



UNITED STATES GOVERNMENT  
**NATIONAL LABOR RELATIONS BOARD**  
**OFFICE OF THE GENERAL COUNSEL**  
Washington, D.C. 20570

August 2, 2019

Deborah S. Hunt  
Clerk, United States Court of  
Appeals for the Sixth Circuit  
540 Potter Stewart U.S. Courthouse  
100 E. Fifth Street  
Cincinnati, Ohio 45202-3988

Re: *FirstEnergy Generation, LLC v. NLRB*  
6th Cir. Nos. 18-1654 & 18-1782  
Before Judges Suhrheinrich, Bush, and Readler

Dear Ms. Hunt:

On July 23, 2019, the National Labor Relations Board (the Board) submitted a proposed judgment in the above case pursuant to FRAP Rule 19. On July 31, 2019, FirstEnergy Generation, LLC (the Company) submitted a counter-proposed judgment.

The Board wishes to emphasize that its proposed judgment fully hews to the Court's July 2, 2019 decision, wherein the Court denied enforcement of only those parts of the Board's Order finding unlawful the Company's subcontracting of turbine and generator work without first bargaining with the International Brotherhood of Electrical Workers, Local 272, AFL-CIO (the Union) and the Company's related refusal to provide requested information regarding subcontracting. The Court enforced the portion of the Board's Order finding that the Company unlawfully implemented, after impasse, only selective pre-impasse bargaining proposals that were inextricably linked to other proposals not imposed. The Board's proposed judgment faithfully implements that outcome. It retains from the Board's decision, 366 NLRB No. 87, the standard order language relating to the enforced violation and deletes all provisions predicated on the unenforced subcontracting and information request allegations.

By contrast, the Company's counter-proposed judgment seeks to rewrite, or altogether eliminate, several provisions of the Board's Order that it did not challenge before the Board or the Court and that were unaffected by the Court's decision. In doing so, the Company offers no basis for its revisions nor does it identify any provision of the Board's proposed judgment that fails to comport faithfully with the Court's decision.

Specifically, the Company's revisions to the Board's Order include wholesale elimination of three paragraphs from the enforced portion of the Board's Order and insertion of two paragraphs entirely drafted by the Company and finding no counterpart in the Board's Order.

- 1) Wholesale elimination of the following three paragraphs from the Board's Order, Section 2:
  - (b) Upon request by the Union, and at the Union's option, either reinstitute the "in-the-box" retiree health benefits or implement the general wage increases, equity adjustments, and shift differentials that should have accompanied the implemented HSA and 401(k) payments (while retaining HSA and 401(k) payments previously made), in accordance with the Respondent's Second Comprehensive Offer of Settlement dated September 17, 2015. In either case, the reinstatement of the "in-the-box" retiree benefits or the implementation of the additional wage increases, equity adjustments, and shift differentials shall be retroactive to the date the Respondent eliminated the "in-the-box" retiree health benefits.
  - (c) Make all bargaining unit employees and former bargaining unit employees whole, with interest, for their losses resulting from either the Respondent's elimination of the "in-the-box" retiree health benefits or its failure to implement the general wage increases, equity adjustments, and shift differentials that should have accompanied the implemented HSA and 401(k) payments, depending on which option the Union selects in paragraph 2(b) above.<sup>1</sup>
    - 1/ In the event the Union opts to have the Respondent reinstitute the "in-the-box" retiree health benefits, at the

compliance stage the Respondent may litigate whether any particular employee's losses resulting from the elimination of those benefits should be offset by any HSA or 401(k) payments the Respondent previously made for the benefit of that employee. See *Active Transportation Co.*, 340 NLRB 426, 426 fn. 2 (2003) (the Board permits the employer to litigate at compliance whether back payments to union funds should be offset by what it spent to provide employer-sponsored benefits), *enfd.* 112 Fed. Appx. 60 (D.C. Cir. 2004).

- (d) Compensate affected bargaining unit employees and former bargaining unit employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 6 within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year for each employee.

2) Insertion of the following two paragraphs, which are entirely new and find no counterpart in the Board's Order, Section 2:

- b) Respondent filed a petition for bankruptcy on March 31, 2018 in the United States Bankruptcy Court for the Northern District of Ohio, Eastern Division (the "Bankruptcy Court"). The Region and the Union each filed a proof of claim in Respondent's pending Chapter 11 case asserting a general unsecured claim against Respondent for the amounts owed by Respondent under the Order.
- c) On behalf of the former and current bargaining unit employees, the Region's general unsecured claim against Respondent will be calculated in the aggregate amount of the general wage increases, equity adjustments, and shift differentials that should have accompanied the implemented HSA and 401(k) payments (while retaining HSA and 401(k) payments previously made), in accordance with the Respondent's Second Comprehensive Offer of Settlement dated September 17, 2015, for such former and current bargaining unit employees excluding those employees who have executed written waivers. The Region's

general unsecured claim is subject to allowance by the Bankruptcy Court and the Region will receive the distributions made on account of any such allowed claim in connection with Respondent's pending Chapter 11 case, including pursuant to any plan of reorganization for Respondent confirmed by the Bankruptcy Court. Such distributions to the Region will be the only amounts payable by the Respondent under the Order.

