

**UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD  
REGION 8**

**UNITED STATES POSTAL SERVICE**

**and**

**Case**

**08-CA-197451**

**AMERICAN POSTAL WORKERS UNION,  
LOCAL 170**

**COUNSEL FOR THE GENERAL COUNSEL’S ANSWERING BRIEF TO  
RESPONDENT’S EXCEPTIONS TO THE DECISION OF THE  
ADMINISTRATIVE LAW JUDGE**

**I. INTRODUCTION**

Pursuant to Section 102.46(d) of the Rules and Regulations of the National Labor Relations Board, the undersigned Counsel for the General Counsel respectfully files this Answering Brief to Respondent United States Postal Service’s Exceptions to Administrative Law Judge Thomas Randazzo’s Decision.<sup>1</sup>

In its Exceptions, Respondent does not challenge the ALJ’s finding that it violated Section 8(a)(5) and (1) by unilaterally reducing the duration of two daily paid breaks without providing the American Postal Workers Union, Local 170 (Union) with notice and a meaningful opportunity to bargain. Rather, Respondent solely objects to the granting of backpay to the unit employees to compensate them for the additional 10 minutes a day they worked due to the shortened breaks. As will be explained below, Respondent’s Exceptions should be denied because make-whole relief in the form of backpay is an appropriate remedy for Respondent’s violation of the Act.

---

<sup>1</sup> In this brief, the ALJ’s Decision in JD-36-18 will be identified as “Decision” page and line. References to the official transcript of this proceeding will be referred to as Tr. \_\_\_\_.

## II. PROCEDURAL BACKGROUND AND THE ALJ'S DECISION

On August 29, 2017, upon a charge filed by the Union, a complaint issued alleging that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally reducing the length of unit employees' two daily paid breaks from 15 to 10 minutes without bargaining with the Unit. At the time the Complaint issued, the shortened breaks were still in effect. On September 27, 2017, Respondent restored the 15-minute paid breaks, and thus no backpay has accrued since that date.

On February 12, 2018, the Region amended the Complaint and consolidated it with a Compliance Specification seeking backpay for the six-month period when employees were not remunerated for their additional work when the breaks were shortened. On March 7, 2018, a hearing was held before Administrative Law Judge Thomas Randazzo. In his Decision that followed, the ALJ found that Respondent violated Section 8(a)(5) and (1) by unilaterally reducing the duration of paid breaks without providing the Union with notice and a meaningful opportunity to bargain over that change or the effects of that change. Decision, p. 11, lines 44 – 46.

As part of his Decision, Judge Randazzo ruled on the Compliance Specification, starting first with a review of the pertinent facts:

Prior to March 2017, when their breaks were 15 minutes, the employees had 7 hours and 30 minutes of productivity or work time for which they were compensated. (Tr. 55.) However, when the breaks were reduced to 10 minutes, the employees had 7 hours and 40 minutes of productivity or work time, and it is undisputed that those employees did not receive compensation for that extra 10 minutes per day of productivity that they worked between March 25 and September 26, 2017. (Tr. 55.) Respondent Manager Dale Patterson admitted at trial that the reduction in break times resulted in employees having to provide the Respondent an extra 10 minutes of service per shift. (Tr. 110-113.)

Decision, p. 17, lines 25-28.

Judge Randazzo then explained why an award of backpay was appropriate:

It 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., lines 28 - 32. Judge Randazzo ordered Respondent to make the unit employees whole by providing backpay in the amounts stipulated to by the parties. The total amount of the backpay awarded was \$11,585.89, plus interest and any adverse tax consequences. Id. at p. 21, lines 10 - 45.

On June 22, 2018, Respondent filed its Exceptions to the ALJ's Decision.

### **III. ARGUMENT**

#### **A. Judge Randazzo did not err in awarding backpay as a remedy for Respondent's unlawful action of unilaterally reducing paid break periods.**

As Judge Randazzo explained, “the Board's standard remedy in 8(a)(5) cases involving unilateral changes resulting in losses to employees is to make whole any employee affected by the change.” Decision, p. 16, lines 34-37 (quoting Grand Rapids Press, 325 NLRB 915, 916 (1998)). The loss here was a direct result of the shortened breaks, resulting in employees giving Respondent an additional 10 minutes of productivity each day without additional compensation. The Board has regularly awarded make-whole relief when employees work additional time due to shortened or eliminated paid breaks. In Choctaw Manufacturing, Co., 340 NLRB 502 (2003), the Board found that the employer had unlawfully and unilaterally eliminated paid smoking breaks. As one of the remedies, the Board ordered that the employer:

make whole the unit employees for any loss of earnings and other benefits they may have suffered as a result of the Respondent's unlawful actions. Backpay shall be computed in accordance with Ogle Protection Service, 183 NLRB 682 (1970), *enfd.* 444 F. 2d 502 (6th Cir. 1071), with interest...

Id. at 504; see Dresser-Rand Co., 362 NLRB No. 136 (2015) (ordering employees to be made whole where paid lunch break was eliminated), enf'd in part, denied in part, 838 F.3d 512 (5th Cir. 2016); American Eagle Protective Services Corp., 05-CA-126739, 2015 WL 670313 (2015) (same); see also Inland Steel Co., 259 NLRB 191 (1981) (a Section 8(a)(3) case, ordering affected employees to be made whole for 15 minutes per day – 5 minutes for the elimination of washup time and 10 minutes for the reduction of paid lunch).

