

Systems Management, Inc. and Service Employees International Union, Local 29, AFL-CIO and International Brotherhood of Painters and Allied Trades of the United States and Canada, Local 327, AFL-CIO, Party to the Contract

First Union Management, Inc. and Service Employees International Union, Local 29, AFL-CIO

International Brotherhood of Painters and Allied Trades of the United States and Canada, Local 327, AFL-CIO and Service Employees International Union, Local 29, AFL-CIO and Systems Management, Inc., Party to the Contract. Cases 6-CA-19321, 6-CA-19465, 6-CA-19407, 6-CB-7174, and 6-CB-7194

April 22, 1991

**SUPPLEMENTAL DECISION AND ORDER
REMANDING**

BY CHAIRMAN STEPHENS AND MEMBERS
CRACRAFT AND OVIATT

On February 14, 1989, the National Labor Relations Board issued its Decision and Order¹ finding that Systems Management, Inc. (Respondent Systems) had violated Section 8(a)(1), (2), (3), and (5) of the National Labor Relations Act and that International Brotherhood of Painters and Allied Trades of the United States and Canada, Local 327, AFL-CIO (Respondent Painters) had violated Section 8(b)(1)(A) and (2) of the Act. To remedy the violations, the Board ordered, inter alia, that Respondent Systems cease recognizing Respondent Painters and, on the request of Service Employees International Union, Local 29, AFL-CIO (Local 29), restore the status quo prior to the implementation of various unilateral changes by Respondent Systems, and to bargain with Local 29 with respect to the rates of pay, wages, hours, and other terms and conditions of employment of the unit employees, the Board also ordered the Respondent to reinstate the predecessor's employees and reimburse those employees for any monetary loss they may have suffered as a result of the unilateral changes with interest, and to continue those payments until Respondent Systems negotiates in good faith with Local 29 or to impasse; and to make whole Respondent Systems' employees by paying them what they would have earned under the terms of Local 29's contract with the predecessor.

Thereafter, Respondent Systems filed a petition for review with the United States Court of Appeals for the Third Circuit, and the General Counsel filed a cross-application for enforcement. On April 17, 1990, the court issued its decision enforcing the Board's Order, except for the backpay award.² The court declined to enforce the make-whole remedy for Respondent Sys-

tem's employees and remanded the case to the Board to determine, regarding the predecessor's employees, the amount of backpay, the time period for which it must be paid, and the specific employees to be made whole. The court explained that it could not leave these "substantive details of the award" to the Board's compliance proceedings because "none of the Local 29 workers were ever actually employed by Systems [and] the Board has yet to determine for what period of time such compensation should be paid." (901 F.2d at 308). The court added that, "[w]hile it is possible the Local 29 workers would be entitled to compensation for the full term of Systems' contract . . . other termination dates, including bargaining to impasse, are possible," citing *Kallman v. NLRB*, 640 F.2d 1094, 1103 (9th Cir. 1981).

The ensuing judgment of the Third Circuit issued on June 28, 1990.

On August 8, 1990, the Board advised the parties that it had accepted the remand of the court and that they might file statements of position "with respect to the issues raised by the remand." The General Counsel and Respondent Systems filed statements of position.

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

We accept the court's decision as the law of this case. The court's judgment enforces the Board's Order with the exception of the backpay award. In its decision remanding the proceeding to the Board for a factual determination as to the extent of backpay owed, the court stated that further specification is required as to "the amounts of backpay, the time for which it must be paid, and the specific workers to be paid." (901 F.2d at 309.)

This case will be remanded for reopening the record and further hearing before the judge for the limited purpose of taking evidence on the extent of respondent Systems' backpay liability as stated by the court. A remand hearing is necessary to determine which of the predecessor's employees are entitled to backpay; whether Respondent Systems would have agreed to the monetary provisions of the predecessor employer's collective-bargaining agreement with Local 29; whether a good-faith impasse in negotiations would have been reached as of a certain date; and whether Respondent Systems would have implemented its own monetary terms as of that date. Because it is uncertain whether Respondent Systems would have agreed to the monetary terms of the prior contract between Local 29 and the predecessor, the burden of proof must be placed on Respondent Systems to establish that it would not have agreed to the terms of the prior contract, the date on which it would have bargained to agreement, and the terms of the agreement that would have been negotiated, or to establish the date on which it would have

¹ 292 NLRB 1075.

² *Systems Management v. NLRB*, 901 F.2d 297 (3d Cir. 1990).

bargained to good-faith impasse and implemented its own monetary proposals. The Board has consistently held that such uncertainties should be resolved against the one whose unlawful acts created them.³

ORDER

It is ordered that this proceeding is remanded to Administrative Law Judge Thomas R. Wilks for the pur-

³*Armco, Inc.*, 291 NLRB 1171 (1988); *State Distributing Co.*, 282 NLRB 1048, 1049 (1987).

pose of reopening the record and conducting a further hearing for the limited purpose of taking evidence on the extent of Respondent Systems' backpay liability. The administrative law judge shall prepare a supplemental decision containing credibility resolutions, findings, conclusions, and recommendations as deemed necessary, consistent with this remand Order. Following service of the supplemental decision on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations shall apply.