As noted above, the Company offers no justification to delete three entire paragraphs from the Board's Order that relate to enforced violations consistent with the Court's decision. Because the Company did not raise before the Board any objections to the specific remedies it now implicitly challenges, the Court is barred from considering any such challenges. *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982) (Section 10(e) bar on judicial consideration of issues not raised before Board is jurisdictional); *Airport Shuttle-Cincinnati, Inc. v. NLRB*, 703 F.2d 220, 224-25 (6th Cir. 1983) (failure to file motion for reconsideration with Board barred Court's consideration of issue). The Company also waived any objections to the contours of the relevant portions of the Board's remedial Order by failing to argue them in its opening brief to the Court. *See Tri-State Wholesale Building Supplies, Inc. v. NLRB*, 657 Fed. App'x, 421, 425 (6th Cir. 2016).

With respect to the Company's efforts to rewrite the Board's Order to its liking by adding two entirely new paragraphs, the Company offers no basis for such an overhaul. If accepted, the Company's counter-proposed judgment in this regard would incorrectly restrict the Board's compliance proceedings by directing a particular calculation method. (*See Counter-Proposed Judgment, Section 2(c).*) The Supreme Court has recognized that the Board is vested, in the first instance, with the authority to determine the liquidation of a backpay award. *See Nathanson v. NLRB*, 344 U.S. 25, 29 (1952). With regard to the Board's plenary role in computing backpay, the Court has stated:

The fixing of the back pay is one of the functions confided solely to the Board. At the time an order of the Board is enforced the amount of back pay is often not computed. Once an enforcement order issues the Board must work out the details of the back pay that is due and the reinstatement of employees that has been directed. This may be done by negotiation; or it may have to be done in a proceeding before the Board. The computation of the amount due may not be a simple matter. . . . Congress made the relation of remedy to policy an

administrative matter, subject to limited judicial review, and chose the Board as its agent for the purpose.

*Id.* at 29-30. The Company ignores the Board's role as articulated by the Supreme Court and seeks to appoint itself, through entry of its counter-proposed judgment, as the agent for calculating the back pay award. The Court must reject the Company's efforts. *See McCann Steel Co. v. NLRB*, 570 F.2d 652, 657 (6th Cir. 1978) ("As with the Board's other remedies, the power to order back pay is for the Board to wield, not for the courts. . . . When the Board, in the exercise of its informed discretion, makes an order of restoration by way of back pay, the order should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.") (citing *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 346-47 (1953)).

Further, to the extent the Company's counter-proposed judgment references the bankruptcy court's ability to determine the allowability of claims, that does not warrant this Court modifying the Board's Order. (*See Counter-Proposed Judgment* paragraph 2(c): "The Region's general unsecured claim is subject to allowance by the Bankruptcy Court . . . .") Where this Court has now entered judgment against the Company and Board compliance proceedings have yet to occur, the bankruptcy court patently lacks jurisdiction to adjudicate the validity or amount of the Board's backpay claim in determining allowable claims. *See Tucson Yellow Cab Co., Inc. v. NLRB*, 27 B.R. 621, 623 (9th Cir. B.A.P. 1983); *NLRB v. Baldwin Locomotive Works*, 128 F.2d 39, 44 (3d Cir. 1942). The language the Company suggests is, at best, unclear and readily subject to misinterpretation.

In short, the Board's proposed judgment modifies the Order precisely and consistently with the Court's decision. The Board therefore respectfully submits that its proposed judgment should be adopted over the Company's counter-proposed judgment, which alters the Board's Order in ways that the Company never challenged before the Board or the Court and that ignore settled principles of law. A certificate of service is enclosed.

Very truly yours,

/s/ David Habenstreit

David Habenstreit

Acting Deputy Associate General Counsel

National Labor Relations Board

1015 Half Street, SE

Washington, DC 20570  
(202) 273-2960

**UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

FIRSTENERGY GENERATION, LLC,	)	
a wholly owned subsidiary of FirstEnergy Corporation,	)	
	)	
Petitioner/Cross-Respondent	)	
	)	
v.	)	Nos. 18-1654,
	)	18-1782
NATIONAL LABOR RELATIONS BOARD,	)	
	)	
Respondent/Cross-Petitioner	)	

**CERTIFICATE OF SERVICE**

I hereby certify that on August 2, 2019, I electronically filed the foregoing document with the Court for the United States Court of Appeals for the Sixth Circuit using the appellate CM/ECF system. I further certify that the foregoing document was served on all parties or their counsel of record through the appellate CM/ECF system.

s/ David Habenstreit  
David Habenstreit  
Acting Deputy Associate General Counsel  
National Labor Relations Board  
1015 Half Street, SE  
Washington, DC 20570  
(202) 273-2960

Dated at Washington, D.C.  
this 2nd day of August, 2019