UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

UNITED STATES POSTAL SERVICE,	)	
	)	
Respondent,	)	
	)	
and	)	**Case 08-CA-197451**
	)	
AMERICAN POSTAL WORKERS UNION, LOCAL 170,	)	
	)	
	)	
Charging Party	)	

RESPONDENT'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION AND SUPPORTING BRIEF

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BACKGROUND

This Complaint arises out of the unfair labor practice charge filed by the American Postal Workers Union, Local 170 ("APWU" or "Union"), on April 21, 2017, alleging that the Postal Service unilaterally changed the break schedule and unilaterally reduced the time for breaks on March 25, 2017. Specifically, the undisputed facts show that employees were at all times paid for eight hours of time, inclusive of breaks. Prior to March 25, 2017, employees received two 15 minute breaks. Effective March 25, 2017, employees received two 10 minute breaks. The employees' workday remained eight hours. The Postal Service restored the employees' breaks to 15 minutes on September 27, 2017.

The Complaint in this matter was filed on August 29, 2017. The remedy of backpay was not raised in either the original charge or the Complaint. The Amended Complaint was filed on February 12, 2018, seeking for the first time the remedy of backpay. The hearing was conducted on March 7, 2018, before Administrative Law Judge (ALJ), Thomas M. Randazzo. The Postal Service does not challenge the ALJ's finding that it failed to bargain with the Union over the reduction of break times from 15 to 10 minutes from March 25, 2017, to September 27, 2017, or the effects of such a change, and that such a unilateral change constitutes a violation of Section 8(a)(5) of the Act. The Postal Service, however, does challenge the ALJ's finding that backpay is an appropriate remedy.

ARGUMENT

Respondent, United States Postal Service ("Postal Service"), pursuant to Section 102.46 of the Board's Rules and Regulations hereby timely submits its exceptions to the

Administrative Law Judge's (ALJ's) decision, issued on May 25, 2018. Respondent incorporates its supporting brief, including the citation of authorities, with its exceptions herein. Respondent files exceptions with respect to the following rulings made by the ALJ.

1. The ALJ erred when he awarded backpay as a remedy

The ALJ's ruling is set forth at pages 16 [line 34] through 19 [line 28] and page 20 [lines 13-28] of the decision.

First, the ALJ rejected Respondent's argument that backpay is inappropriate because the employees were paid for an eight-hour day, regardless of whether the two breaks were 10 or 15 minutes. The ALJ based his decision on the fact that, following the unilateral change, the employees were required to be "productive" – or perform an additional 10 minutes of work per day – even though it resulted in no change to either their pay or the length of their work day. ALJ Decision, p. 16 [lines 11-25]. As the ALJ concluded, "[i]t stands to reason that requiring employees to work for an additional 10 minutes per day when they should not have been working is a damage that should be compensated and remedied to make them whole for their losses." Id., at p. 16 [lines 26-28]. The ALJ then cites to Atlas Tack Corp., 226 NLRB 222 (1976), for the proposition that he may direct "a make-whole remedy for any loss of pay employees may have suffered as a result of [a] change in [a] lunchbreak practice and length of workday." Id., at p. 16 [lines 28-32].

However, as set forth in the cited quotation, the unilateral change is Atlas Tack Corp. resulted in a change to the length of the employees' workday. Specifically, the employer in that case substituted a 20-minute paid lunch break with a 30-minute unpaid

lunch break and extended the work day by 30 minutes. As the ALJ in that case ordered, and the Board affirmed:

> It has been found that Respondent unilaterally changed the working conditions of its employees by implementing a rule requiring employees to take an unpaid half-hour lunch instead of a 20-minute paid lunchbreak. In addition, Respondent increased the length of the workday by a half hour from 3 to 3:30 p.m. If Respondent had merely changed from a paid to an unpaid 20-minute break, its responsibility would be limited to that amount. By lengthening the day by half an hour, employees are obliged to remain and should therefore be compensated for that time. I shall therefore recommend that the employees affected shall be made whole for any loss of earnings they may have sustained as a result of both the Respondent's changes of the paid lunchbreak and the length of the workday.

Atlas Tack Corp., supra. at 228.

As such, the facts in Atlas Tack Corp. are wholly distinct from the facts in this case. There, backpay was required to compensate the employees both for the pay lost by converting the paid lunch to an unpaid lunch and for requiring the employees to extend their workday. In the instant case, however, the employees lost no pay and their workday was not extended.

Moreover, the ALJ never addressed two factually analogous cases cited in Respondent's post-hearing brief, where the employer reduced the employees breaks from 15 to 10 minutes without loss of pay or change to length of the workday, but the Board ordered no backpay. Lake City Management, 303 NLRB No. 18 (1991); Postal Service, 275 NLRB 360 (1985).

Second, the ALJ rejected Respondent's alternative argument that neither the charge nor the Complaint ever sought backpay as a remedy and, therefore, the claim for backpay raised in the Amended Complaint was untimely and barred under Section 10(b). The ALJ based his decision on his finding that "Respondent did not assert its

10(b) argument as an affirmative defense in its answers to either the complaint or the amended complaint/compliance specification, and it did not assert such a defense at trial." Id., at p. 17 [lines 39-43]. The ALJ continued, "[a]s the Respondent failed to assert its 10(b) defense until its post-hearing brief, the argument is rejected as untimely." Id., at p. 17 [lines 44-45].

To the contrary, the Postal Service, in its March 5, 2018, Answer, included the following Fifth Affirmative Defense:

> In neither its charge nor its related grievance did the Union seek any monetary award for the alleged unilateral action by the Postal Service in reducing breaks from 15 to 10 minutes. Therefore the Amended Complaint exceeds the scope of the Charge and the General Counsel does not have 'carte blanche' to investigate matters not raised in the charge.

Accordingly, the Postal Service did timely raise its 10(b) defense and the ALJ erred when he rejected Respondent's affirmative defense as untimely. Likewise, the ALJ erred when he found that, "[e]ven if respondent's 10(b) argument was timely, it lacks merit and I would dismiss it on the merits as neither the Board's Rules and Regulations … nor its well-established practice and procedure, requires that the proposed remedy be alleged in the charge, or even in the complaint." ALJ Decision, fn 13.

To the contrary, Section 10264.2 of the NLRB's Casehandling Manual provides that "[t]he allegations of the complaint should be sufficiently detailed to enable the parties to understand the offenses charged and the issues to be met" (emphasis added). Moreover, Section 10268.1 of the NLRB's Casehandling Manual provides that "[w]here appropriate the complaint should contain a prayer for relief. Indeed, the

complaint should set forth the requested remedy whenever any other than a routine remedy is sought (emphasis added)" That there is no Board or ALJ decision awarding backpay under these facts – i.e., a unilateral change resulting in no loss of pay or extension of the workday – suggests the remedy sought here is "other than routine."

For all of the foregoing reasons, the ALJ's findings regarding backpay should be reversed or, if appropriate, remanded for further briefing and analysis.

DATED June 22, 2018, at St. Louis, Missouri.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 22, 2018, I served the foregoing Exceptions and Brief in Support, unless otherwise indicated, via regular first-class mail as follows:

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