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Pennsylvania State Corrections Officers Association and Business Agents Representing State Union Employees Association. Cases 04–CA–037648, 04–CA–037649, and 04–CA–037652

August 26, 2016

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA
AND HIROZAWA

On May 23, 2014, Administrative Law Judge Robert A. Giannasi issued the attached supplemental decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief. The Respondent filed cross-exceptions and a supporting brief, and the General Counsel filed an answering brief.

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

The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge’s rulings, findings, and conclusions only to the extent consistent with this Supplemental Decision and Order.

The issue in this compliance case is the amount of backpay owed as a result of the Respondent’s failure to bargain with the Union over the effects of its decision to discharge five employees. Before turning to that question, however, we first address the General Counsel’s May 4, 2016 motion to vacate the Board’s March 23, 2012 Decision and Order in the unfair labor practice case and to consider de novo the judge’s March 17, 2011 decision.

I. GENERAL COUNSEL’S MOTION

Facts

On March 17, 2011, the judge issued a decision finding, inter alia, that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to bargain over the effects of its decision to discharge five employees. To remedy this effects-bargaining violation, the judge’s recommended Order required the Respondent to engage in effects bargaining upon the Union’s request, and to pay backpay pursuant to *Transmarine Navigation Corp.*, 170 NLRB 389 (1968).

The General Counsel filed exceptions regarding the judge’s dismissal of two other allegations, and the Respondent filed an answering brief to the General Counsel’s exceptions. There were no exceptions to the effects-bargaining violation or the *Transmarine* remedy.

On March 23, 2012, the Board issued a Decision and Order, reported at 358 NLRB 108 (2012), in which it rejected the General Counsel’s exceptions. The Board also modified the judge’s order “to conform to the violations found and to the Board’s standard remedial language”, and substituted a “new notice to conform to the Order as modified.” *Id.* at 108, fn. 3. However, the Board did not address the merits of the effects-bargaining violation or the *Transmarine* remedy, and its “new notice” did not alter the substance of the judge’s recommended Order and notice. Thereafter, the Respondent and the Union met for the purpose of engaging in effects bargaining pursuant to the judge’s *Transmarine* remedy. The sufficiency of the parties’ effects bargaining is the subject of this compliance case and is discussed below.

On May 4, 2016, the General Counsel filed a motion to vacate the Board’s March 23, 2012 Decision and Order and to consider de novo the judge’s March 17, 2011 decision. The Respondent did not file a response.

Discussion

The General Counsel’s motion to vacate correctly states that, at the time the Board issued its March 23, 2012 decision, the composition of the Board included three persons whose appointments were later determined to be invalid. See *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014). The General Counsel argues that de novo review of the judge’s March 17, 2011 decision is therefore necessary to “obtain a valid Decision and Order on which to base the Board’s determination concerning the compliance proceeding.” We do not agree.

The General Counsel’s motion is based upon an apparent misunderstanding of the record. In paragraph 2 of the motion, the General Counsel states:

2. On April 13, 2011 and April 26, 2011, respectively, Counsel for the General Counsel and Respondent filed exceptions to Judge Giannasi’s Decision with the Board.

However, the Respondent did not file any exceptions; the document filed by the Respondent on April 26, 2011, was an answering brief to General Counsel’s exceptions. Thus, the judge’s finding of an effects-bargaining violation and his recommended *Transmarine* remedy were not challenged before the Board. By failing to file exceptions to the judge’s decision and recommended Order, the Respondent waived its right to challenge any of the judge’s findings, conclusions and recommendations, including the finding of an effects bargaining violation and the related *Transmarine* remedy. See 29 USC § 160(c); Section 102.48 of the Board’s Rules and Regulations.

Moreover, in the 4 years since the issuance of the Board's March 23, 2012 decision, the Respondent has never sought to challenge that decision. Rather, as noted above, the Respondent and the Union met for the purpose of engaging in effects bargaining pursuant to the *Transmarine* remedy ordered by the judge. When a dispute arose regarding the sufficiency of the parties' effects bargaining, the Respondent did not contest its obligation to engage in effects bargaining. Instead, it argued that it had fulfilled that obligation. (See R. Exh. 4 (the Respondent's counsel's bargaining notes); Tr. 14.) Indeed, in its cross-exceptions and supporting brief in the present case, filed on July 3, 2014, after the Supreme Court issued its *Noel Canning* decision, the Respondent relied on the Board's March 23, 2012 decision in support of its arguments to the Board.

In summary, the Respondent did not challenge the judge's findings of an effects-bargaining violation or the related *Transmarine* remedy, through exceptions to the Board or otherwise. Moreover, the Respondent does not—and could not—challenge in this compliance proceeding either the judge's March 17, 2011 decision or the Board's March 23, 2012 decision.¹ Accordingly, in all the circumstances of this case, we find it unnecessary to revisit the Board's March 23, 2012 Decision and Order, and we deny the General Counsel's motion.²

II. COMPLIANCE CASE

We now turn to the judge's May 23, 2014 supplemental decision, in which the issue is the amount of backpay owed as a result of the Respondent's failure to bargain with the Union about the effects of its decision to discharge five employees. The judge found, and we agree, that the backpay period ran for 26 weeks, from March 28 to September 28, 2012. We disagree, however, with the judge's finding that discriminatee Bill Parke failed to mitigate his damages. We find that the corrections officer position that Parke declined was not substantially equivalent to his former position with the Respondent. Therefore, we conclude that all five

discriminatees are entitled to the full 26-week backpay award.

A. Backpay Period

Facts

The Respondent represents corrections officers employed by the Commonwealth of Pennsylvania (the Commonwealth). Through a unique arrangement with the Commonwealth, the Respondent employs some of those corrections officers as its business agents. While employed by the Respondent, those individuals take a leave of absence from the Commonwealth but continue to accrue leave and pension credits and to draw a portion of their salary, for which the Respondent reimburses the Commonwealth. At the end of their employment with the Respondent, they have an automatic right of reinstatement to their former jobs as corrections officers with the Commonwealth.

Since July 21, 2010, Business Agents Representing State Union Employees Association (the Union) has represented the Respondent's business agents and support staff. On August 20, 2010, the Respondent discharged business agents Lee Dyches, Shawn Hood, Patricia Hurd, John Miller, and Parke, and the Respondent directed them to return to their former positions as corrections officers. Dyches, Hood, Hurd, and Miller complied with this directive; Parke did not. Thereafter, the Union filed a charge alleging, *inter alia*, that the Respondent violated Section 8(a)(5) and (1) by failing to bargain over the effects of the discharges. On March 17, 2011, the judge issued a decision finding the effects-bargaining violation and recommending a limited backpay remedy pursuant to *Transmarine Navigation Corp.*, 170 NLRB 389 (1968).

In January 2012, the Respondent's employees filed a petition to decertify the Union. The Region dismissed the petition on March 7, 2012.

On April 4, 2012, the Respondent and the Union met and engaged in effects bargaining. The Respondent proposed bargaining about the Board's *Transmarine* backpay remedy. The Respondent's counsel's bargaining notes reflect that he told the Union's president the following: “[W]e were going to bargain over the effects of removing the business agents, which included a review of the *two week backpay remedy the Administrative Law Judge suggested* in this matter.” (R. Exh. 4 (emphasis added).) The Respondent gave the Union documents “establishing what the *backpay amount* would be for the five removed business agents for a *two week period* immediately following their removal.” (Id. (emphasis added).) The Respondent offered the Union 2 weeks' backpay without deductions for interim earnings. The Respondent stated, however, that it would deduct 1

¹ It is well settled that “[i]ssues litigated and decided in an unfair labor practice proceeding may not be relitigated in the ensuing backpay proceeding.” *Transport Service Co.*, 314 NLRB 458, 459 (1994); see also *NLRB v. Overseas Motors, Inc.*, 818 F.2d 517, 519, 520 (6th Cir. 1987); *NLRB v. Laredo Packing Co.*, 730 F.2d 405, 407 (5th Cir. 1984).

