affidavit in support of its motion, a dispute arose as to the ending date of the back pay period. The Region resolved that against the Union with an ending date of August 22, 2014. That date is not challenged in either motion).

3. In its answer to the compliance specification (First Affirmative Defense) and in its Motion, Rochester Gas contends that it had no back pay obligation until after the Supreme Court denied certiorari on July 1, 2014, 4 years after the Board's 2010 Order. This contention cannot be accepted by the Board. It is contrary to well-established law holding that a court-enforced order cannot be modified by the Board. Moreover, the issue Rochester Gas seeks to raise – the appropriateness of the remedy ordered by the Board - is resolved against it by the proceedings below and for that reason as well may not be re-litigated now. *M.D. Miller Trucking & Topsoil, Inc.*, 363 NLRB No. 49 (2015), slip opinion at 2. Rochester Gas argues alternatively in its Motion the period between February 8, 2013 (when the Second Circuit stayed its mandate) and July 1, 2014 (when the Supreme Court denied certiorari and the Second Circuit issued its mandate) should be excluded from the back pay period. Neither claim has merit as a matter of law.

4. The Board cannot modify its enforced Order. As the Board explained in *Regional Import & Export Trucking*, 323 NLRB 1206, 1207 (1997):

Under Section 10(e) of the Act, on the filing of the record with the court of appeals, the jurisdiction of the court of appeals is exclusive and its judgment and decree is final, subject to review by the Supreme Court. *Haddon House Food Products*, 260 NLRB 1060 (1982). Here, as noted above, the Board's Order has already been enforced and accordingly we no longer have jurisdiction to modify that Order. The Third Circuit's decision enforcing the Board's finding of joint and several liability is the law of the case and we cannot now absolve the Respondent Union from that liability. For these reasons, we reject the

Respondent Union's offset methods (1) and (2) and deny the Respondent Union's motion to reconsider and modify the 1988 Order.

5. Similarly, in *Atlantic Veal & Lamb*, 29-CA-24484 (August 23, 2012), the Board denied the employer's motion for reconsideration of a make-whole remedy for the discriminatee. The employer argued that the Board's second supplemental decision and order in the case found that the discriminatee lied to someone about his interim earnings and that this should negate the credibility findings in the underlying case. The Board rejected this invitation to reconsider its original decision:

We lack jurisdiction to grant the Respondent's motion. As stated above, the Board's order in the underlying case has been enforced by the D. C. Circuit. The court's judgment and decree are final, subject only to Supreme Court review. See, e.g. *Grinnell Fire Protection Systems Co.*, 337 NLRB 141, 142 (2001) (Board has no jurisdiction to modify a court-enforced Order); *Regional Import & Export Trucking Co.*, 323 NLRB 1206, 1207 (1997) (same). Accordingly, the Board's finding that the Respondent unlawfully discharged [the discriminatee] is the law of the case.

Id. at page 2.

6. In *Scepter Ingot Castings, Inc.*, 341 NLRB 997, 997 (2004), enforced 280 F.3d 1053 (D.C. Cir. 2002) the employer in the underlying proceeding was found to have violated Section 8(a)(5) by unilaterally instituting a wage increase and an employee contribution to health care coverage. The Board ordered the employer to rescind both the changes upon union request. The Board's order was enforced in its entirety by the D.C. Circuit. In the resulting compliance proceeding, the employer argued it should have an offset against the employee insurance contribution in the amount of the greater wage increase. The Board refused the request. It held that it had "no jurisdiction to modify" its order because it had been enforced by the court,

“regardless of the merits” of the requested modification. The Board cited a number of precedents and Section 10(e) of the Act in support of its ruling.

7. To the same effect more recently is *New York Party Schuttle, LLC*, 2015 NLRB LEXIS 449, 2015 WL 3732893*n.3 (Case 02-CA-073340, June 15, 2015) (Board has no authority to disturb its court-enforced order). See also *M.D. Miller Trucking, supra*, citing with approval on a related point *Convergence Communications, Inc.*, 342 NLRB 918, 919 (2004) (Board has no jurisdiction to modify a court-enforced Board order).

8. In its Second and Third Affirmative Defenses, Rochester Gas contends that holding it to back pay prior to July 1, 2014 is an impermissible penalty and does not effectuate the Act, because it had initiated review proceedings during that time. See Rochester Gas’s Brief at Point I. This claim turns the law on its head.

Section 10(g) of the Act provides:

The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as stay of the Board’s order.

Early on, the Sixth Circuit addressed a claim such as that made here and squarely rejected it. The employer respondent in that case sought review of the Board’s order. The employer had refused to bargain with the union after filing the petition for review which was pending in the circuit court. The court stated that the employer’s position was “based upon an erroneous view of the law.” The court went on to specifically state that “the filing of a petition for review of an order of the Labor Board does not operate as a stay of the Board’s order”, consistent with Section 10(g). *Old King Cole v. NLRB*, 260 F.2d 530, 532 (6th Cir. 1958). Accord,

NLRB v. Winn- Dixie Stores, Inc., 361 F.2d 512, 516 (5th Cir. 1966); *NLRB v. Intalco Aluminum Corp.*, 446 F.2d 1232, 1234 n.3 (9th Cir. 1971).

