

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS
BOARD

ROCHESTER GAS & ELECTRIC CORP.,

and

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

**RESPONSE TO GENERAL
COUNSEL'S CROSS-MOTION
FOR SUMMARY JUDGMENT
AND UNION'S SUPPORTIVE
BRIEF**

Case No.: 03-CA-25915

PRELIMINARY STATEMENT

The General Counsel and Union contend summary judgment should be granted in their favor based on cases that do not address a *Transmarine* remedy and do not involve good faith appeals on issues related to bargaining. Instead, the Union and General Counsel contend this is simply a matter of enforcing what the Second Circuit decided, and that a stay of a mandate is simply a ministerial act that has no bearing in this case. Their positions ignore the reality of this case and the purpose of the *Transmarine* remedy to ensure meaningful bargaining takes place when it should and to restore some leverage to the party seeking to bargain.

**THE BOARD SHOULD START THE REMEDY FROM THE TIME CERTIORARI
WAS DENIED OR SHOULD EXCLUDE THE TIME THE CASE WAS STAYED
FROM THE CALCULATION OF PAST COMMUTING COSTS OWED**

A. ROCHESTER GAS IS NOT SEEKING TO RELITIGATE ISSUES

General Counsel and the Union argue Rochester Gas is seeking to impermissibly relitigate issues previously decided in this case. Rochester Gas is not. Rochester Gas does not suggest, as in the cases cited by the General Counsel and the Union, that the modified *Transmarine* remedy imposed by the Board is not appropriate or that Rochester Gas had no obligation to effects bargain once *certiorari* was denied. As the Union points out, Rochester Gas

has always conceded that if there is to be a remedy in this case, the modified *Transmarine* remedy (including an order to bargain and an award of damages that will incentivize bargaining) is the correct remedy.

At no point in time, however, has Rochester Gas conceded that the *Transmarine* remedy should run from the date of the Board's order regardless of the subsequent procedural history in this case. Nor has the Board or the Second Circuit closed the door on Rochester Gas's arguments on this motion. The Board specifically left to Compliance to determine the calculation of the *Transmarine* remedy. See *Rochester Gas*, fn. 5. This is the appropriate forum for Rochester Gas to challenge the determination of Compliance with regard to the specific details of the remedy.

If the Union and General Counsel's position is upheld, parties will be forced to litigate compliance issues before even knowing how Compliance actually calculates the damages. Such a holding will result in a plethora of litigation before the Board that could, in most cases, be avoided. By contrast, leaving compliance issues for litigation in the compliance specification hearing, if necessary, makes sense and effectuates the purpose of the Act.

B. ROCHESTER GAS HAD A GOOD FAITH BASIS FOR ITS APPEAL AND FOR SEEKING CERTIORARI

The Union in particular cites a number of cases in which the Board imposes a remedy from the date of the Board's decision despite an appeal to the Circuit Court. See, e.g. *Old King Cole, Inc. v. NLRB*, 260 F.2d 530, 532 (6th Cir. 1958). Those cases do not, however, apply here. Most of the cases involve back pay remedies to discharged workers. Discharge cases involve other considerations not present in this case.

The Union's sole case relating to a bargaining order does not support its position because it specifically does not involve a good faith appeal. In *Old King Cole*, the Court specifically held that the defense of good faith was not available to the Employer because a prior decision of the Circuit Court invalidated the Employer's reason for failing to bargain. There is no prior decision of the Second Circuit that invalidated Rochester Gas's reasons for failing to bargain. Rochester Gas was clear, that its refusal to bargain was based solely on existing D.C. Circuit Court of Appeals law regarding effects bargaining. Likewise, the General Counsel's reliance on *Emsing's Supermarket*, 307 N.L.R.B. 421 (1992), *affirmed* 872 F.2d 1279 (7th Cir. 1988), is misplaced. *Emsing* and *Old King Cole* support Rochester Gas's position that where an employer refuses to bargain in good faith in order to obtain a Circuit Court's ruling on a disputed issue of law, the remedy should run from after the date of the Circuit Court's decision. Rochester Gas does not challenge decisions holding where there is no good faith basis to appeal, the remedy runs from the date of the Board's order. This position supports the purpose of the *Transmarine* remedy to ensure meaningful bargaining takes place when it should and to restore some leverage to the party seeking to bargain. Punishing Rochester Gas for making a good faith appeal of a disputed issue of law, however, does not serve to ensure meaningful bargaining.