² Although not necessary to our decision, we have reviewed *de novo* the judge's March 17, 2011 decision and the record in the unfair labor practice case in light of the exceptions and briefs filed in that case. If the judge's decision were properly before us, we would adopt it, except that we would find it unnecessary to rely on the judge's discussion of *Fresno Bee*, 337 NLRB 1161 (2002), or *Alan Ritchey*, 354 NLRB 628 (2009).

week's severance pay that it had already paid the employees, and that it would treat the remaining 1 week's pay as a credit against damages it hoped to recover in future lawsuits against Dyches, Hood, Hurd, and Miller alleging fraudulent mileage reimbursements.³ In an April 4, 2012 letter to the Union, the Respondent characterized its offer as "backpay . . . for a 2-week period" with 1 week's pay deducted because it had previously been provided and the other 1 week's pay treated as a credit in future lawsuits. (Jt. Exh. 1; see also R. Exh. 4.)

On April 10, 2012, the Union mailed the Respondent a counteroffer for Dyches, Hurd, Miller, and Parke of 2 weeks' severance pay and payment for all unused leave. The counteroffer for Hood was 2 weeks' severance pay, 70 vacation days, unpaid phone charges, and 6 weeks' mileage reimbursements.

On April 11, 2012, the Respondent rejected the Union's counteroffer, declared impasse, and stated that it would implement its April 4, 2012 offer as its final offer. The parties did not engage in any further effects bargaining, and the Respondent never paid any backpay to the discriminatees, pursuant to the *Transmarine* remedy.

Thereafter, the Regional Director issued a compliance specification. After a hearing, the judge issued a supplemental decision finding that none of the conditions specified in the *Transmarine* remedy had occurred, and that the backpay period ran from March 28 to September 28, 2012, the approximate date on which the Union became defunct and was no longer available to bargain. The judge rejected the Respondent's contentions that the backpay period ended either on April 11, 2012, due to the parties' impasse, or some time prior to September 28, 2012, due to the Region's refusal to process the decertification petition. The Respondent excepts, raising similar arguments to those rejected by the judge.

Discussion

For the reasons stated by the judge and for the additional reasons discussed below, we affirm the judge's finding that the backpay period ran for 26 weeks, from March 28 to September 28, 2012.⁴

³ The Respondent later sued Dyches, Hurd, and Miller. Those lawsuits are still pending.

⁴ Because we have denied the General Counsel's motion to vacate the Board's March 23, 2012 Decision and Order, we find it unnecessary to address our dissenting colleague's contention that if the Board were to issue a new Decision and Order adopting the judge's March 17, 2011 decision, the requirement that the Respondent engage in effects bargaining would commence with that decision. Additionally, we note that no party excepted to the judge's finding that the *Transmarine* backpay period began on March 28, 2012, and therefore, any challenge to the judge's finding has been waived. The only issue before the Board is whether the backpay period ended before September 28, 2012.

First, we affirm the judge's finding that the parties' April 11, 2012 impasse was not a lawful impasse and therefore did not toll the backpay period.⁵ As a preliminary matter, we agree with our dissenting colleague that, under *Transmarine*, an employer that has failed to engage in effects bargaining is ordered to do two things: (1) "bargain over the effects" of the underlying unlawful decision, and (2) give affected employees "limited backpay" for a period beginning 5 days after the date of the Board's Order and ending at the earliest occurrence of several conditions, including when effects bargaining results in an "agreement" or a "bona fide impasse," provided that the backpay shall be no less than what "employees would have earned for a 2-week period." *Transmarine*, 170 NLRB at 390. The dissent accuses us of conflating these two separate requirements. However, contrary to the dissent, it was the Respondent who conflated the requirements by proposing during effects bargaining that the parties bargain about the *Transmarine* backpay remedy and by insisting to impasse on its offer to the Union of "backpay . . . for a 2-week period" with 1 week's pay deducted because it had previously been provided and the other 1 week's pay treated as a credit in future lawsuits.⁶ (Jt. Exh. 1; see also R. Exh. 4.)

The purpose of *Transmarine* backpay is "to restore at least some economic inducement for an employer to bargain as the law requires." *O. L. Willis, Inc.*, 278 NLRB 203, 205 (1986). "It provides that if there are delays in the bargaining process, backpay increases until one of the stated conditions is met, thereby insuring that the consequences to the respondent are progressively greater and that there is a corresponding enhancement of the union's bargaining strength." *Sawyer of Napa, Inc.*, 321 NLRB 1120, 1120 (1996). Permitting a party to bargain to impasse about *Transmarine* backpay would defeat the purpose of the remedy. Thus, whatever the parties agree to in effects bargaining is paid to the discriminatees *in addition* to *Transmarine* backpay.⁷ Here, from the outset, the Respondent proposed reducing the *Transmarine* amount, insisting to impasse on its offer of 2 weeks'

⁵ The dissent asserts that "it is improper for the Board to gloss over the fact that the General Counsel and the Respondent *stipulated* that a bargaining impasse existed on April 11" and that our determination that the April 11, 2012 impasse was unlawful is "[e]ven more troubling." We reject those assertions. The parties' factual stipulation that the Respondent declared impasse on April 11, 2012, is separate and distinct from the legal question whether that impasse was lawful.

⁶ The dissent characterizes the Respondent's offer as a "severance pay proposal." Contrary to the dissent, the record clearly demonstrates that the Respondent made a *backpay* proposal.

⁷ An example helps illustrate this principle. At the end of 3 weeks of effects bargaining pursuant to *Transmarine*, a union and a respondent agree to 1 week's severance pay. The discriminatees will receive 1 week's severance pay *and* 3 weeks' *Transmarine* backpay.

backpay with 1 week's pay deducted because it had already been paid to the discriminatees and with the remaining 1 week's pay treated as a credit in future lawsuits. The Respondent never made a proposal that met its effects-bargaining obligation. Therefore, we agree with the judge that the parties' April 11, 2012 impasse was not a lawful impasse.

Furthermore, even if the Respondent was permitted to bargain over the Board's *Transmarine* backpay remedy, the Respondent's insistence to impasse on treating 1 week of *Transmarine* backpay as a credit against an anticipated recovery in a future lawsuit was impermissible. The Respondent in effect demanded a modification of the *Transmarine* remedy, which requires the Respondent to pay employees a minimum of 2 weeks' backpay minus only interim earnings. See *Sawyer of Napa, Inc.*, 321 NLRB 1120, 1120-1121 (1996) (finding "no legally cognizable impasse" and explaining, "[w]e are not, as asserted by our dissenting colleague, finding that the Respondent was required to adopt any particular position during effects bargaining. The Respondent was free to take any position it wished with respect to such bargaining. However . . . the Respondent was not free to modify [the *Transmarine* remedy] terms . . .").⁸ Further, the Respondent's 1-week's credit for future lawsuits cannot be categorized as interim earnings, and thus cannot be deducted from the 2-week minimum backpay award. A party cannot withhold backpay simply because it might recover that amount in a private lawsuit. See *The State Journal*, 238 NLRB 388, 388 and fn. 5 (1978), citing *Teamsters Local 705 (Randolph Paper Co.)*, 227 NLRB 694, 694-695 (1977) (finding that the respondent was not permitted to offset backpay by the amount of its private claim against the discriminatee for unpaid dues because the respondent's claim "involves a private debt which is irrelevant to these backpay proceedings"). In sum, in the effects bargaining, the Respondent was not entitled to demand that the *Transmarine* remedy be reduced from 2 weeks of backpay to 1 by claiming the second week as a credit against damages it hoped to recover in future lawsuits.

