

**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**

**GENERAL COUNSEL'S OPPOSITION TO  
RESPONDENT'S MOTION FOR SUMMARY JUDGMENT**

**I. Introduction**

All parties agree the sole issue in this compliance proceeding is when the limited Transmarine Navigation Corp., 170 NLRB 389 (1968) backpay remedy began.<sup>1</sup> The General Counsel submits that this issue is easily resolved as the Board ordered the backpay remedy to commence five days after the date of its Order. (Motion GC Exh. A). Rochester Gas and Electric Corporation (Respondent) argues otherwise, contending that the remedy should be tolled during the period in which it unsuccessfully sought to overturn the Board's Order by seeking review from the United States Court of Appeals for the Second Circuit and the U.S. Supreme Court. Rather than overturning the decision, the Second Circuit enforced the Board's Decision and Order in full. (Motion GC Exhs. B and E). Since the Second Circuit did not modify the Board order in any way, including the remedy date, backpay starts 5 days after the Board Order issued, as the enforced Order states.

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<sup>1</sup> The parties agree that the backpay period ends on August 22, 2014, the date on which the Acting Regional Director determined that the Union had not responded to Respondent's request for effects bargaining.

**II. Respondent's Motion Should Not be Granted For The Board's Order Was Not Modified or Stayed**

As more fully set forth in Counsel for the General Counsel's previous submissions in support of General Counsel's Motion for Summary Judgment, Respondent's arguments to delay the start date of the backpay are not supportable. Respondent cites for support of its contentions, Yorke v. NLRB, 709 F.2d 1138 (7th Cir. 1983). That case is distinguishable because the Board's Order was modified by the Seventh Circuit which altered the start date of the Transmarine remedy. Here the Second Circuit did not modify the start date or any other aspect of the Board's Decision and Order. As noted above, the Second Circuit enforced the Board's Decision and Order in full. At this juncture, under Section 10(e) of the Act, once a court of appeals enforces the Board's Order it cannot be modified by the Board. Haddon House Food Products, 260 NLRB 1060, 1060 (1982).

Correspondingly, Respondent's argument that the Second Circuit's review of the decision tolls the backpay period is not supported by any relevant authority. Under Section 10(g) of the Act, simply seeking review with a court of appeals does not operate as a stay of the Board's Order. Rather, a specific court of appeals' order is necessary. See e.g., Ken Lee, Inc. 137 NLRB 1642, 1646-1647 (1962) (holding that filing a petition for review of an order of the Board does not operate as a stay of the Board Order). Respondent did not seek a stay of the Board's Order from the Second Circuit pursuant to Federal Rule of Appellate Procedure 18. Instead, Respondent was granted a stay of the

Second Circuit's mandate pursuant to Federal Rule of Appellate Procedure 41(d), which does not operate to stay the Board's Order.<sup>2</sup>

Contrary to Respondent's assertions, the Second Circuit's stay of its mandate, does not impact the operability of the Board's Order. As more fully set forth in General Counsel's motion for summary judgment, the continued efficacy of the Board's Order is illustrated by the Board's finding in Louisiana Industries, Inc., 182 NLRB 976, 980 fn. 16 (1970), that the Respondent's unilateral changes were unlawful although when implemented, the Respondent was seeking Supreme Court review of the Board's decision that the union was the exclusive bargaining representative of the bargaining unit.

The fact that the Board ordered implementation date for the backpay remedy remains in effect despite court review, is further established by the Seventh Circuit's decision in NLRB v. Emsing's Supermarket, Inc., 872 F.2d 1279 (7th Cir. 1989). In Emsing Supermarket, the Seventh Circuit refused to modify the Board-ordered start date for a Transmarine backpay remedy. Id. at 1290-1291. Here, as in Emsing Supermarket, the Board ordered the backpay remedy to begin five days after the date of its Decision and Order. Id. at 1290. In enforcing the Board's Order, the Seventh Circuit found, that absent an exception, the Transmarine backpay remedy is appropriately calculated from the date of the Board's decision. Id. at 1291. Here, the Second Circuit neither modified the Board-ordered implementation date nor did it note any exceptions. Accordingly, the start date remains as specified by the Board. Thus, any arguments Respondent makes that

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<sup>2</sup> Respondent's motion for a stay of the mandate was filed on January 31, 2013 in the Second Circuit, which is located on the "PACER" electronic filing system for the Second Circuit as Document Number No. 227 in the online docket for case number 10-CV-3448-ag, 11-247-ag, 11-329-ag in the action entitled, Rochester Gas and Electric Corporation v. National Labor Relations Board.

this case is novel and therefore warrants an exception, fails because the Second Circuit did not note any exceptions to the start date.

Finally, Respondent asserts that it is being assessed a punitive fine because it chose to appeal the Board's decision where there were debatable issues of law. This argument is unpersuasive as the law is not uncertain. It is well settled that an employer's failure to bargain with the union over the effects of its decision results in a Transmarine remedy. Accordingly, the Board found Respondent violated Section 8(a)(5) of the Act because it failed to engage in lawful effects bargaining. Unlike the cases cited by Respondent, e.g., Ex-Cello-Corp., 185 NLRB 107 (1970) reversed by 449 F.2d 1046 (D.C. Cir. 1971), involving debatable issues regarding monetary losses caused by an employer challenging the union's certification, this case involves parties in a mature, long-standing bargaining relationship concerning the issue of implementation of the Board's Order.

### **III. Conclusion**

Based on the foregoing and as more fully detailed in General Counsel's motion for summary judgment, the General Counsel submits that as a matter of law the backpay period started five days after the date of the Board's Decision and Order in the underlying case. Accordingly, the General Counsel respectfully requests that, in accordance with Section 102.24(b) and 102.59 of the Board's Rules and Regulations, the Board issue a Supplemental Decision and Order granting summary judgment in the General Counsel's favor.

**DATED** at Buffalo, New York this 21st day of March 2016.

Respectfully submitted,

/s/ Linda M. Leslie

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## STATEMENT OF SERVICE

I hereby certify that on March 21, 2016, Counsel for the General Counsel's Opposition to Respondent's Motion for Summary Judgment was filed in case 03-CA-025915 using the NLRB E-Filing System, and hereby certify that copies of the same document were served via electronic mail (email) to James S. Gleason ([jgleason@hbk.com](mailto:jgleason@hbk.com)), counsel for Respondent, and James LaVaute ([jrlavaust@bklawyers.com](mailto:jrlavaust@bklawyers.com)), counsel for the Charging Party.

Dated at Buffalo, New York this 21<sup>st</sup> day of March, 2016.

Respectfully submitted,

/s/ Nicole Roberts

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