The Board has said the same thing. In *Bob's Big Boy Family Restaurants*, 264 NLRB 432, 434 (1982), the Board stated:

There is no merit to the argument that a party's duties under the Act are suspended or relieved because litigation is pending before the court of appeals . . .

Accord, Wells Fargo Armored Service Corp., 300 NLRB 1104, 1109 (1990).

9. Federal Rule of Appellate Procedure 18 provides the procedure for seeking a stay of the Board's order pending review by the court. The motion must first be made to the agency, then if denied, to the court. No such motion was made by Rochester Gas. In fact, as noted *infra*, it endorsed the Board's remedy before the court. It could not make this claim before the court now, having failed to raise it in its brief to the court seeking review. *See NLRB v. Star Color Plate Serv.*, 843 F.2d 1507, 1510 n.3 (2d Cir. 1988), *cert. denied* 488 U.S. 828 (1988) (Court rejected issue being raised by the petitioner, on two independent bases: failure to raise it in the original brief to the court, and failure to raise it before the Board).

10. In its Reply Brief (Document "1" hereto) filed in the Second Circuit review proceeding, Rochester Gas stated that if the violation found by the Board was affirmed, "affirmance of the Board's remedy is proper." Reply Brief at 10. When Rochester Gas was unsuccessful in the Second Circuit on its petition for review, it moved to stay the court's mandate pending filing of its petition for certiorari. In that application at page 15 (Document "2" hereto), Rochester Gas stated:

Further, the union and the Board will not be harmed by the stay. The Board will retain its ability to ultimately enforce its order if the petition [for writ of certiorari] is not granted.

11. Apropos this issue, in a *Transmarine* remedy case, *Comar, Inc.*, 349 NLRB 342 (2007) (“*Comar II*”), the Board proceeded to calculate the *Transmarine* back pay owing under its original order in the case from the date of the earlier order. Inasmuch as the Board’s original order had been enforced by the D. C. Court of Appeals without modification, the make whole relief ran from the time stated in that order, i.e., five business days from the date of the Board’s original decision on July 31, 2003 (339 NLRB 903). (Attached as Document “3” is the court’s mandate denying the petition for review on May 19, 2004). In the subsequent related proceeding, the compliance specification sought *Transmarine* back pay commencing on August 5, 2003, i.e., five days after the Board’s original decision. (Attached as Document “4” is the applicable paragraph of the compliance specification in that case, at page 9 (paragraph 11(a))). The Board in *Comar II* awarded the *Transmarine* back pay for the time period sought in the specification. 349 NLRB 342, 356 and fn. 29 (2007).

12. Rochester Gas alternatively claims the time during which the Second Circuit stayed its Mandate should be excluded from the back pay period. Rochester Gas alleges in its Motion (see Brief at Point II) that the “Second Circuit . . . stay[ed] execution of its decision” pending the application for certiorari. This is a misguided effort to parlay the Second Circuit’s stay of its Mandate into a stay of the Board’s order. See Rochester Gas’s Brief at 5 (“the Board’s order was stayed during that time.”) The bald claim that the court “stayed its decision” is simply not true, and misapprehends the purpose and effect of the stay of mandate. Rochester Gas posits that the “Second Circuit recognized that its decision created a split among

the circuit courts and stayed its own Mandate . . .” Brief at 5. Contrary to that assertion, there was no conflict with such cases as *Enloe Med. Ctr. v. NLRB*, 433 F.3d 834 (D.C. Cir. 2005) (the circuit where Rochester Gas unsuccessfully sought to obtain review, see *Local Union 36, IBEW v. NLRB*, 631 F.3d 23 (2d Cir. 2010), finding Rochester Gas failed to satisfy the statutory requirements under 28 U.S.C. §2112(a) when it sought to obtain review in the D.C. Circuit). Both *Enloe* and this case turned on a contract analysis of the particular contract terms at issue. The Second Circuit did not cite any purported conflict in the circuits in granting the stay of mandate, notwithstanding Rochester Gas’s musings, and the Supreme Court denied certiorari without comment either.

The procedure for a circuit court to stay its mandate is set forth in Federal Rule of Appellate Procedure 41. After a decision and judgment issues from the court, the case remains in that court's jurisdiction until the court takes the pro forma step of issuing the mandate. Thus, “issuance of the mandate ends the jurisdiction of the circuit court and returns jurisdiction to the district court”, Moore’s Federal Practice 2D §341.02, or in this case to the Board. This document is usually just a copy of the judgment previously filed, with the word "MANDATE" stamped on it. (This is what was done here). This is the device by which the court closes the appeal and transfers the case back to the lower court, or in this case to the agency. See generally **the Appellate Mandate: What it is and Why it Matters**", at 1 (ABA Section of Litigation Appellate Practice Committee, Winter 2012, Vol. 31 No. 2)¹. It is not a stay of the decision of the circuit court.

¹ Copy submitted as Document “5”.

The Second Circuit described it thusly:

The effect of the mandate is to bring the proceedings in a case on appeal in our Court to a close and to remove it from the jurisdiction of this Court, returning it to the forum whence it came.

Sorter v. U.S., 584 F.2d 594, 598 (2d Cir. 1978).