Second, we affirm the judge's finding that the Region's failure to process the decertification petition does not warrant terminating the backpay period prior to Sep-

⁸ Therefore, there is no merit to the dissent's claim that "the Board cannot find a violation here based on a purported renegotiation of the Board-ordered *Transmarine* limited backpay award."

We do not, however, rely on the judge's statement that the Respondent's plan to deduct severance pay was contrary to the minimum backpay award. The General Counsel appears to agree that this was a proper deduction because he listed this payment as interim earnings in the compliance specification.

tember 28, 2012. Contrary to the Respondent's assertion, the Region properly refused to process the petition. As noted by the judge, the petition could not have been reinstated until after the Respondent remedied its violations.⁹ Furthermore, as recognized by the judge, the Union remained the bargaining representative because no election was ever held. The filing of a decertification petition itself has no effect on a union's bargaining status. See *Levitz Furniture Co. of the Pacific*, 333 NLRB 717, 727 (2001) ("[T]he union remains the bargaining representative, and the employer's bargaining obligation continues, while the RM (or RD) election proceedings are underway."). Therefore, we affirm the judge's conclusion that the backpay period ran from March 28 to September 28, 2012.

B. Bill Parke

Facts

Prior to May 2002, Parke was a corrections officer at the State Correctional Institute in Houtzdale, Pennsylvania. He worked 40 hours per week and earned \$2630 biweekly. His job duties involved the care, custody, and control of inmates.

In May 2002, the Respondent hired Parke as its assistant grievance manager in Harrisburg, Pennsylvania. He worked 50-60 hours per week and earned \$3580 biweekly. His job duties involved enforcing the collective-bargaining agreement between the Respondent and the Commonwealth. To be closer to his job, he moved to Mechanicsburg, Pennsylvania. He later adopted two special needs children.

On August 20, 2010, the Respondent discharged Parke and the other four discriminatees and directed them to return to their former positions as Commonwealth corrections officers. Parke requested an 8-week leave of absence from the Commonwealth in order to move back to Houtzdale and to arrange for his children's school and services transfer. The Commonwealth granted Parke only a 2-week leave of absence. Parke did not return to his former position. Instead, he voluntarily retired and subsequently obtained employment in another industry.

⁹ Therefore, we do not rely on the judge's statement that the petition was not promptly acted upon by the Region.

Additionally, despite receiving notice from the Region that their dismissed petition was subject to reinstatement, if appropriate, upon conclusion of the unfair labor practice proceedings and subsequently receiving a copy of the March 2012 Decision and Order in the unfair labor practice case, the employees never requested that the Region reinstate the petition. See *Nu-Aimco, Inc.*, 306 NLRB 978, 979 (1992) (noting that "the policy of dismissing a petition or holding it in abeyance because of pending unresolved unfair labor practice charges . . . postpones processing the petition until the unfair labor practice charges are resolved, at which time the petitioner is entitled to request reinstatement of the petition.").

Pursuant to the parties' collective-bargaining agreement and past practice, Parke was entitled to, but did not, request a transfer to a corrections facility closer to his home in Mechanicsburg. Parke testified that he knew that he had the right to request a transfer and that there was a corrections facility approximately 12 miles from his home.

In his supplemental decision, the judge found that Parke failed to mitigate his damages because he "willfully incurred" a loss by his "clearly unjustified" refusal to return to his former employment" as a Commonwealth corrections officer, citing *St. George Warehouse*, 351 NLRB 961, 963 (2007). The judge determined that the Commonwealth corrections officer position was "intrinsically intertwined" with Parke's assistant grievance manager position, and that overlooking these ties would provide Parke with an undeserved windfall. The General Counsel excepts, arguing that Parke did not fail to mitigate because the two jobs were not substantially equivalent.

Discussion

We agree with the General Counsel that the Commonwealth corrections officer position Parke declined was not substantially equivalent to his assistant grievance manager position with the Respondent. Therefore, we find that Parke is entitled to the full 26-week backpay award.

Discriminatees are required to engage in reasonable efforts to find substantially equivalent interim employment. See *Alamo Cement Co.*, 298 NLRB 638, 638 fn. 2 (1990); *Minette Mills*, 316 NLRB 1009, 1010 (1995). To determine whether interim employment is substantially equivalent to a discriminatee's former employment, the Board compares various criteria, such as pay, working conditions, job duties, commutes, and work locations.

Here, we find that Parke's position as Assistant Grievance Manager with the Respondent and the Commonwealth corrections officer position differed in pay, working conditions, and job duties. Parke earned almost \$1000 less biweekly as a corrections officer than he did as assistant grievance manager, a 25 percent difference in pay. Compare *Arlington Hotel Co.*, 287 NLRB 851, 854 (1987), enf. denied on other grounds 876 F.2d 678 (8th Cir. 1989) (finding that a job that paid 25 percent less was not substantially equivalent). The positions also had different job duties and working conditions. Parke's job with the Respondent was wholly an office job; he enforced the collective-bargaining agreement. By contrast, Parke's corrections officer job with the Commonwealth was an active job that involved the care, custody, and control of prison inmates. Compare *Lord Jim's*, 277 NLRB 1514, 1516 (1986) (finding that busboy/bathroom

cleaner job was not substantially equivalent to cocktail waitress job); *Lundy Packing Co.*, 286 NLRB 141, 144 (1987), enf. 856 F.2d 627 (4th Cir. 1988) (holding that discriminatees are not required to accept interim employment with lower wages and less desirable working conditions). Without question, the corrections officer and assistant grievance manager positions were not substantially equivalent, and we therefore find that Parke did not fail to mitigate by declining to return to his corrections officer job.

ORDER

The National Labor Relations Board orders that the Respondent, Pennsylvania State Corrections Officers Association, Harrisburg, Pennsylvania, its officers, agents, successors, and assigns, shall pay the claimants the amounts specified after their names below, plus interest accrued to the date of payment, as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010), minus tax withholdings as required by Federal and State laws.

Lee Dyches	\$9,646.25
Shawn Hood	3,235.89
Patricia Hurd	11,755.23
John Miller	8,243.08
Bill Parke	\$24,332.27

Dated, Washington, D.C. August 26, 2016

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting in part.

This case arises from the lawful discharge of five employees. However, the Respondent did not satisfy its obligation to bargain over the effects of its decision to discharge these employees, and its failure in this regard violated Section 8(a)(5) of the National Labor Relations

Act (NLRA or the Act).¹ The matter currently before the Board concerns the remedy for this “effects-bargaining” violation. Under longstanding case law, the remedies for an effects-bargaining violation are more limited than the remedies ordered when the underlying decision is unlawful.

