Centra Inc., Central Transport, Inc. and Central Cartage Company *and* Archer Bailey III *and* Teamsters Local Union No. 964, affiliated with the International Union of Teamsters, AFL–CIO.[1] Cases 8–CA–19212 and 8–CA–19282

August 19, 1994

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS STEPHENS, DEVANEY, AND COHEN

On December 20, 1993, Administrative Law Judge Robert W. Leiner issued the attached supplemental decision. The Respondents filed exceptions and a supporting brief.[2]

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 brief and has decided to affirm the judge's rulings, findings,[3] and conclusions.[4]

ORDER

The National Labor Relations Board orders that the Respondents, Centra Inc., Central Transport, Inc., and Central Cartage Company, a single employer, Sterling Heights, Michigan, its officers, agents, successors, and assigns, shall make whole the Central States, Southeast and Southwest Areas Pension and Health and Welfare Funds on behalf of the Group A and Group B employees by remitting the sums set forth below, plus interest:

Group A Employees	
Pension Fund	$534,927
Health and Welfare Fund	733,770
Group B Employees	
Pension Fund	3,168
Health and Welfare Fund	6,403
Total	$1,278,268

Paul C. Lund, Esq., for the General Counsel.
James M. Brogan, Esq. and *A. Christopher Young, Esq. (Harvey, Pennington, Herting & Renneisen, Ltd.)*, of Philadelphia, Pennsylvania, for the Respondent.

SUPPLEMENTAL DECISION

ROBERT W. LEINER, Administrative Law Judge. On August 31, 1990, the National Labor Relations Board (the Board) issued its Decision and Order (299 NLRB 658 (1990)), in substance directing Centra Inc., Central Transport, Inc., and Central Cartage Company (collectively Respondent), its officers, agents, successors, and assigns, to make whole 59 employees for any loss of wages and benefits resulting from Respondent's unfair labor practices in violation of Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act). On January 17, 1992, the United States Court of Appeals for the Sixth Circuit enforced the Board's Order in its entirety (954 F.2d 366).

On May 6, 1993, the Regional Director for Region 8 of the National Labor Relations Board issued a compliance specification and notice of hearing, amended September 2, 1993, as further amended at the hearing, seeking recovery, inter alia, of backpay for the employees and of defaulted contributions to union-negotiated pension and health and welfare funds covering these employees. Respondent filed timely answers to the above-amended compliance specification, admitting various allegations there, denying others, and asserting its freedom from any obligation, in whole or in part, to pay any back wages, or pension or health and welfare contributions.

At the hearing held in Cleveland, Ohio, on September 29 and 30, 1993, the parties were represented by counsel, were given full opportunity to call and examine witnesses, to submit oral and written evidence, and to argue orally on the record. At the close of the hearing, the parties waived final argument and elected to submit posthearing briefs. There-

[1] The name of the Charging Party has been changed to reflect the new official name of the International Union.

[2] The Respondents also filed a motion to reopen the record to consider additional evidence pertaining to Federal district and appellate court determinations concerning D & S Leasing's withdrawal liability under the Multi-Employer Pension Plan Amendments Act of 1980, 29 U.S.C. § 1381–1461, contending that this evidence is material to the issue of the Respondents' pension fund liability as required by the relevant collective-bargaining agreements. The General Counsel filed a memorandum in opposition to the Respondents' motion, and the Central States, Southeast and Southwest Areas Pension and Health and Welfare Funds (Central States Funds) filed a motion to intervene in order to address the merits of the Respondents' motion and the method of calculating interest on delinquent fund contributions. After reviewing the parties' submissions, we deny the Respondents' motion on the grounds that it does not present newly discovered evidence. See *Holly Farms Corp.*, 311 NLRB 273, 281 (1993). In this regard, we note that the Federal district court's decision, which was summarily affirmed by the Sixth Circuit Court of Appeals, issued before the compliance hearing closed. For the same reason, we deny the Respondents' request that a hearing be held to determine whether to reopen the record. We also deny Central States Funds' motion to intervene.

[3] The Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In fn. 4 of his decision, the judge inadvertently stated that the Respondents commenced operations with the Group B employees as new hires on June 2, 1991, rather than 1986. We correct the error.

In adopting the judge's findings that the Respondents are required to remit payments to the pension and health and welfare funds on behalf of the unit employees, Member Devaney does not rely on the judge's analysis of ''concrete evidence'' of the employees' economic interest in the future of the funds, or on his related finding that the burden of proof shifted to the Respondents to demonstrate that the employees have no future interest. See *Ron Tirapelli Ford*, 304 NLRB 576, 576 at fn. 2 (1991), enf. denied 987 F.2d 433 (7th Cir. 1993).

