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

ATLAS REFINERY, INC.,)
)
 and)
)
)
 LOCAL 4-406, UNITED STEEL,)
 PAPER AND FORESTRY, RUBBER,)
 MANUFACTURING, ENERGY,)
 ALLIED, INDUSTRIAL AND SERVICE)
 WORKERS INTERNATIONAL UNION,)
 AFL-CIO)

Case: 22-CA-28403

**ANSWERING BRIEF TO THE GENERAL COUNSEL AND CHARGING PARTY’S
EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

COMES NOW, Respondent, ATLAS REFINERY, INC., (hereinafter the “Company”), pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board, (“Board”), files its Answering Brief to the General Counsel and Charging Party’s Exceptions to the August 7, 2009 Decision of the Administrative Law Judge Michael A. Rosas.

I. The Company Was Lawful in Implementing the Terms of the Final Revised Offer.

Contrary to the Union’s position that Atlas violated §8(a)(5) and 8(a)(1) of the National Labor Relations Act (the “Act”) by implementing the terms of the final revised offer, Atlas’ unilateral acts were lawful. First, negotiations had reached a deadlock and

pursuant to the Clarke Manufacturing decision, a lawful impasse had been reached. See 352 NLRB No. 25, 144 (2008)(The totality of the circumstances should be examined in determining if the lawful impasse has been reached). Once a lawful impasse has been reached, the parties have no obligation to continue to bargain and may implement the terms of the final offer. National Labor Relations Board v. Cambia Clay Prod. Co., 215 F.2d. 48, 55 (6th Cir. 1954). Here Atlas implemented the terms of the “final revised offer.” This proposal was presented on June 6th following the final mediation session on June 2nd where the final offer was proposed. The Union argues the ALJ should have found an individual violation separate and apart from implementing the unilateral terms.

However, the Company had the authority to implement the terms of the final revised offer because they were not “significantly different” from those proposals made during negotiations. Winn – Dixie Stores, Inc. v. NLRB, 567 F.2d. 1343, 1350 (C.A. FLA. 1978).

“It is well established that an employer violates his duty to bargain when . . . he unilaterally institutes changes in the existing terms and conditions of employment. However, if parties have bargained in good faith to an impasse, then an employer may institute unilateral changes in terms and conditions of employment so long as they are not *substantially different* or greater than any which the employer has proposed during the negotiations.” (Emphasis added).

Atlas Track Corp., 226 NLRB 222, 227 (1976).

Viewing the final proposal of June 2nd and the final revised proposal of June 6th in a side-by-side comparison, the proposals are not significantly different. Both proposals, June 6th and June 2nd, included a five-year contract term. Both included a 20% wage

reduction. The division of the wage reduction was broken down differently in the proposals, however in both proposals the 20% reduction would occur over the first and second years; both required a flat wage rate in the third year, and saw a 3% increase in both years four and five. In the June 6th proposal a slight difference included the addition where the wage reduction for Tier 2 employees was distinct from Tier 1 employees; however both Tiers still faced a 20% wage reduction in the first two years, a flat rate in year three and a 6% increase over the last two years. (ALJD 10-11; GC Exh. 25; R Exh. 28; GC Exh. 28; R Exh. 32). Both proposals sought conditions adjusting health care; holidays, sick time and vacation time; as well as pension benefits. Further, both proposals included concessions made by the Company. Therefore, the terms in the final revised offer were not materially different or “significantly different” from proposals made during negotiations. *Cf. NLRB v. Compton Highlands Mills*, 337 U.S. 217, 223 (1949) (holding the company engaged in unfair labor practices where it unilaterally raised pay rates which were “substantially greater” than those previously offered).

II. The ALJ’s Decision To Deny The Post-Trial Motion To Amend The Complaint To Include A Direct Dealing Charge Was Proper.

Both General Counsel and the Charging Party took exception with the failure of the ALJ to amend the complaint to add a claim for direct dealing in violation of the Act. They further found exception to the ALJ’s failure to find a violation of direct dealing. However, both General Counsel and the Charging Party fail to account for the violation of due process and the prejudice the Respondent would face. “The fundamental elements of due process are notice and the opportunity to be heard.” *The Earthgrains*

Company, 351 NLRB 45 (2007). Neither were offered through General Counsel's post trial motion to amend the Complaint.

