

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28**

WILLIS ROOF CONSULTING, INC.

and

Case 28-CA-20852

**UNITED UNION OF ROOFERS,
WATERPROOFERS AND ALLIED
WORKERS, LOCAL 162, AFL-CIO**

**GENERAL COUNSEL'S BRIEF IN SUPPORT OF
EXCEPTIONS TO THE SUPPLEMENTAL DECISION
OF THE ADMINISTRATIVE LAW JUDGE**

**TO: Lester A. Heltzer, Executive Secretary
Office of the Executive Secretary**

Respectfully submitted,

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I. INTRODUCTION

The facts in this compliance case are very clear. They also are undisputed since the Respondent's representative and sole proposed witness, Secretary-treasurer Joseph Willis, "left the building" before the hearing began and failed to return. The Administrative Law Judge (ALJ) only had to consider the Board Order, enforced by the United States Court of Appeals for the Ninth Circuit, that the parties had entered into a collective-bargaining agreement on December 29, 2005, for the period November 1, 2005 through December 31, 2006 (the Agreement); and the testimony of the Region's compliance officer. Since the Respondent contended that it had given notice to the Charging Party Union that it did not wish to have the Agreement roll over pursuant to the Agreement's evergreen provision, Counsel for General Counsel (CGC) also presented testimony from the Union's International representative that the Union had never received such notice. The Respondent presented no evidence regarding the content of the Agreement other than agreeing that "should there exist a collective bargaining agreement," the contribution rates were those applied by the compliance officer. (GCX 1(x) (Respondent's Answer), p. 8, ¶¶ 6 & 7).

Notwithstanding these facts and Board procedure in compliance hearings, the ALJ held that he could not find that the Agreement contained a roll-over provision. (ALJD at 5). The ALJ thereby failed to find that the Respondent owed benefit contributions beyond the initial term of the Agreement. The ALJ stated that he could not find an agreement containing a roll-over provision (and a liquidated damages provision) notwithstanding that the Union representative identified, pursuant to the ALJ's questioning, a document as containing the Agreement. In failing to find that the Agreement contained a roll-over provision, the ALJ showed that he misunderstood his role in a compliance specification hearing. He also failed

to interpret correctly record testimony that identified an exhibit as the collective-bargaining agreement that the Board found the parties agreed to on December 29, 2009.

II. RELEVANT FACTS

On January 31, 2007, the Board issued an Order granting General Counsel default judgment in this matter. 349 NLRB No. 24. (GCX 1(a)). In that Order, the Board found, as alleged in the Complaint, that a collective-bargaining agreement was entered into by the parties on December 29, 2005, for the period November 1, 2005 through December 31, 2006.

The Order directed the Respondent to:

(a) Recognize the Union as the limited exclusive collective-bargaining representative of the employees in the unit, described above, and comply with the terms and conditions of the November 1, 2005 through December 31, 2006 collective-bargaining agreement with the Union *and any automatic renewal or extension thereof*.

(b) Make all the required health and welfare and pension benefit contributions on behalf of the employees in the unit that have not been made since December 29, 2005, with interest, in the manner set forth in the remedy section of this decision.

(c) Make whole the unit employees for any expenses ensuing from the Respondent's failure to make the required contributions, with interest, in the manner set forth in the remedy section of this decision.

(d) Make whole the unit employees for any loss of earnings or other benefits ensuing from the Respondent's failure to comply with the collective-bargaining agreement in any other respects, with interest.

349 NLRB No. 24, slip op. at 3 (emphasis added). The Ninth Circuit enforced the Board's Order on October 25, 2007. (GCX 2).

On January 29, 2009, the Regional Director issued an Amended Compliance Specification (Compliance Spec). (GCX 1(v)). The Respondent submitted its Answer on February 13, 2009. (GCX 1(x)). As this matter was proceeding through the Board process,

the Union's benefit funds initiated an action in the United States District Court for the District of Nevada seeking payment of the contributions owed. (TR. 8 (colloquoy)).

III. ARGUMENT

A. The ALJ Failed to Recognize the Respondent's Burden in Compliance.

The ALJ failed to apply the burdens in a compliance specification properly. The Region's compliance officer testified that he relied upon the document marked at the hearing as Charging Party Exhibit 1 for his calculations of the contributions due to the Union's benefit funds for the years 2006-2008. (TR. 79-80). After comparing the calculations in the compliance specification for the contributions owed for 2006-2008 to the calculations done by the Respondent for the same years and finding them to be very similar, CGC and the Union decided to stipulate to the Respondent's calculations so as to eliminate that issue. (TR. 123-26). CGC thereby met his burden in a compliance proceeding.

