

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Rochester Gas & Electric Corporation and Local Union 36, International Brotherhood of Electrical Workers, AFL–CIO. Case 03–CA–025915

May 24, 2016

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA
AND MCFERRAN

On August 16, 2010, the National Labor Relations Board issued a Decision and Order finding, in relevant part, that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to bargain over the effects of discontinuing its practice of allowing employees to drive company vehicles to and from work.¹ Among other things, the Board ordered the Respondent to pay bargaining unit employees the monetary value of the vehicle benefit for a period of no less than 2 weeks, commencing 5 days after the date of the Board’s Decision and Order.² On January 17, 2013, the United States Court of Appeals for the Second Circuit entered its judgment enforcing, in full, the Board’s Order.³

On November 5, 2015, the Acting Regional Director for Region 3 issued a compliance specification and notice of hearing alleging the amounts due under the Board’s Order. On November 19, 2015, the Respondent filed an answer admitting certain allegations in the specification and denying other allegations. The Respondent denied the allegation in paragraph 1 of the specification that the backpay period begins on August 23, 2010.⁴ The Respondent asserted, rather, that the backpay period begins on July 1, 2014, the date the Supreme Court denied the Respondent’s petition for certiorari.

On January 27, 2016, the General Counsel filed with the Board a Motion to Transfer Proceedings to the Board for Summary Judgment and a brief in support, on the

ground that there are no issues of material fact in dispute that would warrant a hearing in this matter. Also on January 27, 2016, the Respondent filed a cross-motion for summary judgment and brief in support, agreeing that there are no material questions of fact and that transfer of the proceeding to the Board is appropriate. The Union filed a brief in support of the General Counsel’s motion and in opposition to the Respondent’s motion. On March 7, 2016, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why either motion should not be granted. The General Counsel, the Respondent, and the Union each filed a response.⁵

The Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motions for Summary Judgment

The parties agree that the only issue in this proceeding is the legal question regarding the starting date of the modified *Transmarine* remedy. The specification alleges that the backpay period begins on August 23, 2010, 5 business days after the Board issued its Decision and Order in the underlying unfair labor practice proceeding on August 16, 2010, as stated in that decision. The Respondent contends, however, that the backpay period does not begin until July 1, 2014, the date the Supreme Court denied the Respondent’s petition for certiorari. The Respondent submits that starting backpay 5 days after the Board issued its decision would impermissibly penalize the Respondent for appealing when there were debatable issues of law, and its only means of obtaining review was to refuse to bargain. In the alternative, the Respondent contends that the period of time that the Second Circuit stayed its mandate (February 8, 2013 until July 1, 2014) should be excluded from the calculation, as the Board’s order was also stayed during that time.

As noted above, the Board’s Decision and Order stated that the Respondent is “to pay each employee the monetary value of the vehicle benefit from 5 days after the date of this Decision and Order until the occurrence of the earliest of” one of five conditions. 355 NLRB at 508. The Order’s requirement that payment is to commence 5 days after the issuance of the Order is in accordance with well-established law.⁶ The Second Circuit enforced the

¹ 355 NLRB 507.

² 355 NLRB at 508. The Board required the Respondent to compensate employees for its failure to bargain over the effects of the loss of the vehicle benefit in a manner similar to that required in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968).

³ 706 F.3d 73, cert. denied 134 S.Ct. 2898 (2014). On February 8, 2013, the court granted the Respondent’s motion to stay the court’s mandate while the Respondent petitioned the Supreme Court for certiorari. On July 1, 2014, the Supreme Court denied the Respondent’s petition, and on the same date, the Second Circuit issued its mandate.

⁴ The Respondent also denied the allegations in the specification concerning the number of days certain employees worked during the backpay period. The General Counsel concedes for the purposes of his motion for summary judgment that the number of days worked are as set forth by the Respondent in its answer.

⁵ The Union filed a letter directing the Board’s attention to its previously filed brief.

⁶ The Regional Director determined that the backpay period should be tolled as of August 22, 2014, because as of that date the Union had failed to timely respond to the Respondent’s offer to bargain (and the Respondent had provided relevant information), as required by the Board’s *Transmarine* order. The General Counsel denied the Union’s appeal of that determination. On September 2, 2015, the Board denied the Union’s request for review of the General Counsel’s decision.

