UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON D.C.

DOUGLAS AUTOTECH CORPORATION

Respondent

and CASE 07-CA-51428

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), AFL-CIO, AND ITS LOCAL 822

Charging Union

ACTING GENERAL COUNSEL'S OPPOSITION TO RESPONDENT'S MOTION FOR RECONSIDERATION, REHEARING AND TO REOPEN THE RECORD

AND

ACTING GENERAL COUNSEL'S REQUEST FOR EXPEDITED CONSIDERATION

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On November 18, 2011, the Board issued its Decision and Order in this case in which it found that Douglas Autotech Corporation ("Respondent") violated Section 8(a)(3) and (1) of the Act by discharging the entire bargaining unit employed at its Bronson, Michigan facility. The Board also found that Respondent violated Section 8(a)(5) by thereafter failing and refusing to meet and bargain with International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO, and its Local 822 ("the Union").

The Board ordered the traditional remedy in unlawful discharge cases while permitting Respondent to introduce evidence in a compliance proceeding as to whether the lockout would have persisted and the terms and conditions on which employees would have returned to work. The Board also modified the judge's recommended Order by requiring backpay and other monetary awards be paid with interest compounded on a daily basis in accordance with *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), and notice positing in accord with *J. Picini Flooring*, 356 NLRB No. 9 (2010).

On December 16, 2011, Respondent filed its Motion for Reconsideration, Rehearing and to Reopen the Record, averring that:

- the Board erred in deciding that Respondent "reemployed" the strikers within the meaning of Section 8(d)(4) by locking them out and bargaining with the Union in response to the Union's unconditional offer to return;
- the Board erred by ordering a Notice to Employees "inconsistent" with its decision;
- the Board erred in finding that the parties' negotiations since August 4, 2008, have been limited to the effects of the unlawful discharges;
- the Board erred by requiring Respondent to bear the burden of proof during compliance as to whether the lockout would have persisted and the terms and conditions on which the employees would have returned to work; and
- the Board erred by modifying the judge's remedy to comply with its decisions in *Kentucky River Medical Center and J. Picini Flooring.*

Section 102.48(d) of the Board's Rules and Regulations requires that a motion for reconsideration, rehearing or to reopen the record be based on "extraordinary circumstances" and "material error." Respondent's Motion falls woefully short of the requisite standard. Nowhere in its Motion does Respondent cite any facts or legal authority warranting reconsideration, rehearing or reopening the record. Instead, Respondent seeks to relitigate the case while ignoring completely the Board's detailed analysis of the issues.

It is readily apparent that Respondent's Motion is but one more cynical attempt to delay these proceedings and frustrate the remedial purposes of the Act. Given the substantial passage of time since Respondent's unlawful discharge of approximately 146 employees and its refusal to bargain with their Union, the Acting General Counsel respectfully requests that the Board expedite its consideration of this matter.

I. The Board Properly Found that Respondent "Reemployed" the Strikers Within the Meaning of Section 8(d)(4).

The claimed "material error" here is nothing more than Respondent's recycled contention that the strikers were not "reemployed" within the meaning of Section 8(d)(4). There is no showing of any "extraordinary circumstance" warranting a reconsideration of the Board's decision on this issue. Respondent merely rehashes arguments previously presented to, and considered by, the Board. Indeed Respondent repeats, almost verbatim, footnote 2 of Member Hayes' dissent regarding the meaning of the term "reemployed," an argument specifically addressed by the Board majority at page 7 of the Decision. Obviously, the Board, including Member Hayes, is well aware of its Decision in this matter and does not need to have its analysis reiterated by Respondent.

In sum, Respondent has neither specified extraordinary circumstances nor identified any material error by the Board, as required by the Board's rules. Thus, there is no basis for

reconsideration, rehearing or reopening of the record and the Motion should be denied.

II. The Board's Order and the Notice to Employees Are Appropriate.

Respondent contends that the Board erred by not modifying the Notice to Employees or paragraph 2(c) of the judge's recommended Order requiring Respondent to offer reinstatement to the unlawfully discharged employees. Respondent's argument is without merit. The Board's Order in this matter is premised on long-standing Board principles, entirely consistent with its decision and abundantly clear. The Board ordered the traditional remedy of reinstatement while permitting Respondent to introduce evidence in a compliance proceeding establishing that in the absence of its unfair labor practices, the lockout would have persisted; or the date on which the parties would have bargained to an agreement ending the lockout and the terms of the agreement that would have been negotiated; or establishing the date on which the parties would have arrived at a good faith impasse. The Notice cannot, and need not, account for every contingency of compliance. There is no material error as to the Board's Order or the Notice and no basis for reconsideration, rehearing or reopening of the record in the instant matter.