Here the General Counsel and Charging Party failed to provide the Respondent with either requirement. The motion to amend was filed in the General Counsel's post-trial brief, after the record had already been closed. The ALJ found this filing was "extremely late" (ALJD 16, L. 9) and unjustified (ALJD 16, L. 3). The ALJ relied on Sloan Electrical Contractors in finding Respondent was not put on notice and therefore prejudiced by the lack of due process. 337 NLRB 1139, FN. 14 (2002). Counsel for the General Counsel and Charging Party both argue that the Respondent was put on notice because the claim was closely related to the testimony and claims at trial pursuant to the Pergament Test. 296 NLRB 333, enfd. 920 F.2d. 130 (2nd Cir. 1990). However, more recently the Board found "the mere presence in the record of evidence relevant to an unstated accusation 'does not mean the defending party . . . had notice that the issue was being litigated.'" Tractor Sales, Inc., 347 NLRB 748, FN. 7 (2006) *quoting* Con Air Corp. v. NLRB, 721 F.2d. 1355, 1372 (D.C. Cir. 1983); Champion International Corp., 339 NLRB 672, 673 (2003) ("It is axiomatic that a [party] cannot fully and fairly litigate a matter unless it knows what the accusation is.").

The General Counsel and the Charging Party's arguments under the Pergament Test also fail under the second prong of the test, which requires the claim to be fairly and fully litigated. 296 NLRB 333, 334 enfd. 920 F.2d. 130 (2nd Cir. 1990). The ALJ found that the Respondent did not litigate the claim. (ALJD 16, L. 14). Specifically, the ALJ held that even though the testimony "crosses into the realm of direct dealing" it did not mean the matter was fairly and fully litigated. (ALJD 16, L. 13-14).

Therefore, the Board should affirm the ALJ's decision to deny the "extremely late" post-trial motion and protect Atlas' due process rights.

III. Remedies: The Status Quo Cannot Be Restored.

The General Counsel and Charging Party find exception with the ALJ's failure to order rescission and restoration to the status quo. This includes returning conditions of employment to pre-impasse conditions. This includes back pay and any deduction lost by all employees for health benefits and the pension benefits. All employees include those who accepted the unilateral conditions and returned to work. However, if the Board does not find a lawful impasse occurred it will be impossible for the Company to restore the status quo.

First, in restoring the status quo the Company is charged with restoring Alers, Ardiente, Dechavez, Braudillo and Nunez to either their former jobs or substantially equivalent positions. However, in the Trade Industry News, the Board ordered the respondents to reinstate the terminated employees "unless they have in the meantime acquired other regular and substantially equivalent employment or the employer can show that it failed to offer reinstatement for legitimate and substantial business reasons." 343 NLRB 372 (2004). In the present case, Alers has returned to work at Atlas but unfortunately Atlas is unable to offer the other terminated employees the same or substantially equivalent position because those positions no longer exist. Due to the continued deterioration of the financial condition of Atlas, which the Union was fully informed of during negotiations, including complete and open access to documentation of this financial crisis, the Company was forced to reduce its workforce, therefore positions were eliminated. Due to the reduced workforce, positions the former

employees occupied no longer exist and there is not a substantially equivalent position for them to begin re-employment.

The same argument applies to back pay and payment for the deductions of health and pension benefit contributions. The economic climate of the Company which again was a central issue in negotiations is devastating; and therefore, makes it impossible to rescind and restore the pre-impasse conditions. The Company as a whole is no longer in the same condition as it was pre-impasse. The workforce has been substantially reduced, production has been decreased, and the Company continues to face a financial crisis. All of which was presented to the Union during negotiations and ignored by the Union. To now impose a remedy of back pay and payment for the deductions to all thirteen employees defeats the purpose of imposing back pay remedies, which is to deter the Company from further participating in unfair labor practices. The Company asserts that it was not participating in unfair labor practices, but even if found to be, a remedy such as this is penal and against public policy. See Kenrich Petrochemicals, Inc. v. NLRB, 907 F.2d. 400, 406 (3rd Cir. 1990)("[T]he Board is not only concerned with recompensing the injuries suffered . . . but also with devising the remedy that will best effectuate the public purposes expressed in Section 1 of the Act").

