UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ALUMINUM CASTING & ENGINEERING CO., INC.,

Respondent,

and

UNITED ELECTRICAL, RADIO &
MACHINE WORKERS OF AMERICA (UE),

Charging Party.

Case Nos. 30-CA-12855; 12902;
12943; 12944; 12949

STATEMENT OF POSITION OF RESPONDENT ALUMINUM CASTING & ENGINEERING CO., INC. REGARDING ISSUES RAISED BY REMAND FROM THE COURT OF APPEALS

Dated: April 29, 2010

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TABLE OF CONTENTS

Page No.

I. INTRODUCTION 1

II. BRIEF PROCEDURAL HISTORY 2

III. THE BOARD'S BACKPAY REMEDIES ARE "MAKE WHOLE." 3

IV. THE DISCRIMINATEES RECEIVED WAGE RATES THAT EXCEEDED THE BOARD-ORDERED RATES LONG AGO 4

V. THE BACKPAY PERIOD FOR EACH DISCRIMINATEE SHOULD END WHEN THE DISCRIMINATEE RECEIVED A WAGE RATE EQUAL TO THE BOARD-ORDERED WAGE RATE 6

VI. THE ETERNAL REMEDY SOUGHT BY THE UNION DRAMATICALLY EXCEEDS A MAKE-WHOLE REMEDY AND WOULD CREATE A WINDFALL FOR THE DISCRIMINATEES 8

VII. CONCLUSION 9

TABLE OF CASES AND AUTHORITIES

CASES

Page No.

Aluminum Casting & Engineering Co., Inc.,
328 NLRB 8 (1999) 2

Aluminum Casting & Engineering Co., Inc.,
349 NLRB 178 (2007) 2, 5, 7

Aluminum Casting & Engineering Co., Inc.,
352 NLRB 1 (2008) 2, 4

F.W. Woolworth Co.,
90 NLRB 289 (1950) 3

Master Appliance Corp.,
164 NLRB 1187 (1967) 3

Plasticrafts, Inc.,
248 NLRB 1179 (1980) 4, 6, 7

Republic Steel Corp. v. NLRB,
311 U.S. 7 (1940) 3

Southern Household Products Co.,
203 NLRB 881 (1973) 3

United Electrical, Radio and Machine Workers of America v. NLRB,
580 F.3d 560 (7th Cir. 2009) 1, 2

The Respondent, Aluminum Casting & Engineering Co., Inc. (hereafter "Respondent" or "ACE/Co.") by its attorneys Krukowski & Costello, S.C., by Kevin J. Kinney and Timothy C. Kamin, submits this Statement of Position with respect to the issues raised by the remand order of the Seventh Circuit Court of Appeals in this matter.

I. INTRODUCTION

This matter is one that has spanned more than fifteen (15) years, and now can fully and finally be resolved by the Board's crafting of a reasonable remedy making employees whole without exceeding a make whole remedy for punitive purposes or creating an unjust windfall for employees. In this matter, the Court of Appeals disagreed with and reversed the Board's determination that the backpay period in this matter was limited to 1995 because of a 1996 change in compensation systems by ACE/Co. *See* 580 F.3d 560 (7th Cir. 2009). Following the remand, it remains for the Board to determine what other backpay period is appropriate as a make whole remedy.[1]

The Respondent asserts that the appropriate make whole remedy is for the Respondent to compensate each employee by paying the amount of the withheld hourly wage increase (25 cents) for all hours worked by each employee until the employee, in fact, received wage increases that met or exceeded the wage rate that the employee would have received if the 1995 increases had been granted. The decisions by the Board and the Seventh Circuit make it clear that ACE/Co. had no obligation to grant wage any increases in 1996 and beyond and, therefore, the wage increases voluntarily granted by ACE/Co. in 1996 and subsequent years must serve as an offset against the unlawfully withheld increase from 1995. The Union's assertion that each employee should receive 25 cents for all hours worked since 1995 is not a reasonable make

[1] ACE/Co. has already made payment of backpay for the wage increase for all hours worked in 1995 to all affected employees pursuant to the Board's 2008 Order.

whole remedy, because it ignores the realities and effects of the numerous subsequent wage increases that have been granted to employees during the interim fifteen (15) years, which have placed the employees in a position far better than the 1995 increase would have.