[4] The judge failed to include a recommended Order in his supplemental decision. Accordingly, we have set forth an order that conforms to the judge's conclusions, which we have adopted, regarding the Respondents' liability to the pension and health and welfare funds.

after, the General Counsel and Respondent submitted timely briefs which have been carefully considered.[1]

The pleaded issues to be resolved relate to Respondent's obligation, if any, to make whole 59 employees (Tr. 64) by payment to them of back wages and other benefits; and, separately, its obligation to reimburse the pension fund and health and welfare fund for contributions that would have been made absent Respondent's unfair labor practices. At the opening of the hearing, the parties settled the issue of employee backpay by Respondent agreeing to pay to the 59 employees $5.53 million on or before December 31, 1993. There thus remained for resolution solely the amount of contributions, if any, which should have been made on behalf of the discriminatees by Respondent to the trust funds here: the Central States Pension Fund and the Central States Health and Welfare Fund.

On the entire record, including the briefs, and from my observation of the demeanor of the witnesses as they testified, I make the following

FINDINGS OF FACT

Background

In the underlying unfair labor practice proceeding, the Board, with court approval, found that the above-captioned entities (Centra Inc.; Central Transport, Inc.; and Central Cartage Company) constituted a single employer within the meaning of the Act. That single employer was also the joint employer of a group of 59 employees on the payroll of D & S Leasing, Inc. which, pursuant to an agreement with Respondent, provided the 59 employees to perform freight consolidation work at Respondent's premises in Cleveland, Ohio.[2]

On and before May 31, 1986, the wages and other terms of employment of these 59 D & S employees working at Respondent's premises were established in a collective-bargaining agreement between D & S Leasing, Inc., and Teamsters Local Union No. 964. This collective-bargaining agreement, known as the ''White Paper Agreement,'' which expired March 31, 1988, granted covered employees less wages and benefits than received by Respondent's employees otherwise covered in the Teamsters National Master Freight Agreement (NMFA). Respondent's own employees, represented by Teamsters Local Union No. 407, were covered by the terms of NMFA. As found by the Board and court, on Saturday, May 31, 1986, Respondent terminated its contract with D & S Leasing, transferred the freight consolidation work to one of its own corporate entities (Central Cartage Company), and D & S Leasing (with Respondent as joint employer) laid off all 59 employees working at Respondent's premises.

On the following Monday, June 2, 1986, Respondent commenced performing the freight consolidation work at the same Ohio facility. It meanwhile had hired 26 of the former D & S employees as ''new hires'' under the NMFA which employees were now represented by Local 407, as above noted. These ''new hires'' under NMFA, were nevertheless paid at lower rates of wages and benefits than even under the White Paper agreement between D & S and Local 964. In addition, Respondent filled out its ranks by hiring replacement employees for the 33 D & S employees who were not rehired.

The Board and court found that the Respondent violated Section 8(a)(1) and (5) of the Act, as joint employer of the D & S employees, by refusing to recognize and bargain with Local 964 over its decision to cancel Respondent's contract with D & S Leasing; by failing to bargain over the effects of the transfer of this work to Respondent; and by altering the wages, hours, and other conditions of employment of both the 26 ''retained'' employees (''Group B'' employees) and the 33 laid-off employees whom it never rehired or retained (''Group A'' employees). Furthermore, the Board and court found that Respondent, as joint employer, violated Section 8(a)(1) and (3) of the Act by laying off and refusing to recall the 33 ''Group A'' employees.

Aside from ordering Respondent to bargain collectively with Local 964, particularly with regard to its decision (and the effects of its decision) to cancel the D & S Leasing contract and to transfer the consolidation work to Respondent, the Board directed Respondent to offer the 33 employees in Group A immediate and full reinstatement to their former jobs and to make them whole ''for any loss of wages and benefits they have suffered as a result of the discrimination practiced against them with interest.'' In addition, the Board directed that Respondent make whole the 26 former D & S employees (Group ''B'') hired by Respondent on or about June 2, 1986, for any loss of wages and benefits, with interest, which they suffered as a result of Respondent's unilateral alteration of their wages in terms and conditions of employment (failing to apply the White Paper agreement).