Board's Order in full. Specifically, the court described the Board-ordered *Transmarine* remedy, including that it would commence "five business days after the date of the Board's decision", and "affirm[ed] the determination of the Board as to its chosen remedy." 706 F.3d at 90–91. Under Section 10(e) of the Act, the Board has no jurisdiction to modify an Order that has been enforced by a court of appeals because, upon the filing of the record with the court of appeals, the jurisdiction of that court is exclusive and its judgment and decree final, subject to review only by the Supreme Court.⁷ *Scepter Ingot Castings, Inc.*, 341 NLRB 997, 997 (2004), enf. sub nom. *Scepter, Inc. v. NLRB*, 448 F.3d 388 (D.C. Cir. 2006).⁸

The Respondent's reliance on *Yorke v. NLRB*, 709 F.2d 1138 (7th Cir. 1983), cert. denied 465 U.S. 1023 (1984), is misplaced. In *Yorke*, the United States Court of Appeals for the Seventh Circuit found, under the specific facts of that case, that the Board's traditional *Transmarine* remedy should be modified to commence from the date of the court's opinion rather than from the Board's Order. 709 F.2d at 1146. Because the *Yorke* court expressly modified the starting date of the *Transmarine* remedy, no jurisdictional bar was present in that case. In this case, unlike *Yorke*, the Second Circuit enforced the Board's Order in full, including the starting date of the backpay period.

Moreover, even assuming, arguendo, that we could modify the starting date of the *Transmarine* remedy notwithstanding Section 10(e) and the court's enforcement of our Order, we find no merit in the Respondent's argument that we *must* do so to avoid penalizing the Respondent. While the Respondent was clearly within its rights to pursue all legal avenues available to it, including petitioning the Supreme Court for certiorari, tolling the accumulation of backpay during the pendency of the Respondent's appeals would unfairly shift the burden for the delay to the wronged employees. As stated by the Supreme Court in *NLRB v. J. H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 264–265 (1969), "Wronged employees are at least as much injured by the Board's delay in collecting their back pay as is the wrong doing employer. . . . [T]he Board is not required to place the consequences of [such] delay, even if inordinate, upon wronged employees to the benefit of wrongdoing employers." That rationale is even more compelling here, where there is no

contention that the Board was responsible for the delay in the underlying litigation.⁹

Finally, there is no support for the Respondent's alternative argument that the period of time that the Second Circuit stayed its mandate should be excluded from the backpay calculation. Section 10(g) of the Act expressly provides that the commencement of proceedings in a United States court of appeals pursuant to a petition for enforcement or review "shall not, unless specifically ordered by the court, operate as a stay of the Board's order." 29 U.S.C.A. § 160(g). No stay of the Board's Order was ever sought or granted, and the Respondent cites no authority for its contention that the stay of the court's mandate operated as a stay of the Board's Order. Indeed, the Board rejected a similar argument in *Louisiana Industries, Inc.*, 182 NLRB 976, 980 fn. 16 (1970) (holding that the stay of the court's mandate "did not affect the operability of the Board's Order, but merely precluded the Board from instituting contempt proceedings based on the Respondent's later refusal to bargain . . . while the petition for a writ of certiorari was pending in the Supreme Court."). See also *Bob's Big Boy Family Restaurants*, 264 NLRB 432, 434 (1982) ("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. . . .").

Accordingly, we grant the General Counsel's motion for summary judgment and deny the Respondent's cross-motion.

ORDER

The National Labor Relations Board orders that the Respondent, Rochester Gas & Electric Corp., Rochester, New York, its officers, agents, successors, and assigns, shall make whole the employees named below by paying them the amounts following their names, with interest accrued to the date of payment as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as set forth in *Kentucky River Medical Center*, 356 NLRB 6 (2010), and minus tax withholdings required by Federal and State laws:

⁹ We recognize that, in *Yorke*, the Seventh Circuit held that "the Board cannot penalize the employer for challenging a *Transmarine* order in good faith by imposing monetary liability retroactively to its refusal to bargain after the Board's decision." 709 F.2d at 1146. See, however, *NLRB v. Emsing's Supermarket*, 872 F.2d 1279, 1291 (7th Cir. 1989) (court rejected respondent's request to apply holding in *Yorke* and calculate *Transmarine* remedy from date of court decision rather than Board order). We note that this case does not arise in the jurisdiction of the Seventh Circuit and *Yorke* has not been followed in other circuits.

⁷ Sec. 10(e) states, in relevant part: "Upon the filing of the record with [the United States court of appeals] the jurisdiction of the court shall be exclusive and its judgment and decree shall be final," except for potential further review by the Supreme Court. 29 U.S.C. § 160(e).

⁸ See also, *Dupuy v. NLRB*, 806 F.3d 556, 563–565 (D.C. Cir. 2015); *NLRB v. Mastro Plastics Corp.*, 261 F.2d 147, 148 (2d Cir. 1958).

EMPLOYEE NAME	AMOUNT DUE
Thomas Eichele	\$ 10,202.40
Steven Parnell	16,816.99
Jeffrey Pierce	7,006.09
Toney Proctor	4,342.30
Richard Shamp	10,487.40
Alfred Smith	15,076.26
John Spratt	20,965.10
Kim Williams	16,611.04
TOTAL AMOUNT DUE	\$101,507.58

Dated, Washington, D.C. May 24, 2016

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD