

R&H Coal Co., Inc. and United Mine Workers of America, District 28. Case 11-CA-12750

March 12, 1992

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND
RAUDABAUGH

On November 8, 1991, Administrative Law Judge William N. Cates issued the attached supplemental decision. The Respondent and General Counsel filed exceptions and supporting briefs, and the Respondent filed an answering brief in response to the General Counsel's exceptions.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified.¹

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and orders that the Respondent, R&H Coal Co., Inc., Tazewell, Virginia, its officers, agents, successors, and assigns, shall make whole the employees listed below by payment to them of the amounts set forth below, opposite their names, with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

<i>Employee</i>	<i>Wages & Benefits</i>
James Ball	\$8,227
Ken Davis	1,164
Arthur Lee Dye	10,386
Charlie Dye	10,168
Gary H. Dye	9,903
Randall Dye	10,543
Chester Elkins	9,525
Eugene Elkins	9,224
Charles Harris	3,571
William Harrison	1,081

¹The General Counsel has excepted to the judge's failure to order interest on the amount of backpay owed to employees from the date of the supplemental decision until the date the Respondent fully complies with the Board's Order. We find merit in the General Counsel's exception. It is Board policy to include interest on backpay awards until compliance with the Board's order is achieved. See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962). Further, we note that the judge in the underlying unfair labor practice proceeding recommended that the employees be made whole, with interest. That recommendation was adopted by the Board and was enforced by the United States Court of Appeals for the Fourth Circuit.

Robert Lambert	5,153
Lonnie Lester	17,730
Larry Lowe	6,452
Brad Miller	10,290
David Perkins	2,225
Daniel Richardson	10,041
Larry Plaster	10,776
Jack Richardson	10,747
Gary L. Sparks	5,077
Larry Sparks	7,914
Barry Walls	1,616
Michael Whited	587
Roger Whited	8,944
Larry Whitt	4,170
Total	\$175,514

Rosetta B. Lane, Esq., for the General Counsel.

Charles L. Woody, Esq. (Spilman, Thomas, Battle, & Klostermeyer), of Charleston, West Virginia, for the Company.

James J. Vergara Jr., Esq. (Vergara & Associates), of Hopewell, Virginia, for the Charging Party.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

WILLIAM N. CATES, Administrative Law Judge. The National Labor Relations Board (Board) issued an order (unpublished) on July 11, 1989, directing R&H Coal Co., Inc. (Company) to, on request, rescind the unilateral changes in the unit employees' wages and other terms and conditions of employment and make all employees whole, with interest, for losses they incurred by virtue of such changes until the Company negotiated in good faith with the United Mine Workers of America, District 28 (Union) to agreement or to a valid impasse. The United States Court of Appeals for the Fourth Circuit issued an order (Case 89-1599) on January 30, 1990, enforcing the Order of the Board. Thereafter, a controversy arose over the amount of backpay and benefits due under the terms of the Order. The Board's Acting Regional Director for Region 11, as an agent of the Board's General Counsel, issued a compliance specification and notice of hearing on August 31, 1990. The Company filed an original and amended answers to the compliance specification on September 17, 1990, and August 5, 1991, respectively. A supplemental trial was held in Tazewell, Virginia, on September 24, 1991. Thereafter, counsel for the General Counsel and Company filed briefs which have been carefully considered.

At trial, the parties stipulated figures representing net backpay for each of the affected employees as wages and benefits and stipulated the amount paid as bonuses to each of the affected employees.

In light of the parties' stipulations, the only issue before me centers around the bonuses paid to the employees. Specifically, the issue is whether the amounts paid by the Company as production bonuses should be allowed as credits or setoffs against the stipulated backpay figures for the discriminatees.

I conclude, for the reasons hereinafter set forth, that the Company is not entitled to set off the bonus payments against its backpay liability.

The applicable collective-bargaining agreement (National Bituminous Coal Wage Agreement of 1984) contains a "Miscellaneous" article (XXII) which at section(s) thereof addresses "Bonus Plans." Section(s) reads in pertinent part:

(2) Conditions. Bonus plans shall not be commenced or continued unless a plan satisfies all of the following conditions:

(B) The plan shall provide an earnings opportunity above the standard daily wage rate for all active classified Employees at the mines.

Company President Glen Hubbard testified the Company could not, and did not, pay its employees at the standard contract rate so in October 1988 it implemented an incentive production bonus plan. He said the only way the Company could "bring the [employees] pay scale up" was to "bring the tonnage up." Hubbard said he made an announcement to the employees and,

I told them, in order to bring the pay scale up, if we could run the production up that I could increase their pay through a production bonus.