13. FRAP 41 provides for a stay of mandate where a petition for rehearing to the circuit court is timely filed (Rule 41(d)(1)) or where an application for certiorari is being filed (Rule 41(d)(2)). In such instances, a stay keeps the case at the circuit court so the Board will not initiate further proceedings while further review is attempted by the respondent. This is simply a jurisdiction mechanism, not a revisiting or nullifying of the court's decision.

14. Nor is a stay of mandate a stay of the court's judgment. If a respondent believes it has sufficient grounds to not comply with the court's judgment, "[it's] only proper recourse [is] in timely fashion to petition [the] court for modification of its clear mandate." *NLRB v. Mastro Plastics Corp.*, 261 F.2d 147, 148 (2d Cir. 1958) (holding employer in contempt for failing to comply with the court's order in *NLRB v. Mastro Plastics Corp.*, 214 F.2d 462 (2d Cir. 1954), affirmed, 350 U.S. 270 (1956)).

15. The above cases support the Region's motion for summary judgment and require denial of Rochester Gas's motion. The make whole relief under the Board's order must commence five business days after the Board's August 16, 2010 decision. Rochester Gas cannot challenge the start of the back pay period five business days after the Board's decision, because that is now a court-enforced liability, and neither the Board nor the Second Circuit stayed the Board's Order while Rochester Gas unsuccessfully sought to overturn that Order.

Dated: February 2, 2016

Respectfully submitted,

BLITMAN & KING LLP

By: _____


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ldm/jrl/nlrbaautos/motion for sj 2-2-2016

Statement of Service

I hereby certify that on February 2, 2016, I electronically filed Charging Party's Submission in Support of Counsel for General Counsel's Motion to Transfer Proceedings to the Board for Summary Judgment, and in Opposition to Respondent Rochester Gas & Electric Corp.'s Motion for Summary Judgment, in case 03-CA-025915 using the NLRB E-Filing System, and I hereby certify that I served copies of the same documents via electronic mail (e-mail) to James S. Gleason (jgleason@hhk.com), Counsel for Respondent, and Linda M. Leslie, Esq., (Linda.Leslie@NLRB.gov), Counsel for the General Counsel.

Dated at Syracuse, New York this 2nd day of February, 2016.

Respectfully submitted,

/s/ James R. LaVaute

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Document "1"

10-3448-ag
11-0247-ag, 11-0329-ag

United States Court of Appeals
for the
Second Circuit

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

Petitioner,

ROCHESTER GAS & ELECTRIC CORPORATION,

Petitioner-Cross-Respondent,

- v. -

NATIONAL LABOR RELATIONS BOARD,

Respondent-Cross-Petitioner.

ON PETITION FOR ENFORCEMENT OF AN ORDER
OF THE NATIONAL LABOR RELATIONS BOARD

REPLY BRIEF FOR PETITIONER-CROSS-RESPONDENT

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**POINT IV.
IF A REMEDY IS TO BE AWARDED, THE BOARD'S
REMEDY SHOULD BE AFFIRMED**

RG&E asserts that there has been no violation of the Act. However, assuming arguendo that this Court finds to the contrary, the Board's remedy was appropriate. The Union seeks both a make-whole remedy and the full *Transmarine* remedy. Such an award would be punitive and unwarranted on the facts in this case. *See Yorke v. NLRB*, 709 F.2d 1138, 1146 (7th Cir. 1983) ("make whole" orders should be issued only when the employer has no 'debatable' defense for its refusal to bargain."). This is not appropriate under the facts of this case. The Board has continually held that the appropriate remedy for an effects bargaining violation is the remedy set out in *Transmarine Navigation Corp.*, 170 N.L.R.B. 389 (1968). *AG Comm'rs Systems Corp.* 350 N.L.R.B. 173, 173 *enf'd sub. nom. IBEW, Local 21 v. NLRB*, 563 F.3d 418 (9th Cir. 2009); *Odebrecht Contractors of California, Inc.*, 324 N.L.R.B. 396 (1997). Courts have blessed the appropriateness of a *Transmarine* remedy as well. *See IBEW, Local 21 v. NLRB*, 563 F.3d 418, 423-24 (9th Cir. 2009) (*Transmarine* remedy is standard remedy for failure to bargain over the effects of a decision); *NLRB v. Pan Am Grain Co.*, 432 F.3d 69, 72-73 (1st Cir. 2005) (*Transmarine* remedy is proper where employer breaches only duty to bargain over effects).

When fashioning a remedy for an effects bargaining violation, the Board can exercise its discretion and take into account the particular circumstances of the case. See *Yorke*, 709 F.2d at 1144-45, citing, *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 9-13 (1940) (“the Board is given wide leeway in fashioning remedies” as long as the remedy effects the remedial policies of the Act); *AG Comm’rs Systems Corp.* 350 N.L.R.B. at 173 (“in fashioning a remedy for an effects bargaining violation, the Board may consider any particular or unusual circumstances of the case.”).

In *AG Comm’rs Systems Corp.*, the Board declared that “the purpose of our [*Transmarine*] remedy is not to punish a respondent for its misconduct, but to expunge the actual consequences of the unfair labor practice.” *AG Comm’rs Systems Corp.*, 350 N.L.R.B. at 174. In affirming the Board, the Ninth Circuit reasoned that the Board had legitimate reasons for limiting the remedy, “including preventing a back pay windfall to fully employed and represented installers.” *IBEW, Local 21*, 563 F.3d at 425.