III. The Board Did Not Err in Finding that the Parties' Negotiations Since August 4, 2008 Have Been Limited to the Effects of the Unlawful Discharges.

The Board's finding that the parties' negotiations since August 4 have been limited to effects is fully supported by the record. Specifically, the record shows that the parties had one bargaining session following the unlawful discharges of August 4, 2008. At that session on August 14, Respondent's Counsel Bruce Lillie explicitly refused to bargain with the Union because "the employees have been terminated" [ALJD at 38; Tr at 138, 697].

Respondent includes in its Motion for Reconsideration a list of correspondence dating between May 7, 2010 to April 20, 2011 purportedly showing communications between the parties after the record in this matter closed [Respondent's Brief at 10]. This so-called evidence

is completely irrelevant to any question presently before the Board. Even if it were relevant, Respondent did not comply with Section 102.48(d)(1) and (2) which requires that "evidence which has become available only since the close of the hearing … shall be filed promptly on discovery of such evidence." Respondent did not file a motion to reopen the record promptly in accord with Section 102.48(d). In sum, the Board's finding that the parties' negotiations since August 4, 2008 have been limited to effects is fully supported by the record. Any evidence assertedly to the contrary is untimely and, in any event, would not require a different result.

IV. The Board Properly Found that Respondent Should Bear the Burden of Proof as to Whether the Lockout Would Have Persisted.

Respondent next argues that the Board erred in finding that it should bear the burden of proof in a compliance proceeding that the lockout would have persisted. Specifically, Respondent argues (1) that such evidence "is more appropriate for the ALJ's review rather than presentation at the compliance stage," and (2) that the Union should bear the burden of proof that the lockout would not have continued. Again, Respondent has failed to identify any extraordinary circumstances or offer any facts or legal authority warranting reconsideration. Respondent's mere disagreement with the Board's Decision is not a basis for reconsideration. Respondent's Motion should be denied.

V. The Board Properly Modified the Judge's Recommended Order in Accordance with *Kentucky River Medical Center* and *J. Picini Flooring*.

Respondent argues that the Board erred in retroactively applying to this case the daily compound interest standard established in *Kentucky River Medical Center,* 356 NLRB No. 8 (2010). Again, Respondent's claim of error is baseless. In *Kentucky River*, the Board specifically rejected the argument that retroactive application of the standard is "manifestly unjust," ruling that it would "apply this policy retroactively in this case and *in all pending cases*

in whatever stage, *given the absence of any manifest injustice* in doing so." Id at 4-5 (emphasis added) citing *SNE Enterprises, Inc.*, 344 NLRB 673 (2005). Indeed, the Board further stated that "[n]o respondent, then, can fairly be said to have relied on the Board's prior rule of awarding only simple interest on backpay awards in deciding to take the unlawful action on which their liability is based." Id. The Board's modification of the judge's remedy by requiring that backpay and any other monetary remedy be paid with interest compounded on a daily basis comports with its decision in *Kentucky River*. Respondent's claim of error is without merit and its Motion should be denied.

In arguing that the Board improperly ordered the electronic posting of the Notice to Employees, Respondent cites only the dissenting opinion of Member Hayes in *J. Picini Flooring*, 356 NLRB No. 9 (2010), that electronic posting is an extraordinary remedy. Absent from Respondent's Motion is citation to any extant Board law in support of this proposition. Consistent with *J. Picini Flooring*, the Board's Order in the instant case requires only that "in addition to physical posting of paper notices, notices shall be distributed electronically such as by e-mail, posting on an intranet or internet site, and/or by other electronic means, if the Respondent customarily communicates with its employees by such means." Once again, Respondent's claim of error is baseless and its Motion should be denied.

CONCLUSION

For the reasons stated above, the Acting General Counsel respectfully requests that the Board expeditiously deny Respondent's Motion for Reconsideration, Rehearing and to Reopen the Record.

Dated at Grand Rapids, Michigan, this 22nd day of December 2011.

/s/ *Steven Carlson*

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