II. BRIEF PROCEDURAL HISTORY.

This matter began with an unfair labor practice charge filed approximately fifteen (15) years ago. It has now been more than eleven (11) years since the Board issued its Decision and Order determining that ACE/Co. had committed an unfair labor practice in 1995 when, during a union organizing campaign, it failed to implement an across-the-board wage increase for employees.[2] Following a trip to the Court of Appeals which enforced the Board's order in part and remanded for remedy determinations, the Board conducted formal compliance proceedings and ordered in 2007 that the period of the backpay remedy was limited to the year 1995, because ACE/Co. had changed its compensation system in 1996.[3] Following the preparation of specific backpay calculations and a summary judgment motion by General Counsel, the Board ordered specific backpay amounts to be paid, and ACE/Co. paid all such amounts as ordered.[4]

Subsequently, the Union sought judicial review of that backpay order, the Seventh Circuit Court of Appeals reversed the Board's determination that ACE/Co.'s 1996 change in compensation systems served to end the backpay period as of the end of 1995, and the Court remanded the matter to the Board for a determination of a remedy consistent with the Court's opinion.[5]

In this most recent Court of Appeals review, it is clear that the court has rejected the limitation of the backpay remedy to hours worked in 1995, because the court disagreed that the

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[2] Aluminum Casting & Engineering Co., Inc., 328 NLRB 8 (1999).
[3] Aluminum Casting & Engineering Co., Inc., 349 NLRB 178 (2007).
[4] Aluminum Casting & Engineering Co., Inc., 352 NLRB 1 (2008).
[5] 580 F.3d 560 (7th Cir. 2009).

evidence established a change in compensation practices sufficient to create a "new baseline." As a result, that 1996 change in compensation practices cannot by itself serve to end the backpay period.

However, the Seventh Circuit's opinion did not mandate any particular backpay period ending date. Certainly, the Court did not mandate that the backpay period run fifteen (15) years through the current date.

III. THE BOARD'S BACKPAY REMEDIES ARE "MAKE WHOLE."

The Board has long adhered to the principle that the purpose of a backpay remedy under the Act is not to punish the respondent or unjustly enrich the discriminatee, but merely to put the discriminatee – as closely as possible – in the same position he or she would have enjoyed absent the discrimination. *See Contractor Services, Inc.*, 351 NLRB No. 4, 3 (2007), citing *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 12 (1940) and *Master Appliance Corp.*, 164 NLRB 1187, 1190 (1967). Under these principles, a backpay remedy ends when the employee has otherwise received that to which the employee would have received in the absence of the violation.

For example, a discharged discriminatee's backpay period ends when the discriminatee accepts or refuses an unconditional reinstatement offer. *See Southern Household Products Co.*, 203 NLRB 881 (1973). Once the employment that was unlawfully denied is reinstated, the backpay period ends. *See id.* Likewise, during that discriminatee's backpay period, the Board's remedy calculations offset what the discriminatee actually did receive in interim earnings against that which the discriminatee should have received from the offending employer. *See F.W. Woolworth Co.*, 90 NLRB 289 (1950). The remedy is limited to that which the employee should have received, and the remedy ends when the employee receives it.

Likewise, where the discriminatee's injury is the denial of a wage increase, the Board has held that future wage increases voluntarily granted by the employer will serve as offsets which, in fact, do serve to remedy the harm suffered by the discriminatee, retroactively as well as prospectively. *See Plasticrafts, Inc.*, 248 NLRB 1179 (1980). The purpose of the remedy is merely to compensate the discriminatee for any losses incurred as a result of the unlawful action, and only for the actual duration of those losses – not in perpetuity.

IV. THE DISCRIMINATEES RECEIVED WAGE RATES THAT EXCEEDED THE BOARD-ORDERED RATES LONG AGO.

The Board's finding that employees were denied unlawfully a total of 25 cents in wage increases during 1995 has not been disturbed by the Court. Thus, ACE/Co.'s obligation under the Board's Order was to grant to each employee a wage rate equal to the employee's 1994 wage rate plus 25 cents. For example, if the employee was earning $9.00 per hour at the end of 1994, the Board found that the employee was unlawfully denied the higher wage rate of $9.25 at some point in 1995. However, the period of that denial did not last forever.