In this case, the only consequence of the alleged unfair labor practice is that employees are not able to use a Company vehicle to commute to and from work. Thus, the Board’s remedy requiring RGE to pay “the monetary value of the vehicle benefit,” squarely addresses the consequence of the alleged violation and makes the employees whole for the whatever arguable losses they suffered. J.A. at 237.

Without citing a single case in support, the Union maintains the erroneous position that the Company vehicle policy constituted wages and compensation. The Board properly held that it viewed RGE's decision as resulting in increased commuting costs (J.A. at 237), not as affecting employees' compensation.

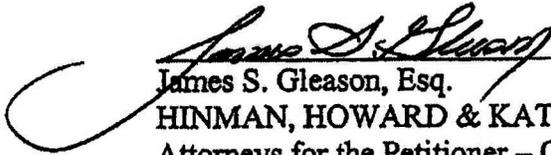
The reporting requirements of the Internal Revenue Service do not necessitate a different outcome. The Internal Revenue Service requires that when an employer provides a Company vehicle for commuting to and from work, the employer must withhold a certain amount from the employee's wages. *IRS Pub. 15-B* (2011). RGE merely complied with the IRS regulations. The fact that RGE followed a mandatory withholding law does not mean that RGE viewed the Company Vehicle Policy as income to RGE employees.

Therefore, while RGE maintains that there was no effects bargaining violation, if this Court finds one to have occurred, affirmance of the Board's remedy is proper.

CONCLUSION

The Board has overstepped its bounds in this case. Whether the Court finds that the Union has waived its right to effects bargaining or that effects bargaining is simply not appropriate for this type of decision, the Board's Decision should be reversed. The Union should not be allowed to recoup a right it has bargained away under the guise of effects bargaining.

Dated: Binghamton, New York
June 2, 2011


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Document "2"

Nos. 10-3448, 11-274, 11-329

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

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

ROCHESTER GAS & ELECTRIC CORP.,
Petitioner-Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent-Cross Petitioner.

**APPLICATION TO STAY MANDATE PENDING FILING OF PETITION
FOR CERTIORARI**

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Further, the Union and the Board will not be harmed by the stay. The Board will retain its ability to ultimately enforce its order if the petition is not granted.

There is no danger RG&E will not be available to effects bargain once the

Supreme Court has ruled. This is a case where the balance of the equities tips

“heavily” in favor of granting a stay.

CONCLUSION

For the foregoing reasons, RG&E respectfully requests that this Court grant their motion for a stay of the mandate pending the Supreme Court’s decision on RG&E’s pending petition for writ of certiorari.

Dated: January 29, 2013
Binghamton, New York

Respectfully submitted,

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Document "3"

4-CA-28570

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No: 03-1253

September Term, 2003

COMAR, INC.,

PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT

UNITED STEELWORKERS OF AMERICA,
INTERVENOR

Consolidated with No. 03-1354

UNITED STATES COURT OF APPEALS FOR DISTRICT OF COLUMBIA CIRCUIT	
FILED	MAY 19 2004
CLERK	

MANDATE	
Pursuant to the provisions of Fed. R. App. Proc. 41(b)	
ISSUED:	MAY 19 2004
BY:	M. D. W. [Signature]
ATTACHED:	<input type="checkbox"/> Assigning Order <input type="checkbox"/> Opinion <input type="checkbox"/> Order on Costs

**On Petition for Review and Cross-Application for Enforcement
of an Order of the National Labor Relations Board**

Before: RANDOLPH, TATEL, and GARLAND, Circuit Judges.

JUDGMENT

This petition for review was considered on the record from the National Labor Relations Board and the briefs of the parties. It is

ORDERED AND ADJUDGED that the petition for review be denied, and the cross-application for enforcement be granted.

Substantial evidence exists showing that the historically recognized bargaining unit at Comar's Vineland facility remained appropriate after its relocation to the Buena facility: the former Vineland applicator division employees continued to

A True copy:

United States Court of Appeals
for the District of Columbia Circuit
By: [Signature] Deputy Clerk

- 2 -

perform the same work under essentially the same supervision; they did so in a separate room in a building apart from the Buena finishing department employees; the skill levels and tasks of the applicator division employees remained distinct from those of the Buena finishers; and the two departments serviced different customers with different needs and product requirements. Comar itself recognized the separate identity of the relocated applicator division, notifying the employees that the unit would be moved "like a beehive" and assuring its customers that nothing about the operation would change upon relocation.

These facts "provide[] ample support for the Board's conclusion that the basic character of the work environment was not fundamentally changed by the relocation," *Leach Corp. v. NLRB*, 54 F.3d 802, 809 (D.C. Cir. 1995), and that the bargaining unit was not accreted into the existing finishing department. See *Int'l Ass'n of Machinists v. NLRB*, 759 F.2d 1477, 1479-80 (9th Cir. 1985) (factors considered in accretion determination include functional integration of business, similarity of working conditions, collective bargaining history, degree of employee interchange between the groups, geographical distance, similarity of job classifications and skills, etc.); see also *Trident Seafoods, Inc. v. NLRB*, 101 F.3d 111, 118-19 & n.13 (D.C. Cir. 1996). There is substantial evidence that Comar essentially moved the applicator division unit - virtually intact - to another location without a well-defined plan or timetable for achieving functional integration. Comar then refused to recognize the union that represented the unit employees and unilaterally made changes to the wages, benefits and other conditions of their employment. Substantial evidence also supports the Board's determination that Comar failed to provide the union with requested information about the relocation.