Further, past contract pay and benefits will remain subject to pay and benefit reductions which shall be retroactive to the expiration of the last contract between the parties. If impasses and unilateral implementation is not sustained, the rates of pay and benefits for the subject period, therefore, have not yet been determined and shall be subject to negotiations between the Company and the Union.

IV. An Award of Compound Interest is Against Board Precedent

The ALJ was correct in refusing to award a remedy including compound interest. Both General Counsel and counsel for the Charging Party allege that the only way to make the employees whole is to award compound interest. However, this proposal has been continuously rejected by various Administrative Law Judges and the Board. In 2005, the ALJ in the Roger's Corporation case awarded compound interest; however, the Board then overturned the ALJ holding that the Board would not “deviate from [the] current practice of assessing simple interest”. Roger's Corporation, 34 NLRB 504 (2005). This precedence continues today. See Cadence Innovation, 353 NLRB 77 (2009); Carpenters Local 687, 352 NLRB 119 (2008); Regal Health & Rehab Center, Inc., 354 NLRB 71 (2009) (slip opinion).

In Narricot Industries, decided earlier this year, the ALJ found that an award of compound interest is against Board precedent. 353 NLRB 82 (2009)(slip opinion). In Narricot, the General Counsel asserted the Board should award compound interest on a quarterly basis in concert with the practice of the Internal Revenue Service. *Id.* This is the same argument propounded in the present case before the Board by both the General Counsel and counsel for the Charging Party. In Narricot, the ALJ rejected the argument stating, “there is no existing Board authority to deviate from the past practice of awarding simple interest.” *Id.* Earlier this month the Board failed again to address the issue of compound interest after an ALJ deferred to the Board. Quickway Transportation, Inc., 354 NLRB 80, 69 (2009)(slip opinion).

In the present case before the Board, the Board should not deviate from its current practice of awarding simple interest. There is no present Board authority to

support an award of compound interest. The arguments made by General Counsel have been made to the Board previously and rejected by the Board in very recent decisions. Therefore, the Board should affirm the ALJ's refusal to award compound interest.

V. The Company was Permitted to Negotiate Without the Presence of Jeff Gilliam.

The Charging Party asserts that the refusal to negotiate with Jeff Gilliam was so egregious that it prevented the imposition of a lawful impasse. Counsel for the Charging Party relies on *Taton Tire Corporation*, 333 NLRB 1156 (2001) to assert its position that negotiations without Gilliam were detrimental to the Company's assertion that a lawful impasse occurred. However, this position is not asserted by the facts of the case, and is not credible. In fact, prior to the single occasion where Gilliam appeared in the middle of a negotiation session, Gilliam had not been involved in any of the prior negotiation sessions. The Union had removed Gilliam from the negotiating committee after he accepted a job with another company, and was no longer working at Atlas. Gilliam was replaced by another Atlas employee on their negotiating team. Further, Gilliam was not a "permitted party" to attend negotiations. The Collective Bargaining Agreement permitted three "plant representatives" to represent the Union at meetings to settle disputes. (GC Exh. 1, Art. 11). Elsewhere in the Collective Bargaining Act, the parties refer to "representatives of the local and/or international union." (GC Exh. 1, Art. 12). The class of individuals referred to as "plant representatives" is much more narrower; and it is solely these individuals who sat on the Union committee and were able to attend the negotiations. Before his termination, Jeff Gilliam was on the Union committee as Chief Steward. Once Gilliam took a job at another company and his

employment was terminated with Atlas, it was the Union that removed him from the committee and replaced him as Steward.

Five negotiation sessions were conducted by the Union committee, all which were attended by Gilliam's replacement. It was not until the sixth session of May 8th that the Union attempted to have Gilliam participate in negotiations. His appearance at this negotiation session was intended to disrupt the negotiations.

Secondly, counsel for the Charging Party ignores the defense the Company validly asserted in objecting to Gilliam's sudden appearance at negotiations. The Charging Party asserts that the Union's ability to choose their representatives is "a prerequisite to true and effective bargaining." The Oliver Corporation, 74 NLRB 483, 486 (1947). However, the rule allowing the Union to select a representative freely is "not absolute or immutable." NLRB v. International Ladies' Garment Workers Union, AFL-CIO, 274 F.2d. 376, 378 (3rd Cir. 1960). Hostility towards the Company is one such defense. See NLRB v. Kentucky Utilities Co. 182 F.2d. 810 (6th Cir. 1950). Other such defenses include ill-will and conflicts of interest. NLRB v. Brotherhood of Teamster and Auto Truck Drivers Local No. 70, 459 F.2d. 694 (9th Cir. 1972) quoting General Electric Company v. NLRB, 412 F.2d. 512, 517 (1969). In this case, the Company reasonably believed all three of the listed defenses existed, and, therefore, immediately petitioned the NLRB to review those objections. In the interim, the Company did not condition the resumption of negotiations on the exclusion of Gilliam.