Rule 102.56(b) of the Board's Rules and Regulations spells out the Respondent's burden in its Answer: "As to such matters [within the knowledge of the respondent], if the respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, *the answer shall specifically state the basis for such disagreement, setting forth in detail the respondent's position as to the applicable premises and furnishing the appropriate supporting figures.*" (Emphasis added). In fact, the Respondent alleged in its Answer the same contribution rates as in the Compliance Spec; and did not allege that the roll-over provision relied upon by the compliance officer (Article XVI, CPX 1, p. 18) was absent from the Agreement.

It was then the Respondent's burden to show either: a) the Respondent had given the notice required by the agreement's roll-over provision to stop the agreement from rolling

over; or b) the Agreement the Respondent entered into did not contain a roll-over provision. The Respondent did not show either. Instead, the Respondent argued that the ALJ would be required to “make up a number, based upon what the Union thinks it should have been.” (TR. 34). The disingenuousness of this argument by the Respondent is reflected by the fact that the Respondent used the same rates for the pension and welfare contributions as the compliance officer. (GCX 1(x) (Respondent’s Answer), p. 8, ¶¶ 6 & 7). The Respondent knew very well what the contribution rates were and where in the Agreement they were.

The Respondent’s counsel apparently planned to produce evidence with regard to first of these options, *i.e.*, that the Respondent allegedly gave notice to stop the Agreement from rolling over. (GCX 1(x), p. ¶ 5). Tellingly, the Respondent did not contend that the provisions relied upon by the Compliance Officer in CPX 1 – the roll-over, or evergreen, clause (CPX 1, p. 18) and the pension and health benefit contribution articles (CPX 1, pp. 12-14) – were not contained in the Agreement. In fact, the Respondent even admitted that if that Agreement rolled over, the pension and health benefit contribution articles in CPX 1 were the proper measures of its obligations. (GCX 1(x), p. 8, ¶¶ 6 & 7). More importantly, the Respondent did not, as was its burden, present any evidence that the Agreement did not contain the provisions that the compliance officer relied upon, or that it contained any contrary provision. The ALJ was required in such a circumstance to accept the General Counsel’s determination of the amounts owed by the Respondent to the Union’s benefit funds in the absence of any contrary evidence put forth by the Respondent.

The Respondent could not contend in good faith that the Agreement did not contain a roll-over provision. Although Willis marked up the final draft given to him by the Union in an attempt to evade the fact that he had entered into the Agreement, he did not mark up the

roll-over provision. (CPX 1, p. 18). Any contention by the Respondent that it did not know whether the Agreement found by the Board contained the roll-over provision would be clearly false inasmuch as that provision was not one of the many Willis tried to change *ex post facto*. The ALJ should have found that the Agreement contained the roll-over provision in Article XVI but he did not do so. The Board should reverse the finding of the ALJ that it could not be found that the roll-over provision was part of the Agreement.¹

Finally, the Respondent's contention in its Answer and throughout the proceeding was that no agreement had been entered into and, further, that the ALJ should revisit the contract formation issue. (GCX 1(x), p. 7, ¶ 3; TR. 15-25).² The ALJ denied the Respondent's motion for a stay so as to allow the district court time to rule on the issue of contract formation and held that he could not revisit the contract formation issue. The Board also should reject the Respondent's contention that there was no collective-bargaining agreement inasmuch as the Board held that the parties had entered into the Agreement on December 29, 2005, that was in effect from November 1, 2005, to December 31, 2006; and the Ninth Circuit Court of Appeals enforced the Board's Order.

Issues litigated and decided in an unfair labor practice proceeding may not be relitigated in the ensuing backpay proceeding. *Paolicelli*, 335 NLRB 881, 883 (2001) (citing *Aroostook County Regional Ophthalmology Center*, 332 NLRB 1616, 1617 (2001); *Arctic Framing*, 313 NLRB 798, 799 (1994)). Moreover,

¹ The Respondent also attempted, through Perea, to show that a statement by Willis that he "would not sign the fucking agreement" was giving notice that the Respondent did not wish the Agreement to roll over. Perea testified that Willis was speaking about the Agreement – CPX 1 – and not a subsequent agreement. (TR. 141-42). The Respondent produced absolutely no evidence whatsoever that the Respondent complied with the terms of Article XVI to stop the Agreement from rolling over.