We conclude that the Board reasonably determined, based on substantial evidence, that Comar violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5) & (1), by failing to bargain in good faith about the effects of the relocation. Moreover, the Board did not abuse its discretion in denying Comar's motion to reopen the record and deferring to a subsequent compliance proceeding Comar's claim of post-hearing operational changes. See *Great Lakes Chemical Corp. v. NLRB*, 967 F.2d 624, 629-30 (D.C. Cir. 1992).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after

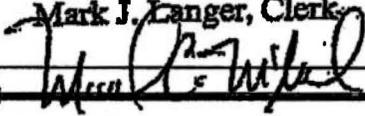
- 3 -

resolution of any timely petition for rehearing or rehearing en banc. See FED. R. APP.
P. 41(b); D.C. CIR. R. 41.

FOR THE COURT:

Mark J. Langer, Clerk

BY:


Michael C. McGrail
Deputy Clerk

Document “4”

JUDGES COPY

MASTER CONSOLIDATED BACKPAY SPECIFICATION

and

Cases 4-CA-28570 and
4-CA-33903

UNITED STEEL, PAPER AND FORESTRY,
RUBBER, MANUFACTURING, ENERGY,
ALLIED INDUSTRIAL AND SERVICE
WORKERS INTERNATIONAL UNION,
AFL-CIO f/k/a AMERICAN FLINT GLASS
WORKERS UNION OF NORTH AMERICA,
AFL-CIO

COMPLIANCE SPECIFICATION AND NOTICE OF HEARING

The National Labor Relations Board, herein called the Board, issued its Decision and Order, herein called the Board's Order, in this matter on July 31, 2003 (339 NLRB 903), directing Comar, Inc., its officers, agents, successors, and assigns, herein called Respondent, *inter alia*, to:

rescind the unlawful changes made in the terms and conditions of employment of the unit employees; make whole certain unit employees who accepted transfers to Respondent's Buena, New Jersey facility, herein called Class A employees, Kristie Armstrong, Ruth Benowitz, Barbara Bryant, Linda Caudill, Mary Cione, Lea Clark, Margaret Creelman, Sarah Hannah, Beatrice Ingegneri, Norma Loatman, Carole Loguidice, James Massey, Doris McGaha, Michael Munson, Rita Ojeda, Arlene Pollock, Joe Anne Saul, Florence Simione, Debra Stamm, Lenell Stewart, and Joy (Ballurio) West, herein also called Armstrong, Benowitz, Bryant, Caudill, Cione, Clark, Creelman, Hannah, Ingegneri, Loatman, Loguidice, Massey, McGaha, Morgan, Munson, Ojeda, A. Pollock, Saul, Simione, Stamm, Stewart, and West, for any loss of earnings or benefits they suffered as a result of the unlawful changes made in the terms and conditions of their employment after the transfers;

offer discharged unit employees Theresa Capaldi, Judith Carney, Shelley Carney, Nancy Fairman, Vessi Gargoff,¹ John Gray, Catherine Guilford, Michele Guilford, Sheila Heck, Robert Joslin, Latanya Mack, Gail Paulaitis, Ella Percev, Linda Pierce, Helena Pollock,² Ingrid Regalbuto, Rhonda Rio, Sandra Thurston, June Walko, Alice Weddington, and Anthony Wiessner³ herein called Capaldi, J.

¹ The Administrative Law Judge misspelled Vessi Gargoff's name as Vessi Garoff.

² The Administrative Law Judge misspelled Helena Pollock's name as Helena Pollack.

³ In his Decision, the Administrative Law Judge included Barbara Brett, Gregory Campbell, and James Smart in the list of employees to be reinstated and made whole. Upon investigation in the compliance phase, it was determined

7. For all employees, calendar quarter net interim earnings is the difference between calendar quarter interim earnings and the sum of calendar quarter interim expenses and PTO deductions from interim earnings.

8. For all employees, calendar quarter net backpay is the difference between calendar quarter gross backpay and calendar quarter net interim earnings.

9. ~~Calendar quarters are omitted for those quarters during which no net backpay is due.~~

10. The total net backpay due each discriminatee is the sum of the calendar quarter amounts of net backpay, 401(k) contributions and associated penalties, medical benefits and life insurance benefits due.

11. (a) Respondent's liability for backpay pursuant to the *Transmarine* remedy to Armstrong, Benowitz, Bryant, Capaldi, J. Carney, S. Carney, Caudill, Cione, Clark, Creelman, Fairman, Gargoff, Gray, C. Guilford, M. Guilford, Hannah, Heck, Ingegneri, Joslin, Loatman, Loguidice, Mack, Massey, McGaha, Morgan, Munson, Ojeda, Paulaitis, Percev, Pierce, A. Pollock, H. Pollock, Regalbutto, Rio, Saul, Simone, Stamm, Stewart, Thurston, Walko, Weddington, West, and Wiessner commenced on August 5, 2003, on which date, as found by the Board, Respondent was obligated to commence bargaining with the Union on those subjects pertaining to the effects of the relocation of the unit employees from Vineland, to Buena, New Jersey. Respondent's liability for backpay pursuant to the *Transmarine* remedy continues to the present time, except with respect to Capaldi, Cione, Gray, M. Guilford, Paulaitis, Percev, Stewart, Thurston, and Weddington.