As my colleagues correctly note, when a party unlawfully fails to bargain over the effects of a lawful decision, the backpay remedy is a limited one, as set forth in a case decided nearly 50 years ago, *Transmarine Navigation Corp.*, 170 NLRB 389 (1968). Under *Transmarine*, the party that has failed to engage in required effects bargaining is ordered to do two things: (i) to “bargain over the effects” of the underlying lawful decision; and (ii) to give affected employees “limited backpay” for a period ending when effects bargaining results in “agreement” or a “bona fide impasse” (whichever occurs first), provided that the backpay shall be no less than what “employees would have earned for a 2-week period.” *Transmarine*, 170 NLRB at 390.²

In the circumstances presented here, I believe the parties may have been unclear regarding what was being addressed in effects bargaining. But my colleagues and the judge are better informed regarding what the Board’s effects-bargaining order required and what occurred in bargaining, and I believe the majority has devised a remedy that conflates two separate things: (i) the *Transmarine* backpay remedy, which the Board controls, and (ii) Board-ordered effects bargaining, the substance of which the parties control. The result is a remedy that is contrary to Section 8(d) of the Act, which precludes the Board from imposing substantive terms on parties in bargaining, and that exceeds the scope of the Board’s remedial powers under Section 10(c) of the Act, which precludes the Board from imposing penalties on parties because the Board disapproves of the parties’ lawful propo-

sals. Accordingly, I respectfully dissent from the backpay obligation formulated by my colleagues in this case.³

Discussion

I believe the Respondent complied with the judge’s March 17, 2011 effects-bargaining order. In my view, my colleagues’ decision reflects a misunderstanding of the record, and more importantly, I believe my colleagues misunderstand the distinction between Board-ordered bargaining, on the one hand, and Board-ordered backpay, on the other.

First, my colleagues fail to acknowledge that the judge required the Respondent to engage in effects bargaining and that the Respondent complied with that order. In effects bargaining, the Respondent formulated a lawful severance pay proposal. One aspect of that proposal was that 1 week’s severance pay would be held back pending resolution of a dispute between the Respondent and the discharged employees concerning mileage reimbursements the employees might be required to repay to the Respondent.⁴

Severance pay (including details regarding amount, timing of payment, and potential deductions or offsets) is a mandatory subject of bargaining, about which both the employer and union may insist to impasse.⁵ There is no

³ Because I would find that Respondent owes no more than 2 weeks’ backpay to the affected employees, including former employee Bill Parke, I do not reach or pass on whether Parke failed to mitigate Respondent’s backpay liability during the longer backpay period imposed by my colleagues.

For the reasons stated by my colleagues, I join in the denial of the General Counsel’s motion to vacate the Board’s March 23, 2012 Decision and Order and to consider de novo the judge’s March 17, 2011 decision. Unlike my colleagues, however, I have not reviewed de novo the judge’s March 17, 2011 decision, and I express no views as to whether I would or would not adopt the judge’s decision if it were properly before the Board. I note, however, that the judge’s March 17, 2011 decision included an order requiring the Respondent to engage in effects bargaining, and if the Board were to issue a decision and order adopting the judge’s March 17, 2011 decision, the Respondent would be entitled to an opportunity to comply with that order by engaging in the ordered effects bargaining, and the issue addressed in today’s supplemental decision—whether the Respondent complied, past tense, with the judge’s March 17, 2011 effects-bargaining order would be moot.

⁴ The judge described Respondent’s effects-bargaining proposal as follows: “It offered to pay the claimants 2 weeks’ pay without deductions for interim earnings, less 1 week’s pay claimants received at the time of their discharge for time they did not work for Respondent. Those amounts would then, according to Respondent, be considered a credit against monies allegedly received by claimants for improper mileage reimbursements during their employment. Respondent has sued for the return of such mileage reimbursements in civil lawsuits against Claimants Dyches, Hurd and Miller. Those lawsuits are still pending.” Judge’s decision, *infra*, slip op. at 11.

⁵ See *Champion International Corp.*, 339 NLRB 672, 688 (2003); *Your Host, Inc.*, 315 NLRB 295 (1994); *Waddell Engineering Co.*, 305 NLRB 279 (1991).

¹ See, e.g., *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 681 (1981) (although a particular decision is not a mandatory subject of bargaining, “bargaining over the effects of a decision must be conducted in a meaningful manner and at a meaningful time”).

² The *Transmarine* remedy is based on a recognition that where an employer has already carried out layoffs or discharges, the union may no longer have leverage in bargaining over the effects of those actions, so that a bare order requiring the employer to engage in effects bargaining may fail to “assure meaningful bargaining.” Thus, to “recreate in some practicable manner a situation in which the parties’ bargaining position is not entirely devoid of economic consequences for the [employer],” the Board in *Transmarine* provided “a limited backpay requirement,” under which, beginning 5 days from the date of the Board’s order, the employer must pay the former employees affected by its decision “at the rate of their normal wages when last in the [employer’s] employ . . . until the occurrence of the earliest” of several alternative conditions, one of which is “a bona fide impasse in bargaining”—the condition that occurred in the instant case—but in no event less than 2 weeks’ wages. *Transmarine*, 170 NLRB at 390.

claim that effects bargaining failed to commence in a timely manner, nor is it alleged that the Respondent failed to bargain in good faith. The sole criticism levied by the judge and my colleagues relates to the *substance* of Respondent's severance pay proposal. However, the Board is prohibited from dictating the substance of bargaining. Section 8(d) states that the obligation "to bargain collectively" requires parties "to meet at reasonable times and confer in good faith," but "such obligation does not compel either party to agree to a proposal or require the making of a concession." And in *H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970), the Supreme Court held that the Board's remedial powers do not include a power to dictate any substantive term of an agreement:

It is implicit in the entire structure of the Act that the Board acts to oversee and referee the process of collective bargaining, *leaving the results of the contest to the bargaining strengths of the parties*. . . . The Board's remedial powers under § 10 of the Act are broad, but they are limited to carrying out the policies of the Act itself. *One of these fundamental policies is freedom of contract*. While the parties' freedom of contract is not absolute under the Act, allowing the Board to compel agreement when the parties themselves are unable to agree would violate the *fundamental premise on which the Act is based—private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract*.

Id. at 107–108 (emphasis added); see also *NLRB v. Insurance Agents*, 361 U.S. 477, 488 (1960) ("Congress intended that the parties should have wide latitude in their negotiations, unrestricted by any governmental power to regulate the substantive solution of their differences.").

My colleagues—like the judge—confuse the *remedies* the judge ordered here (that Respondent engage in effects bargaining and provide a limited backpay remedy consistent with *Transmarine*, supra) with the substance of the Respondent's effects-bargaining *proposal* regarding severance pay (including amounts, deductions, and an offset pending resolution of a dispute over mileage reimbursements). The Board has authority to require the Respondent to engage in effects bargaining, and the Board also has the authority to impose a *Transmarine* limited backpay award. However, my colleagues mistakenly conflate the two, and they improperly regard the Respondent's effects-bargaining proposal—the substance of which the Board cannot lawfully dictate—as an effort to negotiate or renegotiate the *Transmarine* backpay remedy.

The *Transmarine* backpay period started running on March 28, 2012.⁶ Under *Transmarine*, the "limited backpay" period ends when the parties reach an agreement or impasse, whichever occurs first, with the further caveat that Board-ordered backpay will not be less than 2 weeks' pay. The Respondent and the Union commenced effects bargaining on April 4. And the General Counsel and Respondent stipulated that "[o]n April 11, PSCOA and [the Union] reached an impasse in bargaining."⁷ A total of 14 days elapsed from March 28 (when the *Transmarine* backpay period commenced) to April 11 (when, as stipulated, bargaining reached an impasse). Therefore, consistent with the Board's "limited backpay" award and *Transmarine*, the Respondent owes the affected employees 14 days' backpay, which also happens to equal the 2-week minimum backpay period.

However, instead of ordering the Respondent to pay the affected employees 2 weeks' backpay, my colleagues find that the Respondent owes those employees 26 weeks' backpay. They extend the backpay period through September 28, the approximate date on which the Union became defunct and was no longer available to bargain. My colleagues do not dispute that under *Transmarine*, the "limited backpay" period ends when effects bargaining reaches impasse, and they acknowledge that the General Counsel and the Respondent stipulated that an impasse was reached on April 11. They find, however, that the stipulated impasse was not a *lawful* impasse, on the basis that the Respondent, in effects bargaining, was required to offer the Union at least the *Transmarine* minimum backpay remedy—i.e., 2 weeks' pay—and failed to do so. My colleagues especially denounce the Respondent's proposal to defer a portion of severance pay pending the resolution of disputed mileage reimbursements that the employees might be required to repay. Based on this proposal, my colleagues find that Respondent's effects-bargaining proposals were "contrary to the *Transmarine* remedy, which requires the Respondent to pay employees a minimum of 2 weeks' backpay minus only interim earnings."

I respectfully disagree with my colleagues' analysis. Preliminarily, I believe it is improper for the Board to gloss over the fact that the General Counsel and the Respondent *stipulated* that a bargaining impasse existed on April 11, when all parties to the stipulation—especially

⁶ The judge issued his recommended decision and order on March 17, 2011, which was affirmed on March 23, 2012. Consistent with *Transmarine*, the backpay period commenced running 5 days after March 23, or March 28, 2012. (Unless otherwise indicated, all other dates referenced in this opinion occurred in 2012.)

⁷ Stipulation of Facts filed by the General Counsel and Respondent, dated April 14, 2014 (admitted as Jt. Exh. 7).

the General Counsel—must have understood the legal effect of that stipulation under *Transmarine*, i.e., that the backpay period *terminated* on April 11. Even more troubling, however, is the majority’s determination that the April 11 impasse was unlawful. As noted previously, I believe that my colleagues confuse the *remedies* imposed here (requiring the Respondent to engage in effects bargaining and provide a minimum of 2 weeks’ backpay) with the substance of the Respondent’s *proposals* in effects bargaining.

In my opinion, the majority’s finding that the Respondent’s effects-bargaining proposal was “contrary” to the *Transmarine* limited backpay remedy is based on the false premise that Board-ordered *backpay* under *Transmarine* enters into Board-ordered effects *bargaining* and limits the substantive proposals that may be put forward by either party. These two components of a *Transmarine* remedy are clearly distinct. One component is the requirement that the parties engage in effects bargaining, as to which Section 8(d) prohibits the Board from dictating substantive terms or proposals. The other component is the *Transmarine* “limited backpay” remedy, which is *not* subject to negotiation between the parties but rather is imposed by the Board, and which is separate from the parties’ substantive proposals in effects bargaining. That remedy is dictated by the terms set forth in *Transmarine*, under which the running of the “limited backpay” period terminates when the parties reach agreement or impasse (whichever comes first), provided that employees receive a minimum of 2 weeks’ backpay.

Therefore, contrary to my colleagues’ conclusion that the *Transmarine* remedy required the Respondent, *in effects bargaining*, to offer the Union a minimum of 2 weeks’ pay, the Board lacks the authority to impose *any* minimum requirement regarding the substance of a party’s bargaining proposals. As the Supreme Court stated in *NLRB v. Insurance Agents*, *supra*, “Congress intended that the parties should have wide latitude in their negotiations, unrestricted by any governmental power to regulate the substantive solution of their differences.” See also Section 8(d), *supra*; *H. K. Porter*, *supra*. In collective bargaining, including Board-ordered effects bargaining, parties are free to advance whatever position they wish, subject to narrow limitations not at issue in the instant case.⁸ Nor does anything in *Transmarine* pre-

⁸ Parties are forbidden to bargain for an illegal subject. For example, a party may not bargain for a contract clause permitting an employer or union to discriminate on an unlawful basis, such as race or sex. See, e.g., *Independent Metal Workers (Hughes Tool Co.)*, 147 NLRB 1573 (1964). Here, there is no allegation that the Respondent’s effects-bargaining proposals involved actions that would have violated State or Federal law. Nor is there any reasonable basis for concluding that Respondent’s pay proposal involved a permissive subject of bar-

clude a party from including in its offer proposals such as those formulated by the Respondent, including a proposal to defer a portion of severance pay based on amounts that the Respondent believed it was entitled to recover from the discharged employees. These issues are grist for the mill of lawful effects bargaining, and they are especially appropriate subjects when the employer, the union and affected employees may wish to resolve all financial issues that exist in relation to lawful terminations of the employment relationship, like those at issue in the instant case.

The record evidence suggests that the parties themselves were unclear regarding what was being addressed in effects bargaining and what was encompassed by the Respondent’s effects-bargaining proposal. However, there is no question that effects bargaining took place consistent with the judge’s order, and I believe the Board cannot find a violation here based on a purported renegotiation of the Board-ordered *Transmarine* limited backpay award. For starters, the Board’s remedial order did not authorize or direct the Respondent to bargain over the *Transmarine* backpay remedy.⁹ The Board remains responsible for enforcement of the *Transmarine* backpay remedy, regardless of whether or not one party or the other may have believed the remedy could itself be the subject of effects bargaining, so there is no risk that bargaining could have compromised the minimum backpay period prescribed in the effects-bargaining order.

gaining that cannot lawfully be insisted upon to impasse. See *NLRB v. Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958); *supra* fn. 5.

⁹ The order directed the Respondent, “[o]n request,” to “bargain with BARSUEA [the Union] with respect to the effects of its decision to discharge Business Agents Lee Dyches, Shawn Hood, Patricia Hurd, John Miller, and Bill Parke.” 358 NLRB No. 19, slip op. at 1. By comparison, the *Transmarine* backpay order directed the Respondent to “[p]ay its discharged business agents . . . their normal wages for the period set forth in the remedy section of the judge’s decision.” *Id.* The judge’s decision, in turn, directed the Respondent to pay the affected employees “backpay at their normal wages from 5 days after the date of this order until the earliest of . . . (1) the date Respondent bargains to agreement as to the effects of the discharges” or “(2) a bona fide impasse in bargaining. . . .” *Id.*, slip op. at 8. Obviously, nothing in these remedial requirements suggests the Board-ordered backpay remedy was to be a subject in effects bargaining.

It appears that the Respondent misunderstood the judge’s order as setting the minimum amount of *Transmarine* backpay as an appropriate starting point for an effects-bargaining proposal. However, the Union was free to reject that offer—which it did, making a counteroffer—and the Respondent never took the position that the judge’s “suggestion” placed a 2-weeks’-pay *ceiling* on the amount of severance pay it could be required to furnish under any agreement reached in good-faith effects bargaining. As noted in the text below, the record also reveals that the Union regarded the Respondent’s effects-bargaining proposal as involving severance pay, not as an attempt to negotiate the minimum *Transmarine* backpay period.

Moreover, the Respondent's severance pay proposal in effects bargaining differed from the Board's *Transmarine* backpay remedy in two respects. First, the *Transmarine* backpay order provided that "net interim earnings" would be deducted from the gross amount of backpay owing to the five employees.¹⁰ In contrast, Respondent's effects-bargaining proposal offered the affected employees "two weeks pay *without deductions for interim earnings*." Second, the Respondent in effects bargaining offered 2 weeks' pay (with the setoff and holdback described above in fn. 5) at a time when nobody knew or could have known when bargaining might result in an agreement or impasse. In contrast, the *Transmarine* backpay order provided for an *indefinite* amount of backpay, with the accrual of backpay commencing March 28, 2012, and continuing until effects bargaining resulted in an agreement or an impasse, whichever occurred sooner. Finally, my colleagues' finding that the Respondent in effects bargaining did nothing more than attempt to negotiate downward the Board-ordered backpay remedy is negated by the General Counsel's stipulation that the Respondent and the Union reached an impasse in effects bargaining. A bargaining impasse presumes good-faith bargaining.

It also appears clear that the *Union* understood that Respondent's effects-bargaining proposals were separate and independent from the Board-imposed *Transmarine* "limited backpay" award. After the Respondent transmitted its offer,¹¹ the Union formulated a counterproposal. The judge described the Union's counterproposal and subsequent bargaining as follows:

Union Vice President Lawrence Blackwell mailed a counteroffer to Respondent on April 10, 2012. The counteroffer was as follows: 2 weeks' severance pay and all unused vacation or leave paid back for Dyches, Hurd, Miller, and Parke; and 2 weeks' severance pay, 70 vacation days, unpaid phone charges and 6 weeks' of mileage reimbursement for Hood. Blackwell also rejected the set off for mileage reimbursement *because he contended that there was no proof that it was invalidly claimed*. On April 11, 2012, Respondent rejected the Union's counteroffer, giving reasons in support of its position. It also stated that impasse in bargaining had occurred. The parties stipulated that Respondent and the Union reached an impasse on April 11, 2012.

¹⁰ The judge's order provided that "[a]ny backpay owing, *less any net interim earnings*, shall be computed . . . with interest . . . compounded daily. . ." (emphasis added).

¹¹ The Respondent's effects-bargaining offer was extended in writing, and the judge's description of Respondent's offer is quoted in fn. 4, *supra*.

Judge's decision, *infra*, slip op. at 11 (emphasis added). Thus, the Union opposed the Respondent's setoff proposal on its merits, not on the basis that was inconsistent with *Transmarine*. Again, this is the type of bargaining conduct that is contemplated in Board-ordered effects bargaining, and Section 8(d) prohibits the Board from requiring anyone to include *any* particular substantive terms in its proposals.

Finally, regardless of whatever confusion may have existed between the parties regarding precisely what was being addressed in effects bargaining, I believe the Board's finding that the parties' effects bargaining was deficient requires that they pass on the substance of the Respondent's proposals, which is precluded under Section 8(d) of the Act.

On the other hand, as stated above, the Board does have the authority to impose on the Respondent the *Transmarine* limited backpay obligation. The *Transmarine* backpay period commenced running on March 28 and ended 14 days later on April 11—the date when bargaining reached an impasse, as stipulated—making it appropriate for the Board to require the Respondent to provide backpay to the five affected employees for a period of 14 days, or 2 weeks.¹²

For the reasons explained above, I do not believe the Board can properly find that Respondent's lawful conduct during ordered effects bargaining warrants a *Transmarine* "limited backpay" award that exceeds 2 weeks. Therefore, I believe the majority's backpay award, spanning an additional 24 weeks, is effectively a fine. Not only is such a penalty proscribed by Section 8(d)—since it results from the Board's disapproval of the *substance* of Respondent's lawful effects-bargaining proposals—it is also improper because nonremedial penalties have long been held to exceed the scope of the Board's remedial authority under Section 10(c) of the Act. See, e.g., *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 235–236 (1938).¹³

¹² The record establishes that the Respondent had previously given the affected employees 1 week's pay for time they did not perform any work. See fn. 4, *supra*. Although my colleagues object to the Respondent's proposal to defer a portion of severance pay pending resolution of the mileage reimbursement dispute, they do not find improper the Respondent's proposed deduction of the 1 week's pay previously provided to the affected employees. Although I believe Respondent's effects-bargaining proposals are distinct from the Board-ordered "limited backpay" that is part of a *Transmarine* remedy, I concur with my colleagues' finding that the 1 week's pay previously provided by Respondent may be deducted from the *Transmarine* backpay remedy.

¹³ In support of their contention that Respondent's proposal was contrary to the *Transmarine* remedy, my colleagues rely on *Sawyer of Napa, Inc.*, 321 NLRB 1120 (1996). *Sawyer of Napa* differs materially from this case. To understand how, recall that the central purpose of *Transmarine*'s limited backpay remedy is "to assure meaningful bargaining." 170 NLRB at 390. By putting the employer's former employees back on the payroll while effects bargaining proceeds, *Trans-*

Conclusion

Based on the above considerations, I respectfully dissent from any effects-bargaining backpay remedy to the extent it exceeds 14 days' backpay.

Dated, Washington, D.C. August 26, 2016

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

David Rodriguez, Esq., for the General Counsel.
Michael McAuliffe Miller, Esq. (Eckert, Seamans, Cherin & Mellott), for the Respondent.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

ROBERT A. GIANNASI, Administrative Law Judge. The hearing in this compliance matter was held on April 14, 2014, in Philadelphia, Pennsylvania. The compliance specification, as

marine seeks to induce in the employer a state of mind like that of a passenger in a taxicab: "Hurry up, the meter's running." In *Sawyer of Napa*, the employer was under the mistaken impression that the meter stopped running at 2 weeks. Instead of a *minimum* of 2 weeks' pay, it believed that *Transmarine* provided for a *maximum* of 2 weeks' pay. Under those circumstances, the Board concluded that "the [r]espondent did not suffer the full consequence of the *Transmarine* remedy and the [u]nion was not accorded the full bargaining strength that the *Transmarine* backpay provisions were designed to generate." 321 NLRB at 1120. In other words, in *Sawyer of Napa* the employer's misconception affected *the bargaining process itself*, which Congress entrusted to the Board's oversight. See *H. K. Porter*, 397 U.S. at 107–108 ("It is implicit in the entire structure of the Act that the Board acts to oversee and referee the process of collective bargaining, leaving the results of the contest to the bargaining strengths of the parties."). I also find unpersuasive my colleagues' reliance on *State Journal*, 238 NLRB 388 (1978), and *Teamsters, Local 705*, 227 NLRB 694 (1977). In *State Journal*, the discriminatee had assigned his earnings to his wife, and the employer had paid the discriminatee's backpay to his wife pursuant to that assignment. The Board held that payment to the discriminatee's wife did not discharge the employer's backpay obligation to the discriminatee. Those facts and that holding have no bearing on this case. In *Teamsters, Local 705*, the Board disallowed the union's claimed backpay offset for union dues owed by the discriminatee, whose discharge the union had secured in violation of Sec. 8(b)(1)(A) and (2). The Board explained that "the object of the [backpay] remedy is to discourage discrimination against employees contrary to the statute and thereby to vindicate the policies of the Act. Consequently, [r]espondent is not permitted to reduce the amount of backpay by the amount of its private claim for dues." 227 NLRB at 694 (emphasis added). Here, in contrast, the issue is whether Respondent bargained to a valid impasse in effects bargaining, and my colleagues are imposing a backpay remedy—far in excess of that contemplated by *Transmarine*—based on their disapproval of the substance of Respondent's effects-bargaining proposals, and contrary to the parties' stipulation that an impasse over those proposals had been reached in bargaining.

revised, sets forth alleged moneys due former employees Lee Dyches, Shawn Hood, Patricia Hurd, John Miller and Bill Parke (hereafter the claimants) under the *Transmarine*¹ backpay remedy ordered in the Board's underlying decision in this case reported at 358 NLRB No. 19 (March 23, 2012). The compliance specification states that the Board's order directed Respondent to bargain with the Charging Party Union (hereafter the Union or BARSUEA) over the effects of its decision to discharge² the claimants and to pay them normal wages they would have earned commencing five (5) days after the issuance of the order until the earliest of the following conditions:

(1) the date that Respondent bargained to agreement with the Union over the effects of the layoffs; (2) the date a bona fide impasse in effects bargaining occurred; (3) the failure of the Union to request bargaining within five business days after receipt of the Board's Order, or to commence negotiations within five business days after receipt of Respondent's notice of its desire to bargain with the Union; or (4) the Union's subsequent failure to bargain in good faith. The Board further ordered that, in no event, would the sum paid to any of the claimants exceed the amount that any of them would have earned as wages from the date of their layoffs to the time they each secured equivalent employment; nor would the sum paid to the complaints be less than they would have earned for a two week period as their normal wages when they last were in Respondent's employ, plus interest.

The compliance specification lists the claimants' bi-weekly earnings at the time of their discharges as follows: Dyches—\$3,099.48; Hood—\$3,194.52; Hurd—\$3,145.25; Miller—\$2860.57; and Parke—\$3,158.12. The specification also alleged that the claimants were on leaves of absence from their corrections officers jobs with the Commonwealth of Pennsylvania (the Commonwealth) while they were employed by Respondent. By agreement with the Commonwealth, a portion of their pay was paid by the Commonwealth and the remainder was paid directly by Respondent, but Respondent reimbursed the Commonwealth for the portion it paid. Their bi-weekly earnings set forth above include both portions of pay.

The compliance specification further alleges that none of the conditions specified in the Board order occurred and that the back pay period ran 26 weeks from March 28, 2012 (5 days after the Board order issued) until September 28, 2012, the approximate date on which the Union that represented the claimants became defunct and was no longer able to bargain. As revised at the hearing, the specification sets forth the gross backpay amounts for each claimant, less interim earnings, resulting in a net back pay amount for each. The total amounts to some \$57,000, plus interest.³

¹ *Transmarine Navigation Corp.*, 170 NLRB 389 (1968).

² The specification erroneously refers to the terminations as layoffs.

³ The parties stipulated that the back pay calculations for Dyches, Hood, Hurd and Miller set forth in the revised compliance specification are properly calculated. Respondent disputes the calculation as to Parke because it contends that Respondent did not mitigate his back pay liability when he declined to return to his former correction officer's position. Respondent, however, agrees that, if its contention as to Parke, is rejected, the back pay calculation for Parke is accurate.

Respondent filed an answer alleging that it had lawfully bargained to an impasse over the amounts due, thus satisfying one of the key requirements of the Board's order. It also asserted that the Union was "essentially defunct and disclaimed any bargaining obligation prior to September 28, 2012." The answer admitted the biweekly earnings of the claimants set forth in the compliance specification. It also admitted the portion of the specification set forth above dealing with the pay of the claimants while they were on leaves of absence from their former jobs. With specific reference to claimant Parke, the answer alleged that he voluntarily declined to return to his former position as a correctional officer for the Commonwealth of Pennsylvania, which he originally left to become an employee of Respondent, even though that opportunity was available to him, as it was to other claimants who returned to their former positions. The answer thus asserts that any backpay for him should be cut off as of the date he declined to return to his former position.

The parties filed posthearing briefs which I have read and considered.

The Facts

Respondent represents some 11,000 corrections officers employed by the Commonwealth of Pennsylvania. Respondent employs some 18 individuals who were represented by the Union. Some of those individuals, including claimants, were former corrections officers. When they were employed by Respondent, the claimants were on leaves of absences from their corrections officer jobs. By agreement with the Commonwealth, a portion of their pay was paid by the Commonwealth and the remainder was paid directly by Respondent, but Respondent reimbursed the Commonwealth for the portion it paid. The claimants also accrued pension and leave credits from the Commonwealth during their employment with Respondent. (Tr. 35-36, 64-65.)

After their discharge by Respondent, all the claimants received letters, dated August 20, 2010, directing them to return to their original correctional institutions to resume their employment there. Work was available for those individuals at their original correctional institutions. (Jt. Exh. 7.) Parke was the only claimant who did not return to his former position as a corrections officer. He voluntarily retired from his former position and accepted either a pension or a lump sum settlement both from the Commonwealth and from Respondent. He did, however, obtain other employment in another industry.⁴

Parke testified that when joined Respondent he left his corrections officer position in Houtzdale, Pennsylvania, and moved to Mechanicsburg, Pennsylvania, nearer to his work site with Respondent in Harrisburg. That was some two and a half hours drive away from Houtzdale. He also testified that, before deciding to retire, he did not request a transfer from his former corrections position to one closer to his home than his work site at Respondent. Such transfers are readily available and permitted under the applicable collective-bargaining agreement. (Tr.

⁴ The parties agree that, under the collective-bargaining agreement between Respondent and the Union, as well as pursuant to past practice, claimants were entitled to return to their former positions as corrections officers. Tr. 15-16.

47-58.)

On April 4, 2012, representatives of Respondent met with Larry Sonnie, the president of the Union, to engage in effects bargaining pursuant to the Board's decision of March 23, 2012. This was the parties' only face to face bargaining meeting. This meeting was initiated by Respondent, whose representative contacted Sonnie. The Union apparently had no knowledge of the Board's decision and had not attempted to initiate effects bargaining. (Tr. 19.)

Respondent's position was set forth in a letter to Sonnie, dated April 4. It offered to pay the claimants 2 weeks' pay without deductions for interim earnings, less 1 week's pay claimants received at the time of their discharge for time they did not work for Respondent. Those amounts would then, according to Respondent, be considered a credit against moneys allegedly received by claimants for improper mileage reimbursements during their employment. Respondent has sued for the return of such mileage reimbursements in civil lawsuits against Claimants Dyches, Hurd and Miller. Those lawsuits are still pending.⁵

Union Vice President Lawrence Blackwell mailed a counteroffer to Respondent on April 10, 2012. The counteroffer was as follows: 2 weeks' severance pay and all unused vacation or leave paid back for Dyches, Hurd, Miller, and Parke; and 2 weeks' severance pay, 70 vacation days, unpaid phone charges and 6 weeks' of mileage reimbursement for Hood. Blackwell also rejected the set off for mileage reimbursement because he contended that there was no proof that it was invalidly claimed.

On April 11, 2012, Respondent rejected the Union's counteroffer, giving reasons in support of its position. It also stated that impasse in bargaining had occurred. The parties stipulated that Respondent and the Union reached an impasse on April 11, 2012. It was also stipulated that neither party made any other effort to contact the other to engage in further effects bargaining.⁶

Sonnie and Blackwell retained their positions in the Union until September 28, 2012, when all parties agree that the Union became defunct. Sonnie testified that he tried to reach out to the claimants to determine their positions on the Respondent's April 4 offer, but none of them returned his calls. He then turned the matter over to Blackwell, who apparently was able to make contact with at least one of the claimants. (Tr. 26, 28, 39-40, 83.) According to Sonnie, between April 2012 and September 2012, the Union was "in a holding pattern" because a petition to decertify the Union was filed with the Board's Philadelphia regional office. He testified that "nobody wanted to do anything because we didn't know whether we were going to be there or not." (Tr. 37.)

