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Aluminum Casting & Engineering Co., Inc. and United Electrical, Radio and Machine Workers of America (UE). Cases 30–CA–12855, 30–CA–12902, 30–CA–12943, 30–CA–12944, and 30–CA–12949

September 22, 2010

FOURTH SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER
AND PEARCE

On April 9, 1999, in the underlying unfair labor practice proceeding, the National Labor Relations Board issued a Decision and Order¹ directing Aluminum Casting & Engineering Company, Inc. (Respondent) to make its employees whole for any loss of earnings and other benefits they may have suffered as a result of the Respondent's unlawful failure to grant them a planned annual wage increase in 1995 in retaliation for their support for the United Electrical, Radio and Machine Workers of America (UE) (Union). On October 13, 2000, the United States Court of Appeals for the Seventh Circuit enforced the Board's decision in part and remanded it in part, with instructions for the Board to conform its Order to the court's opinion.² On May 16, 2001, the Board issued a Supplemental Decision and Order, substituting a new Order and notice for those previously issued on April 9, 1999.³

On April 30, 2003, the Regional Director issued an initial compliance specification alleging that the amount of the illegally withheld 1995 pay increase was 25 cents per hour. The compliance specification sought reimbursement for the discriminatees for the 25 cents per hour that they should have received for each hour worked in 1995. The specification also claimed that each discriminatee was entitled to the 25 cents per hour that should have been included in their base pay for work performed after 1995, notwithstanding that in 1996 the Respondent had lawfully abandoned giving additional across-the-board wage increases in favor of a wage adjustment system based on merit and training.

Following a hearing, Administrative Law Judge Bruce D. Rosenstein issued a Supplemental Decision on November 14, 2003, which adopted the compliance specification in large part, but rejected its allegations about the

backpay period. The judge found that the appropriate backpay period was limited to calendar year 1995 rather than extending from 1995 "until such time as the Respondent permanently applies the appropriate across-the-board wage increase to their hourly wages for the years 1996 through 2003."

On January 31, 2007, in response to the parties' exceptions to the judge's Supplemental Decision, the Board issued a Second Supplemental Decision and Order in this proceeding.⁴ The Board affirmed the judge's finding that the backpay period for the discriminatees should be limited to calendar year 1995 and directed the Regional Director to amend the compliance specification accordingly. The amended compliance specification that issued on May 11, 2007, reflects this change.

On June 4, 2007 the Respondent filed an answer admitting all of the allegations in the amended compliance specification. Thereafter, the parties entered into a Stipulation and Amendment to the Amended Compliance Specification (Stipulation). The Regional Director approved the Stipulation, with two attachments agreed to by the parties, on September 20, 2007.⁵

On October 1, 2007, the General Counsel filed a Motion for Summary Judgment with the Board.⁶ On January 18, 2008, the Board granted the General Counsel's Motion for Summary Judgment, finding the Respondent liable for backpay as alleged.⁷

Subsequently, the Union filed a petition for review of the Board's remedial Order with the Seventh Circuit, and the Board filed a cross-application for enforcement. On

⁴ 349 NLRB 178 (2007).

⁵ The Union later clarified its position that, in signing the Stipulation, it agreed only to the accuracy of the backpay calculations and did not waive its right to challenge the underlying Board decision with regard to the backpay period.

⁶ The Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent and the Union filed responses to the General Counsel's motion. The Respondent requested that the Board grant the motion and asserted that the allegations in the motion "are all correct and accurate." The Union requested that the Board deny the motion, modify its earlier decision, and find that the backpay period in this case extends from 1995 to the present.

⁷ 352 NLRB 1 (2008) (Third Supplemental Decision and Order). Although this decision issued when the Board had only two members, the Seventh Circuit's grant of review and remand to the Board became final prior to the Supreme Court's decision in *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635 (2010), holding that two members cannot act as a quorum of a three-member panel with delegated authority from the Board once the panel no longer has three members. In these circumstances, we regard the matters finally resolved by the court of appeals as res judicata in this proceeding. See *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371, 374–378 (1940); *Nemaizer v. Baker*, 793 F.2d 58, 65 (2d Cir. 1986) (cited with approval in *United Student Aid Funds, Inc. v. Espinosa*, 130 S.Ct. 1367, 1377 (2010)).

¹ 328 NLRB 8 (1999).

² *NLRB v. Aluminum Casting & Engineering Co.*, 230 F.3d 286 (7th Cir. 2000).

³ 334 NLRB 1 (2001).

September 2, 2009, the court granted the petition for review, set aside the Board's Order, and remanded this case to the Board "for proceedings consistent with [the court's] opinion."⁸

On April 1, 2010, the Board notified the parties to this proceeding that it had decided to accept the court's remand and invited the parties to file statements of position with respect to the issues raised by the remand. The Union and the Respondent each filed a statement of position.

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

The Board has considered the court's remand in light of the parties' statements of position and has decided to accept the court's decision as the appropriate application of the remedial principles embodied in the Act to the facts of this case, and to issue the appropriate remedial order against the Respondent for the violations found.

Discussion

In granting the Union's petition for review and setting aside the Board's underlying order, the court rejected the Board's determination that the Respondent's backpay liability was limited to calendar year 1995.⁹ The court held that its prior decision did not excuse the Respondent from carrying forward the 1995 pay increase because doing so was necessary to make the discriminatees whole.¹⁰ The court concluded that this interpretation of its prior decision was "the only interpretation that is compatible with the law governing remedial measures under the Act," which is intended to put each employee in the position he would have been absent the Respondent's misconduct.¹¹ The court then remanded this case to the Board for proceedings consistent with the court's opinion.

Consistent with that remand, we find that, in order to make the discriminatees' whole, the proper backpay award in this case cannot be limited to 1995. It must also

reflect that the unlawfully withheld pay increase would have been incorporated into the discriminatees' "base wage" for each year thereafter, continuing until each discriminatee's last day of employment with the Respondent.

ORDER

It is ordered that the proceeding is remanded to the Regional Director for Region 30 to prepare an amended compliance specification, as follows:

The Regional Director will utilize the same calculations for the payment of the 1995 across-the-board increase as set forth in the April 30, 2003 compliance specification, for the employees listed therein. The period of backpay will not be confined to calendar year 1995. Rather, the 1995 backpay award of 25 cents per hour will be incorporated into the employees' "base wage" for 1995, and all subsequent pay raises are to be added to a base wage that includes the 1995 increase, with interest added thereon. The Regional Director will compute the appropriate interest in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987), minus tax withholdings required by Federal and State laws, until the Respondent ultimately remits the 1995 across-the-board increase, for the calendar year 1995 and all subsequent years, to all employees who were eligible to receive it. This shall include employees who terminated their employment after the 1995 annual increase and any discriminatees still employed by the Respondent.

Dated, Washington, D.C. September 22, 2010

Wilma B. Liebman, Chairman

Craig Becker, Member

Mark Gaston Pearce, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

⁸ *United Electrical, Radio and Machine Workers of America (UE) v. NLRB*, 580 F.3d 560 (7th Cir. 2009).

⁹ 580 F.3d at 565.

¹⁰ *Id.*

¹¹ *Id.*