(b) Capaldi, Gray, Paulaitis, Percev, Thurston, and Weddington ceased seeking equivalent employment prior to August 5, 2003, and, therefore, are entitled to the minimum *Transmarine* remedy of two weeks backpay (defined as 80 hours) at the rate of their normal wages when last in Respondent's employ at Vineland, New Jersey. The amounts due Capaldi, Gray, Paulaitis, Percev, Thurston, and Weddington are entered in the appropriate sections of Appendix D.

(c) M. Guilford died prior to August 5, 2003, and, therefore, her estate is entitled to the minimum *Transmarine* remedy of two weeks backpay (defined as 80 hours) at the rate of her normal wages when last in Respondent's employ at Vineland, New Jersey. The amount due M. Guilford is entered in the appropriate section of Appendix D.

(d) Cione's backpay period pursuant to the *Transmarine* remedy commenced on August 6, 2003, and ended on August 21, 2004, by which date she had retired from Respondent's employ.

(e) Stewart's backpay period pursuant to the *Transmarine* remedy commenced on August 6, 2003, and ended on November 5, 2003, by which date she had retired from Respondent's employ.

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ARTICLES

The Appellate Mandate: What It Is and Why It Matters

By Jennifer L. Swize

Just the other day, a trial team handling post-appeal matters on remand wanted to know the significance of the “mandate” that the court of appeals had issued. As those lawyers recognized, the critical stages of an appeal are typically thought of as briefing, presenting oral argument, and then waiting for a decision from the court. Once the decision issues, and assuming no party intends to seek rehearing, the appeal is generally considered over. But it is not. Even then, the case remains under the appellate court’s jurisdiction until it is officially closed, usually weeks or months after the decision was rendered. That necessary, final step is marked by issuance of the mandate.

In that sense, the mandate is merely a ministerial chore that has little consequence other than formally ending the appeal. But the mandate is important to remember because it affects when, and what, further action may be taken in a case. Importantly, if the appellate relief includes proceedings on remand, the mandate defines the scope of those proceedings.

This refresher on the appellate mandate addresses its basic, procedural aspects, as well as the substantive consequences of its issuance.

The Nuts and Bolts of an Appellate Mandate

At its most basic, the mandate is the device by which an appellate court closes an appeal and transfers jurisdiction to another court. Federal Rule of Appellate Procedure 41, with any modifications by local rule, governs procedural aspects of the mandate.

What the Mandate Looks Like

The mandate is usually an unassuming document. While an appellate court may prepare a new document to serve as the formal mandate, most courts simply issue the mandate by re-issuing other orders from the appeal. Rule 41 establishes this default procedure: “Unless the court directs that a formal mandate issue, the mandate consists of a certified copy of the judgment, a copy of the court’s opinion, if any, and any direction about costs.” Fed. R. App. P. 41(a). To make clear that the re-issued documents are the mandate, the court may stamp them as “mandate” or “issued as a mandate.” *See, e.g., United States v. Rivera*, 844 F.2d 916, 920 (2d Cir. 1988) (citations omitted) (explaining that “the clerk of the court signs her name on a copy of the judgment or order that is stamped ‘MANDATE’ at the top of the first page and ‘true copy’ at the bottom of the last page”). Unless extraordinary circumstances warrant judicial involvement, the clerk’s office, rather than a judge, prepares and issues the mandate.

When the Mandate Issues

Rule 41 governs the date the mandate issues, which is some time after the appellate judgment is



entered. The particular date depends on whether certain post-judgment filings are made—in particular, a petition for rehearing (whether panel or en banc) or a motion to stay the mandate. Where no party seeks either form of relief, the mandate “must issue 7 days after the time to file a petition for rehearing expires.” Fed. R. App. P. 41(b). The result of this 7-day period, in conjunction with the typical 14-day period under Rule 40 for filing a rehearing petition, is that the mandate usually issues 21 days after judgment if no party seeks rehearing or a stay of the mandate. (If it is a civil case in which the United States is involved, 45 days for any party to petition for rehearing are permitted, delaying the mandate’s issuance until 52 days after judgment.) By local rule, however, an appellate court may establish a different time for filing a rehearing petition and thus affect the date the mandate issues. *See, e.g.*, Fed. Cir. R. 40(e) (allowing 30 days for civil cases not involving the United States); D.C. Cir. R. 35(a) (same).

If a party seeks either a rehearing or a stay of the mandate, those requests automatically stay issuance of the mandate. A rehearing petition automatically stays issuance until that request is denied or, if granted, until the rehearing proceedings conclude. *See* Fed. R. App. P. 41(b) (“The court’s mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later.”).

Other post-judgment actions do not automatically stay the mandate. For instance, a motion to extend the time to file a rehearing petition does not automatically stay issuance of the mandate. Thus, if an extension request is granted, and that period exceeds the date for issuance of the mandate, the mandate will likely issue, even though a timely filed petition would have automatically stayed the mandate.

Because the filing of a rehearing petition automatically stays issuance of the mandate, the period between entry of judgment and issuance of the mandate could be several months or more. The time of issuance depends on how quickly the court acts on the rehearing request and conducts any rehearing proceedings. But, whenever those matters run their course, the same 7-day default period applies.