Hubbard said that under the plan the Company paid *all* employees 15 cents per ton for each ton of clean coal produced in excess of the normal clean coal production of 600 tons per day for each work day in half a month. He said the first bonus period for any given month ran from the 1st through the 15th day of the month. The second bonus period for any given month ran from the 16th until the last day of the month—which resulted in some second halves having more (or less days) than first halves. The employees were paid bonus payments every 2 weeks by checks separate from their payroll checks. The amount paid as bonuses for any half month varied in relation to the amount of extra coal produced during that half month. If production in any given half month did not exceed an average of 600 tons of clean coal per day, the employees were not paid any bonus payments. When paid, *all* employees received bonus payments, however, the payments were prorated based on the number of workdays each employee worked during the half month for which bonus payments were being made. In order to be eligible to receive bonus payments, when made, the employees did not have to work extra hours or shifts nor did they have to perform any different duties—they just simply had to produce *more* than the normal tonnage of coal per day over a half month. Employees were always paid their normal wages regardless of whether bonus payments were made or not. Hubbard testified the production incentive bonus was never used to discipline employees nor did the Company ever consider it as a gift to the employees. Hubbard acknowledged the bonuses were simply paid "for day-to-day work which produce[d] exceptional results."

Counsel for the General Counsel argues the clear language in the parties' collective-bargaining agreement prevents the bonuses from being set off against the backpay owed the discriminatees. Counsel for the General Counsel further asserts the bonuses were directly related to extra efforts on the employees' part and were not based on the performance of

their normal regularly assigned duties. In that regard, counsel for the General Counsel contends the bonuses were paid to reward the employees for their extraordinary efforts to increase production and as such may not be used as a setoff against the backpay liability of the Company.

Counsel for the Company argues the Company's sole purpose in paying bonuses was to bring its employees' pay scales up and that it always considered the bonuses as part of its employees' wages. The Company contends it regularly paid the bonuses pursuant to a defined schedule based on specific levels of productivity or efficiency and that the bonuses were part of its regular wage structure and therefore should be set off against the wage claims of the discriminatees as wage payments already received.

Both counsel for the General Counsel and Company cite *K. & H. Specialties Co.*, 163 NLRB 644 (1967), *enfd.* 407 F.2d 820 (6th Cir. 1969), in support of their positions.

The judge, then trial examiner, in *K. & H. Specialties* addressed the question of setoffs of additional compensation against backpay claims. In so doing, the judge, with Board approval, examined what he considered to be "regular monthly bonuses" and "intermittent bonuses." The judge reached different results for the two types of bonuses regarding whether such should be allowed as setoffs against backpay liabilities. With "regular monthly bonuses" the judge allowed setoffs whereas with "intermittent bonuses" he did not. The judge defined a "regular monthly bonus" "as compensation directly related to and based on normal performance of regularly assigned duties." The judge concluded such bonuses "were an integral part of [the] employees' monetary package" which employees had a right to expect would continue to be paid unless or until their wages were somehow otherwise adjusted. The judge concluded that employees paid a "regular monthly bonus" were not required or expected to "exert any extra effort" or to perform any work "outside the normal requirements" of their jobs in order to receive bonus payments. The judge defined an "intermittent bonus" as an "unexpected," "gratuitous," reward for either "extraordinary efforts," or "for the performance of services beyond the range of [the employees'] primary duties." Additionally, the judge concluded a bonus was of the "intermittent" type if the employer was not obligated to pay the bonus unless certain conditions or requirements were met by the employees.

I am persuaded the positions advanced by counsel for the General Counsel must prevail. First, the language related to bonuses in the applicable collective-bargaining agreement is clear. Bonus plans implemented pursuant to the parties' collective-bargaining agreement *must* provide employees with "an earnings opportunity above the standard daily wage rate for all active classified Employees at the mines." Thus, when the Company chose to implement its bonus plan, it did so knowing full well that the bonus payments would be payments over and above the employees' regular wages. That the Company was fully aware of the contract language related to bonus payments and how such payments would be treated is borne out by the testimony of President Hubbard that in the early 1980s the Company implemented a bonus program and that it was understood at the time that the payments were over and above the daily wage rates pursuant to "what the contract language calls for." Second, the bonuses were of the "intermittent" type as defined in *K. & H. Spe-*

cialties. The employees were *only* paid bonus payments if they produced clean coal in excess of what was considered normal production. Whether the employees received bonus payments, and in what amounts, depended on the amount of *extra* coal they produced in any given half month. The employees had no right to expect bonus payments unless they produced *extra* coal. The bonus payments herein were not given for the performance of regularly assigned day-to-day duties but were for “extraordinary efforts” “beyond the range of [the employees’] primary duties.” Thus, the bonus payments cannot be used to set off or reduce the amount of backpay the Company owes. See *Virginia Sportswear, Inc.*, 234 NLRB 315 (1978).

Concluding Findings

I conclude the Company is not entitled to set off the bonus payments it has made against its backpay liability. Accordingly, I conclude the Company is obligated under the Board’s and court’s Orders to pay its employees the amounts set forth opposite their names:

<i>Employee</i>	<i>Wages & Benefits</i>
James Ball	\$8,227
Ken Davis	1,164
Arthur Lee Dye	10,386
Charlie Dye	10,168
Gary H. Dye	9,903
Randall Dye	10,543
Chester Elkins	9,525
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Larry Sparks	7,914
Barry Walls	1,616
Michael Whited	587
Roger Whited	8,944
Larry Whitt	4,170
Total	\$175,514

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹

ORDER

It is recommended that the Board adopt the foregoing findings and conclusions.

¹ If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.