A petition to decertify the Union was filed on January 26, 2012, with the Region 4 of the Board in Philadelphia. Attached to the petition was a statement, signed by 11 of the 18 employ-

⁵ Respondent's claims of invalid mileage reimbursement included an amount for Hood, but, according to the stipulation of the parties, no lawsuit was filed against Hood to recover the mileage amounts he apparently owed. The parties also stipulated that Parke was not accused of collecting invalid mileage reimbursements.

⁶ Respondent conceded that its position on mileage reimbursement, at least, was insisted upon to the point of impasse. Tr. 16-17.

ees in the unit represented by the Union, that the signers no longer wanted the Union to represent them. (R. Exh. 5.) On March 7, 2012, while the underlying case was still pending before the Board, the regional director for Region 4 dismissed the decertification petition because of the then-existing 2010 bargaining agreement whose validity was at issue in the underlying case, “subject to reinstatement, if appropriate,” upon conclusion of the underlying case. In fact, in the Board’s March 23, 2012 decision, the 2010 contract was declared invalid. R. Exh. 7. But apparently no one asked for reinstatement of the decertification petition and no election was held. Furthermore, as indicated above, the Respondent dealt with the Union in effects bargaining in April 2012.

Discussion and Analysis

There are several issues in this case: (1) Did the back pay period end on April 11, 2012, when the parties were admittedly at impasse in their effects bargaining, as Respondent alleges, or September 28, 2012, when the Union became defunct, as the General Counsel alleges? The answer to that question turns on how one views Respondent’s conditions for agreement—that its offer of 2 weeks’ back pay be set off by an earlier week’s pay to the claimants that was unearned and by any amounts due to Respondent because of improper mileage reimbursements to claimants. The General Counsel asserts that these conditions were not mandatory subjects of bargaining. Respondent says that they were. (2) If Respondent’s contention on the above question fails, did the back pay period end at some point before September 28, as Respondent contends, because the Union was essentially incapable of bargaining, mainly because of the filing of a decertification petition, which was not promptly acted upon by the regional office? (3) As to Parke, was Respondent’s back pay liability tolled because Parke, alone among the claimants, voluntarily declined to return to his former position as a corrections officer, as Respondent contends?

It is settled that a lawful impasse cannot exist if a party insists that any agreement include a nonmandatory subject of bargaining—that is, a subject that does not “vital affect” wages, hours or terms and conditions of employment. See *Cushman & Wakefield, Inc.*, 360 NLRB No. 10, slip op. 4 (2013), and cases there cited.

Here, it is clear that the parties were at impasse in bargaining over the effects of the decision to discharge the claimants. It is Respondent’s position that the Board’s order in the underlying case tolled back pay at the point that the parties were at lawful impasse. But it is also clear that the Board’s order required a minimum of two weeks of back pay. Respondent offered two weeks of back pay, but required that there be a set off against that amount of an earlier payment of one week of pay that allegedly had been unearned and of whatever it alleged was improper mileage reimbursement to some claimants during their employment. These conditions were contrary to the minimum back pay remedy in the Board’s order. Insistence to impasse on a position that derogates from a specific Board remedy amounts, in my view, to insistence on an illegal subject of bargaining. See Chapter 16 VI. B. of *The Developing Labor Law* (Sixth Edition, 2012). At the least, such a position does not constitute a mandatory subject, about which the other party

must bargain. Accordingly, I find that the impasse of April 11 was not a valid impasse and the back pay period continued to run thereafter.⁷

Nor do I find that the Union was incapable of bargaining at any point before September 28, 2012, when it became defunct. Clearly, the Union was operative in April 2012 when Respondent engaged with it in effects bargaining. Thus, any contention that the decertification petition, which was filed in January 2012, made the Union incapable of bargaining must fail. No election was held and thus the Union was still a viable entity, at least insofar as carrying out the bargaining contemplated in the Board’s order in the underlying case. Moreover, Respondent negotiated with the Union over effects bargaining, thus waiving any right to challenge its representative status. See *Fallbrook Hospital*, 360 NLRB No. 73, slip op. 1 (2014) (employer waived its right to challenge validity of a union’s certification by entering into negotiations with that union).⁸

It is true that neither side requested a return to the bargaining table after April 11. But that was because Respondent poisoned the well by insisting on improper conditions that caused an impasse. Had it not wrongfully insisted on those conditions, contrary to the Board’s order, the bargaining might well have gone forward. Thus, Respondent, like any wrongdoer, cannot profit from any lack of bargaining from mid-April until the September 2012 date the Union became defunct. I therefore reject the Respondent’s position and agree with the General Counsel’s position that the back pay period runs until September 28, 2012.

The above applies to the claims of Dyches, Hood, Hurd and Miller. Parke is different because I must consider the separate allegation that he failed to mitigate Respondent’s back pay liability by not returning to his former employment with the Commonwealth of Pennsylvania, as did the other claimants. See *St. George Warehouse*, 351 NLRB 961, 963 (2007).

I agree with Respondent that Parke failed to mitigate the back pay obligation to him. He voluntarily retired from his former position and refused even to consider asking for a transfer to a position nearer his home that was likely available. I reject the General Counsel’s attempt (Br. 18–20) to treat Parke’s former corrections officer position as the usual kind of interim employment. That job was intrinsically intertwined with his position with Respondent. Parke’s job as assistant grievance manager for Respondent was based to a great degree

⁷ The briefs of the parties on this issue seem to joust on a separate point—whether seeking a set off for mileage reimbursement, particularly in light of pending lawsuits against some but not all of the claimants, amounts to a mandatory or permissive subject of bargaining. In view of my rationale for finding no lawful impasse, set forth above, I need not address this point. But the General Counsel seems to have the better of the argument since Respondent’s set off is comparable to conditioning agreement on a general release of claims, which is a permissive, not a mandatory, subject of bargaining. See *Borden, Inc.*, 279 NLRB 396, 398–399 (1986).

⁸ As the General Counsel points out (Br. 15), the decertification petition was properly dismissed by the region pending the outcome of the underlying case. The petition was not reinstated thereafter, and could not have been until after the Respondent’s violation (failure to engage in effects bargaining) was appropriately remedied.

on his former experience as a corrections officer since Respondent represents corrections officers. Moreover, as indicated above, Parke was simply on leave of absence from his former position. Indeed, part of his compensation from Respondent was paid by the Commonwealth. He also accrued pension and leave credits from the Commonwealth during his employment with Respondent. And he had an absolute right to return to his former position after his leave of absence was over. To overlook these ties to his former position in determining the mitigation issue would provide Parke with a windfall he does not deserve. Thus, in the particular circumstances of this case, I find that Parke “willfully incurred” a loss by his “clearly unjustified” refusal to return to his former employment. *St. George Warehouse*, above, quoting from applicable authorities.

I do not believe, however, that Parke is entitled to no back pay, as Respondent seems to contend. He is entitled to the minimum 2 weeks of back pay set forth in the Board’s order in the underlying case.

On these findings and conclusions, and on the entire record, I

issue the following recommended⁹

ORDER

The Respondent, its officers, agents, successors and assigns, shall pay the claimants the amounts specified after their names below, plus interest accrued to the date of payment, as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010), minus tax withholdings required by Federal and State laws.

Lee Dyches	\$9,646.25
Shawn Hood	3,235.89
Patricia Hurd	11,755.23
John Miller	8,243.08
Bill Parke	\$3,158.12

Dated, Washington, D.C., May 23, 2014

⁹ If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.