² In support of that argument, the Respondent stated that the judge in the Funds' federal court civil action had denied a motion by the funds to bar the Respondent from arguing that no agreement had been entered into after November 1, 2005. (TR. 15-16). In fact, the refusal of the judge in that case to strike the Respondent's affirmative defense was not a final decision on that issue. (*See* TR. 23-24 (comments by Union's counsel during colloquy)). As shown *infra*, Board law is clear that the issue of contract formation cannot be opened once the Board Order finding an agreement has been enforced by a United States Court of Appeals.

even assuming no relitigation bar, we are powerless in any event to revisit the merits and alter our Order accordingly. That Order has been enforced by the court of appeals. Under Section 10(e) of the Act, we are without jurisdiction to modify a court-enforced Board Order. *Scepter Ingot Castings, Inc.*, 341 NLRB 997 (2004)(citing *Grinnell Fire Protection Systems Co.*, 337 NLRB 141, 142 (2001); *Regional Import & Export Trucking*, 323 NLRB 1206, 1207 (1997); *Haddon House Food Products*, 260 NLRB 1060 (1982)).

Convergence Communications, Inc., 342 NLRB 918, 919 (2004). *Accord Triple A Fire Protection, Inc.*, 353 NLRB No. 88, slip op. at 3 (2009).³ It is very clear that the Respondent's contention that the Board should vacate its Order in this matter should be rejected.

B. The ALJ Erred in Failing to Find that Perea Identified the Agreement.

Second, the ALJ failed to recognize the import of testimony, adduced through his own questioning and quoted in his decision, that CPX 1 contained the Agreement:

Q BY MR. LYBARGER: Did you receive any communications from Mr. Willis after December 29th of 2005?

A I don't recall, but I don't believe so.

Q I believe you signed an affidavit . . . indicating that Mr. Willis had told you that he wouldn't 'sign the fucking agreement.' Do you recall that?

A Yes, I do.

Q And do you recall at about what timeframe that was?

A It was . . . in January.

JUDGE LITVACK: Of what year?

³ The Union had filed a refusal-to-provide information charge against the Respondent and that complaint was consolidated with the compliance specification in this matter. Notwithstanding the Board Order holding that the parties had entered into the Agreement and the enforcement of that Order by the Ninth Circuit, the ALJ stated that he could inquire into the formation of the Agreement with regard to the information charge. (TR. ??). To streamline matters, the Union requested withdrawal of this latter charge and CGC withdrew the allegations in the Complaint that pertained to this charge. (TR. ??).

THE WITNESS: 2006, I think.

JUDGE LITVACK: He was referring to an extension of the Collective Bargaining Agreement that would have expired on December 31, 2005?

THE WITNESS: No. *He was talking about this document right here.*

JUDGE LITVACK: *And when was that due to expire? . . .*

THE WITNESS: *December 31, 2006. . . .*

JUDGE LITVACK: *So, he was referring to Charging Party's Exhibit No. 1 that he wasn't going to enter into?*

THE WITNESS: *Yes.*

(ALJD at 3-4; emphasis added). Thus, Perea identified CPX 1 as the Agreement.

Notwithstanding this identification, the ALJ dismissed the CGC's contention that Perea identified the agreement between the parties. (ALJD at 3). The ALJ erroneously concluded: "Based upon the foregoing, I reiterate that I am unable to make a finding that Charging Party's Exhibit No. 1 embodies the November 1, 2005 through December 31 collective-bargaining agreement, between the parties, to which the Board referred." (ALJD at 4).

A logical reading of Perea's answer to the ALJ reflects that Perea was testifying that CPX 1 contained the Agreement. Counsel for the Respondent was questioning Perea about a letter dated January 16, 2006, that Willis had sent the Union. The Respondent was attempting to show that the January 16, 2006, letter from Willis was notice to the Union that the Respondent did not wish to have the Agreement roll over for another year, and this line of questioning was consistent with the Respondent's position that the Agreement did not roll over. Perea, however, testified that he believed the meaning of Willis' letter is that the Respondent would not sign *what the parties already had agreed to, that is, CPX 1*. When putting together the date of the agreement found by the Board – December 29, 2005 – and the

date of Willis' letter – January 15, 2006 – it is clear that Perea identified what he believed was the agreement reached between the parties. Thus, contrary to the finding of the ALJ, Perea identified CPX 1 as the agreement found by the Board. The Board should reverse the conclusion of the ALJ that the Agreement was not identified.

IV. CONCLUSION

For all the reasons set forth above, the Board should reverse the findings and conclusions of the ALJ that the relevant terms of the Agreement were not established, and order that the Respondent pay to the Funds the amounts owed for 2006 through 2008, plus liquidated damages of 10% of the amounts owed and 12% interest pursuant to Articles IX and X of the Agreement.

Dated at Las Vegas, Nevada this 21st day of July 2009.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the **GENERAL COUNSEL'S EXCEPTIONS AND BRIEF IN SUPPORT OF EXCEPTIONS TO THE SUPPLEMENTAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** in Case 28-CA-20852, was served via E-Gov, E-Filing and facsimile (with permission) on this 21st day of July 2009, on the following:

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