The Board has awarded backpay when a paid break is taken away on a single occasion. In Litton Microwave Cooking Products, 300 NLRB 324 (1990), the Board found that the employer violated Section 8(a)(5) when it unilaterally eliminated the long-standing practice of providing an extra paid half hour for lunch on the day before Christmas. As a remedy, the Board ordered the employer “to make whole any employee who may have suffered losses in wages or benefits as a result of this unilateral change” when the total loss for each employee was limited to 30 minutes of pay. Id. at 336-337. Here, most of the employees had losses in excess of 1000 minutes.

Respondent takes issue with Judge Randazzo’s citation to Atlas Tack Corp., 226 NLRB 222 (1976) to support granting backpay. Respondent argues that Atlas Tack is not applicable because the employees in that case received backpay resulting from their work day being extended by a half hour, as well as from the elimination of a 20-minute paid lunch. Exceptions, pp. 3 – 4. However, no Board case has ever found that a backpay award resulting from the reduction or elimination of a paid break is dependent on the workday also being extended. In fact, the Board in Atlas Tack stated that it would have still awarded backpay even if the workday was not extended. Atlas Tack, supra. (“[i]f Respondent had merely changed from a paid to an unpaid 20-minute break, its responsibility would be limited to that amount”).

Finally, Respondent excepts to the ALJ's failure to address Postal Service, 275 NLRB 360 (1985), which it cited in its post-hearing brief. Exceptions, p. 3. However, Judge Randazzo did discuss this case in an extended paragraph, explaining that because the Board did not find that the employer had violated the Act, no backpay was ordered. Decision, p. 11, lines 30-42.

**B. The award of backpay is not precluded by Section 10(b).**

Respondent next argues that because neither the charge nor the original Complaint specified backpay as a potential remedy, the claim for backpay should be barred under Section 10(b) of the Act. Exceptions, p. 3. Judge Randazzo dismissed this defense on timeliness grounds because Respondent first raised it in its post-hearing brief. Decision, p. 17, lines 41 – 45 (citing Alternative Energy Applications, Inc., 361 NLRB No. 139 (2014)). Respondent's claim that its Fifth Affirmative Defense preserved the issue is baseless.<sup>2</sup> This defense addresses the scope of the complaint in relation to the allegations in the charge and has nothing to do with the timeliness of when the backpay remedy was first alleged.

Even if the Respondent did not waive the defense, Section 10(b) has no applicability here. Section 10(b) precludes the issuance of a complaint "based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon" the charged party. As Judge Randazzo pointed out, "It is for the Board to fashion the remedy which it deems appropriate to undo the effects of the unfair labor practices

---

<sup>2</sup> The Fifth Affirmative Defense states:

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.

Answer, GC Ex. 1(n).

found to have been committed.” Decision, p. 8, n. 13 (quoting Local 964, Carpenters, 184 NLRB 625, 625–626 (1970)).

Respondent’s reliance on the NLRB Casehandling Manual is also misplaced. The sections cited by Respondent do not support its claim that ALJ Randazzo erred by granting backpay as make-whole relief is a routine remedy. While Respondent correctly notes that Section 10268.1 of the Casehandling Manual states that “the complaint should set forth the requested remedy whenever any other than a routine remedy is sought,” there was no remedy granted in this case requiring a pleading for extraordinary relief. A make-whole relief is a “standard remedy” in 8(a)(5) cases, and backpay is a classic form of make-whole relief. Grand Rapids Press, supra; R.J. Houle Mechanical Contractors, 342 NLRB 646, 648 (2004) (“standard Board remedies” include “full make-whole relief”). And contrary to USPS’s assertion, the facts of this case (i.e., no reduction of pay or extended workday) are not unique as to make the claim for backpay “other than routine.” See, e.g., Choctaw Manufacturing, Co., supra; Litton, supra. Moreover, the Board has consistently held that the “provisions of the Casehandling Manual are non-binding.” Hospital Episcopal San Lucas, 12-CA-152114, 2015 WL 559802, n. 1 (2015) (citing Children’s National Medical Center, 322 NLRB 205, n. 1 (1996)); Superior Industries, 289 NLRB 834, 835, n. 14 (1988)).

#### **IV. CONCLUSION**

For the foregoing reasons, Counsel for the General Counsel respectfully requests that the Board deny Respondent’s Exceptions to Administrative Law Judge’s Decision and adopt the findings of fact and conclusions of law reached by ALJ Randazzo.

**DATED** at Cleveland, Ohio this 5th\_day of July 2018.

Respectfully submitted,

/s/ Stephen M. Pincus

Stephen M. Pincus  
Counsel for the General Counsel  
National Labor Relations Board, Region 8  
AJC Federal Building, Rm. 1695  
1240 East Ninth Street  
Cleveland, Ohio 44199  
stephen.pincus@nlrb.gov

**PROOF OF SERVICE**

A copy of the foregoing Brief of Counsel for the General Counsel was sent this on July 5, 2018, to the following individuals by electronic mail:

Dallas Kingsbury, Esq.  
Dallas.G.Kingsbury@usps.gov

Judge Thomas Randazzo  
thomas.randazzo@nlrb.gov

/s/ Stephen M. Pincus  
Stephen M. Pincus  
Counsel for the General Counsel  
National Labor Relations Board  
Region 8  
stephen.pincus@nlrb.gov