The Board ordered that Respondent:

> (e) Rescind any departures from terms and conditions of employment that existed immediately before the Respondent's transfer of work from Central Transport and D & S Leasing to Central Cartage, retroactively restoring pre-existing terms and conditions of employment, including wage rates and benefit plans,

[1] On December 3, 1992, General Counsel submitted a motion to strike portions of Respondent's brief, to correct General Counsel's brief, and to receive certain exhibits in evidence. Respondent, on December 9, submitted a response wherein it requested that General Counsel's motion be denied and that certain documents be received in evidence pursuant to agreements and understandings reached at the hearing, appearing in the official transcript.

In light of possible ambiguities as to precisely the scope of certain materials to be supplied after the close of the hearing and having determined that the authenticity of documents is not in issue, I resolve the issues raised by Respondent's opposition to General Counsel's motion as follows:

(1) The bilateral stipulation relating to the substance of the cross-examination of Compliance Officer Bednar is received.

(2) General Counsel's motion to strike ''Exhibit A,'' attached to Respndent's brief (together with all references thereto) is granted since the material was available prior to the close of the hearing and not offered.

(3) General Counsel's motion to strike Respondent's reference in its brief to and inclusion of the NMFA for the period 1985–1988 is denied. I have been administratively advised that the document, in full, has finally been served on General Counsel.

(4) General Counsel's motion to correct its Br., LL. 4 and 5, p. 5, to provide accurate citations is granted.

(5) G.C. Exhs. 6 and 8 are received unconditionally on Respondent's withdrawal of objections.

[2] At all material times following the unfair labor practice litigation, D & S Leasing, Inc. has been insolvent.

> and make the employees whole by remitting all wages and benefits that would have been paid absent such unilateral changes from June 2, 1986, until it negotiates in good faith with the Union to agreement or impasse; provided, however, that nothing in the order shall authorize or require the withdrawal or elimination of any wage increase unlawfully granted to employees without a request from the Union.

On September 29, 1992, Respondent offered the 33 employees in Group A reinstatement to their former jobs. Sixteen employees accepted reinstatement and 17 declined the offer. The backpay period for employees in Group A begins on June 2, 1986, and runs through September 29, 1992. For those in Group B, from June 2, 1986, through June 30, 1988, when they commenced receiving correct NMFA coverage.

The Compliance Specification and the Positions of the Parties

The compliance specification, as amended, following settlement at the hearing of Respondent's backpay obligation as above-noted, relates only to the question of the amount of Respondent's obligation, if any, to pay into the pension and health and welfare funds. The specification divides Respondent's obligations with regard to these funds into the obligations owed to the 33 employees in Group A and the 26 employees in Group B. The obligations are ''net'' obligations: the General Counsel's specification, as Respondent concedes, deducts from Respondent's obligation the requirement for contributions where individual employees would not have been able to work during the backpay period due to illness, injury, or similar circumstances; and similarly relieves Respondent, with regard to the 33 Group A discriminatees, from contributions where their other intermediate employers made contributions on behalf of particular Group A employees to the same pension and health and welfare funds. There is no dispute that the $5.53 million backpay settlement also included the out-of-pocket medical expenses and health or medical insurance premiums paid by the discriminatees during the backpay period.[3]

Furthermore, there is no dispute that for contributions both to the health and welfare and the pension funds, the compliance specification, as amended, uses rates derived from the White Paper Agreement for the period June 2, 1986, through White Paper expiration in the first quarter of 1988 (March 31, 1988). Thus, for this period, Respondent's obligation to both funds creates a status quo ante by assuming that all 59 employees, had there been no unfair labor practice, would have been subject to the wages, benefits, and other terms and conditions of employment existing in the White Paper Agreement which did not expire until March 31, 1988. With the expiration of the White Paper Agreement on March 31, 1988, the compliance specification asserts that the Group A employees,[4] would then have been paid under the terms of the NMFA, which the Group B employees had been continually working under since June 2, 1986.

As amended at the hearing, the General Counsel's compliance specification asserts that Respondent's Group A pension contribution obligation is $534,927 (G.C. Exh. 2A, amending Appendix A-34). Respondent's Group A health and welfare contribution obligation, similarly amended at the hearing, is $733,770 (G.C. Exh. 2B, amending Appendix A-33). For Group B, the Health and Welfare obligation is $6,403 (Appendix B-25); the Pension obligation, $3168 (Appendix B-26).[5]

Respondent does not dispute the accuracy of the mathematics contained in the General Counsel's compliance specification as amended. In particular, Respondent concedes that the hours and wage rates and other figures leading to the General Counsel's fund-obligation computations are correct insofar as General Counsel's theory goes. Respondent, however, contests the General Counsel's theory: Respondent argues that the General Counsel came to an incorrect conclusion because he did not derive the health and welfare and pension contributions from a correct legal analysis. According to Respondent's arguments, as detailed hereafter, Respondent has no obligation to make any contributions to the health and welfare or pension funds; and, in case of any such obligation, it is more limited than the General Counsel's assertions.