Although the default period typically applies, Rule 41 gives a court the authority to “shorten or extend the time” for issuing the mandate. Fed. R. App. P. 41(b). Parties may ask a court to exercise this authority. For instance, prevailing parties, relying on their success on appeal and circumstances particular to the case, may request an accelerated issuance. And some courts, in their local rules, have identified situations that automatically trigger a shorter or longer period, such as requiring immediate issuance of the mandate in cases dismissed for failure to prosecute. *See* Fed. Cir. R. 41 (order dismissing a case for failure to prosecute constitutes the mandate); 5th Cir. IOP 41 (“by court direction, the clerk shall immediately issue the mandate when the court dismisses a case for failure to prosecute an appeal”); 7th Cir. R. 41 (“The mandate will issue immediately when an appeal is dismissed (1) voluntarily, (2) for failure to pay the docket fee,



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(3) for failure to file the docketing statement under Circuit Rule 3(c), or (4) for failure by the appellant to file a brief”).

Staying the Mandate Pending Supreme Court Review

Filing a petition for a writ of certiorari to the U.S. Supreme Court does not automatically stay the mandate. Nonetheless, certiorari petitions are a common basis for asking an appellate court to issue a stay. Rule 41 expressly contemplates such motions. A frequent reason for seeking a stay pending certiorari is where the relief on appeal includes a remand so that the remand proceedings do not begin before any Supreme Court review. But regardless of the strategic reason for seeking a stay, the party “must show that the certiorari petition would present a substantial question and that there is good cause for a stay.” Fed. R. App. P. 41(d)(2)(A). Some courts, by local rule, routinely deny requests for a stay based on a certiorari petition unless the petition is likely meritorious. *See, e.g.*, 4th Cir. R. 41 (“[o]rdinarily the motion shall be denied,” unless the party demonstrates that the motion “is not frivolous or filed merely for delay” and “present[s] a substantial question or set[s] forth good or probable cause for a stay”); *see also* 5th Cir. R. 41.1; 6th Cir. R. 41(a); 10th Cir. R. 41.1; 11th Cir. R. 41-1(a); D.C. Cir. R. 41(a)(2). If the appellate court grants the stay request, it may require the movant to secure the judgment by posting a bond or other security. And if the stay request is denied, the party may renew its request before the Supreme Court pursuant to Supreme Court Rule 23.

The longest stay that an appellate court can initially enter is 90 days from the date of judgment—which is the same period for seeking certiorari. *See* Fed. R. App. P. 41(d)(2)(A); *see also* Supreme Court Rule 13. If the party actually files a petition, it may obtain a further extension by notifying the appellate court within the period of the stay, and the stay would continue until the Supreme Court ultimately disposes of the case, either at the certiorari stage or on the merits. *See* Fed. R. App. P. 41(d)(2)(B). If the petition is granted, the appellate mandate issues, and jurisdiction is transferred to the Supreme Court. If the Supreme Court denies the petition, Rule 41 directs that the appellate court “must issue the mandate immediately.” Fed. R. App. P. 41(d)(2)(D).

The Seventh Circuit has identified several situations in which a stay request is not warranted, providing useful examples for litigants even in other courts. Stays pending certiorari may be denied where (i) the Supreme Court recently denied certiorari in a case on which the appellate court relied in the pending case (*Al-Marbu v. Mukasey*, 525 F.3d 497, 499–500 (7th Cir. 2008) (Ripple, J., in chambers)); (ii) the petition presents issues that were not preserved (*United States v. Warner*, 507 F.3d 508, 510–11 (7th Cir. 2007) (Wood, J., in chambers)); (iii) the petition does not present an issue of first impression or involve a circuit split (*Bricklayers Local 21 Apprenticeship & Training Program v. Banner Restoration, Inc.*, 384 F.3d 911, 912 (7th Cir. 2004) (Ripple, J., in chambers)); or (iv) the stay request does not show a likelihood of irreparable harm (*Indiana Protection & Advocacy Services v. Indiana Family & Social Services Administration*, 376 F. App'x 630 (7th Cir. 2010) (Hamilton, J., in chambers)).



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Recalling the Mandate

In extraordinary circumstances, an appellate court, by motion or on its own, may recall a mandate that has issued. Although Rule 41 does not expressly contemplate this authority and certain justices “have expressed doubt” about it, the U.S. Supreme Court has held that “the courts of appeals are recognized to have an inherent power to recall their mandates.” *Calderon v. Thompson*, 523 U.S. 538, 549 (1998). But, as the Supreme Court cautioned, because of “the profound interests in repose,” an appellate court is directed to “sparing[ly] use” this power, bearing in mind that “it is one of last resort, to be held in reserve against grave, unforeseen contingencies.” *Id.* Recall of the mandate is reviewed for an abuse of discretion. Among the extraordinary circumstances warranting recall are to resolve jurisdictional issues not previously raised so that the Supreme Court would not confront the issue for the first time without the benefit of a prior ruling on it, see *Alsamhoury v. Gonzalez*, 471 F.3d 209, 209–10 (1st Cir. 2006), and, less substantively but nonetheless important, to add instructions about post-judgment interest, see *Mars, Inc. v. Coin Acceptors, Inc.*, 557 F.3d 1377, 1378–80 (Fed. Cir. 2009).