Under the Board's Order and the Court's opinion, ACE/Co. was not obligated by law to grant any additional wage increases of any kind in 1996, 1997 or in any subsequent year. However, the fact is that ACE/Co. did voluntarily grant wage increases in 1996, 1997 and beyond. It cannot be disputed from the evidence introduced at hearing, including the General Counsel's own Compliance Specification, that the discriminatees, over time subsequent to 1995, in fact received wage increases that resulted in wages rates that met and ultimately greatly exceeded the 1995 wage increase ordered by the Board.

According to the Board's Final Order of 2008, there were 381 discriminatees who were denied the 1995 increase and who were entitled to some measure of backpay. *See* 352 NRLB 1, 2-5 (2008). As Member Walsh's dissent from the Board's 2007 Order pointed out, by the end of

1996, all but twelve (12) of those 381 discriminatees already were receiving a wage rate that was equal to or higher than their 1994 wage rate adjusted by the addition of the 25-cent increase withheld in 1995. *See* 349 NLRB 178, 185 (2007).

These subsequent, voluntarily-granted wage increases greatly exceeded any wage increases that the discriminatees had received in the past, or would have received in 1995 absent the unlawful withholding of the 25-cent adjustment. As a result, within a year or two following the unlawfully withheld increase, the discriminatees wage rates were voluntarily adjusted by ACE/Co. to levels that greatly exceeded that to which the discriminatees were entitled in 1995.

As demonstrated conclusively at the compliance hearing, and without rebuttal or dispute, the Respondent's yearly average increases granted to employees in 1995 and subsequent years greatly exceed those granted in 1994 and earlier:

Year	Ave. incr.
1990	0.25
1991	0.02
1992	0.15
1993	0.16
1994	0.31
1995	0.79
1996	0.32
1997	0.36
1998	0.70
1999	0.87
2000	0.65
1990-1994	0.178
1995-2000	0.615

R. Exh. 2.

It is clear from the Board's prior orders that ACE/Co.'s denial of a 25-cent increase in 1995 denied employees the proper wage rate for some period of time, and that this requires a remedy. However, the evidence also clearly demonstrates that this period of time did not last forever, and did not even last a year for most of the discriminatees. To the extent that there are discriminatees whose wages were not increased by at least 25 cents per hour within the period already remedied by the Board's 2008 Order and already paid out by ACE/Co., then those individuals would be entitled to additional and ongoing backpay until such increases were received. That additional remedy would be consistent with longstanding Board principles regarding make-whole remedies and would also address the point raised by Member Walsh in his dissent to the 2007 Order. Such a remedy would also terminate this decade-long litigation without further appellate court review.

V. THE BACKPAY PERIOD FOR EACH DISCRIMINATEE SHOULD END WHEN THE DISCRIMINATEE RECEIVED A WAGE RATE EQUAL TO THE BOARD-ORDERED WAGE RATE.

It has never been the Board's position that subsequent, non-mandatory wage increases granted by an employer are irrelevant to backpay calculations under the Act. The cases cited by the Union contain no such holding or reasoning. To the contrary, the Board has found that subsequent wage increases will fully compensate discriminatees on a prospective basis for a previous unlawfully withheld increase, leaving the backpay period as the time between the unlawful denial of an increase through the date a commensurate increase was granted. *See Plasticrafts, Inc.*, 248 NLRB 1179 (1980).

In *Plasticrafts*, the Board determined that the employer unlawfully withheld wage increases by unlawfully imposing a "moratorium" on wage increases, the moratorium lasting from November 1996 through May 1977. *See id.* at 1179. The Board found that the moratorium

was imposed by the employer during and because of the pendency of a representation proceeding and subsequent collective bargaining negotiations. *See id.* The Board affirmed the holding of the administrative law judge that no backpay at all was due to discriminatees who received a subsequent wage increase in May 1977, because the May 1977 increase exceeded the employer's past average increases and served to offset the harm of the unlawfully denied wage increases and fully compensated the discriminatees, retroactively and prospectively. *See id.*

In this case, as in *Plasticrafts*, the discriminatees received voluntarily-awarded wage increases in 1996, 1997 and beyond that, for most employees, greatly exceeded any increases that they received in prior years, and greatly exceeded the 25 cent increase that was withheld in 1995. *See* R. Exh. 2. In this case, the Board has held that the discriminatees did not receive a wage including the 25-cent increase for 1995 in a timely fashion. However, all of the discriminatees subsequently did receive that wage rate, along with backpay for 1995 with interest applied. All but twelve (12) of the 381 discriminatees were awarded a wage rate by the end of 1996 that matched or exceeded the Board-ordered rate going forward. *See* 349 NLRB 178, 185 (2007).