It is the Company's prerogative to refuse to meet with a Union representative if the Company can show "persuasive evidence that the presence of [the individual] would create ill-will and make good faith bargaining impossible. King Soopers, Inc., 338 NLRB

269 (2002) quoting KDEN Broadcasting Co., 225 NLRB 25, 35 (1976). Here there is clearly ill-will between Gilliam and the Company. First the Company terminated Gilliam for his egregious conduct, which included receiving payment for leave which he misrepresented to the Company, while being employed full time at another company. Further, Gilliam failed to sign a confidentiality agreement. Finally, the circumstances under which Gilliam was brought into the negotiations were suspect, meant to be disruptive, and evidenced the Union's inability to exercise good faith.

The Union should not be able to hide behind its own bad faith and Gilliam's egregious conduct to assert the Company was wrong in objecting to Gilliam's sudden appearances at a single negotiations session. Clear precedent exists to support the Company's defense in objecting to Gilliam's appearance. Therefore, there is no defense presented by the Charging Party to assert that the impasse was not lawfully reached.

VI. The Company's Obligation To Continue To Pay Union Dues Expired When the Contract Expired.

Counsel for the Charging Party asserts the Company is responsible for the payment of Union dues. However, the Board has previously found "well established precedent [] that an employer's obligation to continue a dues-check off arrangement expires with the contract that created the obligation." Hacienda Hotel, 351 NLRB 32, 504 (2007).

Therefore, when the parties reached a lawful impasse and the contract expired on June 6, 2008, the Company's obligation to pay the Union dues expired as well. The ALJ was correct in failing to impose this remedy sought by the Charging Party. The

Union is free to seek payment of its dues directly from its members. Payment of union dues is an obligation of the union members, not of the Company.

VII. As There Was No Lockout, The Company Is Not Responsible For Loss Of Earnings Or Benefits During This Time.

Respondents have met their burden in showing a lockout did not occur. *Union Terminal Warehouse, Inc.*, 286 NLRB 851, 860 (1987). The alleged lockout occurred on the morning of June 9, 2008. The majority of the employees returned to work within hours of arriving at the company gates. These employees were put to work and production continued. *Id.*; *Sargent-Welch Scientific Co.*, 208 NLRB 811, 812 (1974). Without the finding of a lockout, the Company is not in violation of the Act, and therefore, the imposition of back pay and benefits lost during this time is not warranted.

Respectfully submitted this 2nd day of October, 2009.

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ATLAS REFINERY, INC.,

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AND FORESTRY, RUBBER,
MANUFACTURING, ENERGY, ALLIED,
INDUSTRIAL AND SERVICE
WORKERS INTERNATIONAL UNION,
AFL-CIO,

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD
REGION 22**

CASE NO.: 22-CA-28403

CERTIFICATION OF SERVICE

I, Krista N. Predmore, of full age, certify that:

1. I am employed with the law firm of Laddey, Clark & Ryan, LLP located at 60 Blue Heron Road, Suite 300, Sparta, New Jersey 07871, attorneys for Respondent, Atlas Refinery, Inc., in the above-captioned matter.

2. On Friday, October 2, 2009, I did cause a true and correct copy of the Respondent's Answering Brief to the General Counsel and Charging Party's Exceptions to the Decision of the Administrative Judge, Michael J. Rosas, ALJ, Brief in Support of Respondent's Exceptions to the Decision of the Administrative Judge and this Certification

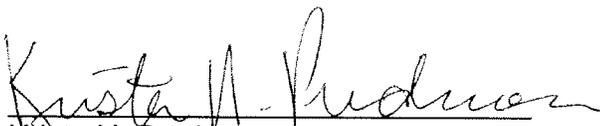
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Pursuant to 28 U.S.C. §1746(2), I certify under penalty of perjury that the foregoing is true and correct.

Executed on October 2, 2009


Krista N. Predmore