It is undisputed that in October 1992, after the backpay period, Respondent and Local 964 entered into a collective-bargaining agreement wherein Respondent became bound to the NMFA, covering these unit employees under the same health and welfare and pension funds as those which existed prior to the unfair labor practices.

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[3] For whatever reason, the official transcript of testimony herein failed to include Respondent's cross-examination of General Counsel's witness, the compliance officer, Mary Bednar. As a result of this omission, the parties, as above-noted, after the close of the hearing, entered into a stipulation regarding the substance of Bednar's cross-examination. Not only did the stipulation observe that the backpay settlement included the health and medical insurance premiums paid out of pocket by the discriminatees in the backpay period, but also noted that the contributions allegedly owing to the health and welfare fund are ''net'' contributions: they are contributions Respondent would have paid on behalf of the discriminatees to those funds, less contributions made by interim employers to the same funds.

[4] The Group B employees were transferred into Respondent's employment as ''new employees' under NMFA, immediately on the commencement of Respondent's operations on June 2, 1991. For purposes of determining Respondent's defaulted fund contributions, they suffered only from the creation of their status as ''new employees.'' The ''Group B'' employees' backpay has been settled. There is no dispute that they suffered, at most, only 30 days of defaulted fund contributions when hired as ''new employees'' under NMFA on June 2, 1986 since, after 30 days, Respondent apparently correctly contributed to the funds on behalf of Group B employees pursuant to NMFA.

[5] Based on information received subsequent to the issuance of the compliance specification, as above-noted, the General Counsel discovered that, during the backpay period, the funds, on behalf of Group A discriminatees, received almost $150,000 from interim employers in contributions to the health and welfare fund and more than $100,000 in contributions to the pension fund. To avoid obliging Respondent to make gratuitous duplicate contributions to the funds in the face of these contributions from interim third-party employers, which would result in a ''windfall'' to the funds, the General Counsel deducted these amounts from Respondent's liability and so amended the backpay specification (G.C. Exhs. 2(a) and 2(b), supra, amending Appendices A-33 and A-34).

The Testimony of Charles Ayers

Aside from the testimony of the Regional compliance officer who drafted the instant compliance specification and who explained the theory of the source of Respondent's alleged obligations with regard to the funds, particularly the application of the White Paper Agreement to all employees until its termination on March 31, 1988, and the application of the NMFA to both Group A and Group B employees after White Paper Agreement termination, General Counsel called only one further witness, Charles E. Ayers, secretary-treasurer of Local 964. Much of his testimony was technically hearsay, as Respondent points out, but that hearsay was based particularly on correspondence with the administrator of the funds and, for the most part, was not contested by Respondent. Furthermore, Respondent offered no testimony or other evidence contradicting any of the testimony of Ayers and I fail to see, relying on such testimony to the extent necessary, how Respondent in any event was prejudiced by its receipt. Respondent, though generally alleging the unreliability of Ayer's testimony, in no event directly challenged the competency of Ayers to testify with regard to the subject of his testimony. Respondent subsequently withdrew its objection to documents introduced during Ayer's testimony.

Ayer's testimony focused in large on the interest of a member of Group A, the discriminatee John (Jack) Mulroy, and I credit such testimony in the absence of any contradiction or limitation.

Respondent did not attempt to controvert his testimony that if an employee has the requisite pension credits, he may, in addition, under certain circumstances, retire with full continued coverage under the health and welfare plan. In particular, in order to get the health and welfare benefits, the retired employee must be covered by the NMFA pension. In order to get the pension rights permitting retirement after 30 years' service, Mulroy, as a discriminatee, has the contractual right to make up for (i.e., to ''purchase'') up to 2 years' of pension coverage which he missed because of Respondent's failure to contribute to the pension fund in the backpay period. Similarly, Respondent has made no Mulroy contribution to the health and welfare plan in the backpay period.