Substantive Aspects of the Mandate

The mandate has substantive purposes as well. The mandate controls which court has jurisdiction over the case and what can further happen in the case. Particularly where the appellate court has ordered further proceedings, being aware of the mandate is critical to preparing for those proceedings.

The Mandate’s Effect on Jurisdictional Matters

Technically, an appellate decision is directed to the lower court from which the appeal arose so that the court can effectuate the appellate judgment. The mandate, therefore, transfers jurisdiction to the lower court to take that action. For instance, if a district court’s decision is affirmed on appeal, the mandate returns the case for entry of judgment to the prevailing party. The mandate terminates the appellate court’s jurisdiction, and that court cannot be asked for further relief.

Until the mandate issues, however, the appellate court’s judgment is not final, and that court retains jurisdiction to decide rehearing petitions or otherwise amend its opinion or judgment. During this same period before the mandate issues (and, indeed, since the initiation of the appeal), the district court lacks jurisdiction, except for matters unrelated to the merits of the appeal or that are merely procedural, such as requests for attorney fees and costs or conferences to schedule anticipated future proceedings.

The Mandate’s Effect on Remand Proceedings

The mandate’s substantive aspects are most noticeable when the appellate court orders further proceedings on remand. Once it receives the mandate, the district court may conduct those proceedings, but it must do so in accordance with what happened on appeal. Known as the “mandate rule,” the mandate informs the district court of what it must do to implement the appellate decision on remand and limits further proceedings to the scope of the mandate. The



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lower court “must comply strictly with the mandate rendered by the reviewing court” and “may not deviate” from the mandate. *Huffman v. Saul Holdings Ltd P’ship*, 262 F.3d 1128, 1132 (10th Cir. 2001); see also, e.g., *United States v. Rivera-Martinez*, 931 F.2d 148, 150 (1st Cir. 1991) (“When a case is appealed and remanded, the decision of the appellate court establishes the law of the case and it *must* be followed by the trial court on remand.” (emphasis in original)). Relatedly, the parties generally cannot raise issues on remand that were not raised in the initial appeal. See, e.g., *Engel Indus., Inc. v. Lockformer Co.*, 166 F.3d 1379, 1383 (Fed. Cir. 1999) (“An issue that falls within the scope of the judgment appealed from but is not raised by the appellant in its opening brief on appeal is necessarily waived.”).

The mandate rule is a form of law of the case—distinguished largely by its (almost-always) mandatory nature. Law of the case, a judge-made doctrine, generally refers to lower-court decisions that the court, in its discretion, may later change in subsequent rulings, although as “law of the case,” such decisions generally are adhered to throughout the district-court proceedings. The mandate rule is more exacting. As its name suggests, it is “mandatory” that the district court follow the appellate court’s rulings. The district court cannot take actions that are contrary to the mandate or revisit the appellate court’s conclusions. Thus, the issues decided by the appellate court and within the scope of the judgment are deemed incorporated within the mandate and precluded from further adjudication unless specifically remanded to the district court to address. *Engel Indus.*, 166 F.3d at 1382–84. The district court, however, has discretion to take actions consistent with or not covered by the mandate.

But as is often the case, even the “mandatory” nature of the mandate rule has exceptions. In certain narrow circumstances, the district court may revisit issues decided on appeal or covered by the mandate. For instance, the mandate may not preclude a district court’s reconsideration where there are subsequent factual discoveries or changes in the law. *Invention Submission Corp. v. Dudas*, 413 F.3d 411, 414–15 (4th Cir. 2005) (finding reconsideration of an appellate determination appropriate if there is a dramatic change in law, significant new evidence, or blatant error that would result in serious injustice); *EEOC v. Sears, Roebuck & Co.*, 417 F.3d 789, 796 (7th Cir. 2005) (finding reconsideration of an appellate determination appropriate where there has been an intervening change in law). Thus, the judge-made mandate rule is not wholly inflexible. *United States v. Bell*, 988 F.2d 247, 251 (1st Cir. 1993) (“After all, the so-called ‘mandate rule’ . . . is simply a specific application of the law of the case doctrine and, as such, is a discretion-guiding rule subject to an occasional exception in the interests of justice.”). For the vast majority of cases, however, the mandate rule limits the scope of what the district court may do on remand.

Often, appellate courts use general language in ordering remands, remanding for “further proceedings consistent with” or “not inconsistent with” its decision. If so, interesting and critical issues can arise about the scope of those proceedings. In these instances, the ministerial role of the mandate is significantly overshadowed by its ability to affect substantive issues in the case.



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Initially, it is up to the district court to determine the scope of the mandate, and the parties may want, or be asked, to present their views on what the district court may consider on remand. The ultimate determination, however, belongs to the appellate court—the court that issued the mandate. *See Engel Indus.*, 166 F.3d at 1382. Thus, an appellate court reviews de novo any district-court ruling on the scope of the mandate.

Conclusion

The mandate is often no more than the appellate court's opinion and judgment stamped with the word "mandate," and it issues at the end of an appeal, long after the hard work of briefing and argument is over. The mandate's effect on jurisdiction and further proceedings, however, makes it important to factor into the schedule and next steps of a case.

Keywords: litigation, appellate practice, Federal Rule of Appellate Procedure 41

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