Under these circumstances, a fair and reasonable make-whole remedy would compensate discriminatees for the time period during which they were denied the 1995 increase, but that time period ends for each individual discriminatee when they received the 25-cent increase to which they were entitled under the Board's Order. The determination of such remedy may be readily calculated based upon the payroll records already in evidence before the Board.

VI. THE ETERNAL REMEDY SOUGHT BY THE UNION DRAMATICALLY EXCEEDS A MAKE-WHOLE REMEDY AND WOULD CREATE A WINDFALL FOR THE DISCRIMINATEES.

The remedy advanced by the Union is that ACE/Co. must pay 25 cents for every hour worked by each employee during a span of more than fifteen (15) years from 1995 to the present, and also add that 25 cents to the employees' wage rates going forward into the future. This proposed remedy suggests that the Board must ignore all increases that were voluntarily granted to the discriminatees by ACE/Co. in the fifteen (15) years subsequent to the withheld 1995 increase. According to the Union's position, ACE/Co.'s liability should be exactly the same today – after numerous significant wage increases – as it would be if ACE/Co. had never granted another wage increase.

For example, under the Union's theory, a hypothetical "Employee A" whose wage rate was $10.00 per hour at the end of 1994 and who was *never* awarded another wage increase would be entitled to the exact same backpay remedy as "Employee B" to whom ACE/Co. voluntarily awarded a wage increase in 1996 to $10.75 and also subsequent increases from to a current wage rate of $15.00 per hour – both would be entitled to 25 cents for every hour worked since 1995. This is an absurd result. It is quite clear that the harm caused by the withholding of the increase has been restored and more than remedied by ACE/Co.'s subsequent, voluntary adjustments to the wage rates.

The robotic addition of 25 cents to whatever wage rate ACE/Co. grants, without regard to the fact that ACE/Co. voluntarily has granted increases that greatly exceed the withheld 1995 increase, completely abandons the Act's remedial, make-whole purposes and rather serves to enrich discriminatees rather than restore them. Under the Union's theory, no matter how many subsequent wage increases the Company provided to employees, it can never "catch up." Under

the Union's formula, ACE/Co. could double or even triple the wage rates of the discriminatees, but ACE/Co. would always owe a 25 cent deficit. This is not consistent with the Act's make-whole remedial purpose.

The Board and the Seventh Circuit agreed that ACE/Co. was under no legal duty to grant any wage increase to any employee following the unlawfully withheld increase of 25 cents 1995. The discriminatees were made whole on a prospective basis when they actually received wage increases equal to or greater than the 25 cents withheld in 1995. For all but twelve (12) of the 381 discriminatees, those wage increases came no later than 1996. Continuing the backpay period beyond those increases for another fifteen (15) years and, through an increase to the current wage rate, for eternity going forward, is not supported by the evidence nor by the Act's remedial, make-whole purposes.

VII. CONCLUSION.

The Court of Appeals has reversed the Board's finding that the backpay period in this case ended at the conclusion of 1995 because of ACE/Co.'s change in compensation practices. However, the Board's application of remedial, make-whole remedies under the Act does not permit the imposition of a remedy that goes beyond making discriminatees whole, provides a windfall to discriminatees and has a punitive, rather than remedial, effect. Thus, the Union's demand for a remedy that ignores subsequent, substantial wage increases granted by ACE/Co. and creates a perpetual, eternal remedy, should be rejected.

Under the make-whole, remedial purposes of the Act, the appropriate remedy in this case is to make the discriminatees whole for the 1995 denial of the 25-cent wage increase, but only until such time as the discriminatees actually received wage increases that met or exceeded that level. Once the discriminatees received such wage increases – and nearly all of the

discriminatees received such increases by 1996 – the harm from the withheld increase was eliminated by ACE/Co.'s voluntarily granted wage increases and the backpay ended.

Dated at Milwaukee, Wisconsin, this 29th day of April, 2010.

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