The General Counsel does not suggest Rochester Gas had no good faith basis to appeal or to seek certiorari. The Union's attempt to argue that there was no good cause to appeal the Board's decision or that the Second Circuit's decision in this case did not create a circuit split that gave Rochester Gas good cause to appeal falls short. The Second Circuit itself specifically explained the split in the circuits and stated in its decision that it declined to join other circuits that had adopted the contract coverage doctrine. *See* Decision, p. 22-23 (Gleason Aff. Ex. "F").

The Court then granted a stay to allow a petition for certiorari to be filed. It is difficult to imagine how that Court could have been more explicit in advising of a circuit split.

This case is unlike those where an employer appeals solely to delay a remedy, and applying that reasoning to this case will only undermine the *Transmarine* remedy by impermissibly punishing Rochester Gas for its good faith appeal.

C. THE STAY OF THE MANDATE INCLUDES A STAY OF THE BOARD'S ENFORCEMENT OF ITS ORDER

The Union argues that the stay of the mandate was a ministerial act that had no real effect on this case. General Counsel agrees that the stay of the mandate does not change the enforcement of the Board's order.

These positions do not account for the fact that Board orders are not self-executing nor do they consider the purpose of the *Transmarine* remedy. Even if the Board's order went into effect on January 17, 2013, the date of the Second Circuit's decision, once that decision was stayed, Rochester Gas could not bargain with the Union without violating the stay. It makes no sense that the Board or Circuit would punish Rochester Gas for not bargaining when it had a Court order staying bargaining pending the petition for certiorari.

The purpose of the *Transmarine* remedy is not to punish Rochester Gas for not bargaining, but to ensure meaningful bargaining takes place when it should and to restore some leverage to the party seeking to bargain. *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"). Excluding the time the action was stayed serves this purpose as it ensures Rochester Gas had incentive to bargain when Rochester Gas could bargain and does not punish Rochester Gas for not bargaining while bargaining was stayed while an important issue of law was being litigated.

A *Transmarine* remedy is not the same as a back pay order in a wrongful discharge case. The sole purpose of a *Transmarine* remedy is to level the playing field between the parties while bargaining is taking place. It is just not consistent with the concept of the *Transmarine* remedy to retroactively order Rochester Gas to begin paying mileage reimbursement to employees for a period of two years before any bargaining could have or did take place. There is no way to view such an approach as other than punitive.

The stay of the mandate stayed the Board and Court's order and the time the stay was in place should be excluded from any calculation of damages owed by Rochester Gas.

CONCLUSION

The idea that Rochester Gas would be punished because it didn't bargain when it couldn't bargain is illogical and inconsistent with the purpose of the *Transmarine* remedy. As Rochester Gas stated in its Memorandum of Law on its cross-motion, this case is in many ways unique because of its facts and its timeline. Despite what the General Counsel and Union argue, there is no Board precedent that neatly addresses the issues it raises.

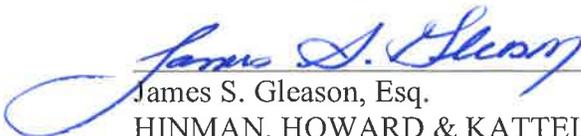
Rochester Gas sought to obtain a definitive ruling on a question of law that has been the subject of divided Board and Court opinions for the past 20 years, and has been an issue of contention between Rochester Gas and the Union in multiple situations. At each step of the way, Rochester Gas promptly sought review and promptly filed its briefs. Through no fault of Rochester Gas, this case took years to wind its way through the judicial system.

Now, the General Counsel seeks to impose a remedy on Rochester Gas that bears no relationship to its failure to bargain and in no way accomplishes the goals of the Board's original modified *Transmarine* remedy. Despite sending an offer to bargain to the Union within days of

the Supreme Court's denial of certiorari,¹ General Counsel seeks to exact a penalty of over \$100,000, justifying that decision on the basis that Rochester Gas didn't bargain when a court order prevented bargaining, and therefore, Rochester Gas should be punished. It is inconsistent with the Act and with good public policy.

The Board should grant Rochester Gas's motion and hold the remedy runs from the date the Supreme Court denied certiorari or in the alternative that the time the mandate was stayed is excluded from the damages calculation, and should deny the General Counsel's cross-motion.

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¹ The Union never actually bargained.