Mulroy plans to retire in 1994. Assuming that, with Respondent's 6 years of pension contributions, Mulroy can then ''purchase'' his pension credits for the 30 years on which to retire under the pension plan, he must, under the pension plan rules, nevertheless have at least 5 out of the last 5 years of his service or 7 out of the last 10 years of his service, prior to retirement, covered by the health and welfare plan if he is to receive, as a pensioner, health and welfare plan coverage. Respondent has not contributed to either fund on behalf of Mulroy for the 6 years 1986–1992. If those health and welfare contributions are not made by Respondent to give him health and welfare coverage for 5 years out of the last 5 years or 7 out of the last 10 years of employment, he may well retire, if Respondent contributes to the pension plan, on the 30-year pension but he would do so without coverage of the health and welfare plan. Thus, the neecessity for contributions under both plans.

Respondent concedes the nature of Ayers' testimony and the predicament faced by Mulroy. Nevertheless, Respondent notes that General Counsel presented no evidence that any other Group A employee is in the same situation (R. Br. 10). Indeed, on the basis of Ayers' further testimony, that pension benefits and health and welfare benefits change from time to time, Respondent argues that what might well affect discriminatee Mulroy may not affect any of the other former D & S employees.

Discussion and Conclusions

The appropriate remedy for unlawful withdrawal of recognition and unilateral changes in employee benefits is the restoration of the status quo ante. *Manhattan Eye, Ear & Throat Hospital*, 300 NLRB 201 (1990); *Roman Iron Works*, 292 NLRB 1292 (1989). The restoration of the status quo ante includes the payment by the offending employer not only of backpay, private insurance premiums, and the alleged discriminatee's out-of-pocket medical expenses, but, separately, reimbursement, with interest, by way of contributions to welfare funds and pension funds existing under an expired collective-bargaining agreement which the employer would have made but for unfair labor practices in unilaterally failing to do so. See *Stone Boat Yard v. NLRB*, 715 F.2d 441, 446 (9th Cir. 1983), cert. denied 466 U.S. 937 (1984); *NLRB v. Transport Service Co.*, 973 F.2d 562 (7th Cir. 1992).[6] The status quo ante, in the instant case, requires that the employees (Group A) subject to unlawful discrimination not suffer further discrimination by treating them differently than their fellows who suffered only from unlawful unilateral changes in their terms of employment, i.e., Group B employees suffered loss of only 30 days' contributions to both funds. To the extent Respondent argues that the terms and conditions of employment of Group A discriminatees should be governed by different terms and conditions then those under which Group B employees worked—after expiration of the White Paper Agreement on March 31, 1988 (under which both groups would have worked had there been no unfair labor practices)—I reject that argument. Such a position not only artificially perpetuates the unlawful discrimination against Group A employees, but flies in the face of the make whole remedies. If the Board, with respect to Group B, has prohibited Respondent's elimination of unlawfully granted benefits (''wage increase'') without union consent, then the ''make whole'' remedy with respect to Group A employees cannot require less, that their benefits be less than their erstwhile fellow employees (Group B) who suffered no statutory discrimination. To do so would unnecessarily continue the lesser White Paper benefits for Group A, the object of Respondent's unlawfully discriminatory effort, while continuing Group B employees (against whom there was no unlawful discrimination) at the higher NMFA level. I will not construe the Board's Order to ''make whole'' both groups so as to undermine its remedial purpose.

Respondent, however, relying on the Second Circuit's refusal to enforce the Board's Order in *Manhattan Eye, Ear & Throat Hospital v. NLRB*, 942 F.2d 151 (1991), denying enf. to 300 NLRB 201 (1990), argues, for its principal argument, that Respondent is not at all liable for back contributions to the subject health and welfare and pension funds because there have been no injuries to either fund, no detriment or liability during the backpay period due to any action or inaction by the Respondent. Thus, Respondent argues, to require

[6] General Counsel's compliance specification, the Respondent's answer and concessions at the hearing establish the prima facie obligation on Respondent to make the pleaded contributions, as amended.

Respondent to make any contributions to those funds, would be a clear ''windfall'' to the funds and punitive to Respondent, thus outside the remedial function of the Board's powers.

As the court of appeals noted in *Manhattan Eye & Ear*, supra, the policies of the Act are essentially remedial, *Republic Steel Corp. v. NLRB*, 311 U.S. 7 (1940); and the Board's remedies must compensate for actual injuries suffered by the employees rather than speculative consequences of unfair labor practices. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 900 (1984). Indeed, compliance proceedings provide the forum for tailoring the remedy to suit the individual's circumstances of each case, 467 U.S. at 902.

Respondent, in short, interposes the following defenses to the payment of the delinquent contributions to the funds: (a) the dispositive position of *Manhattan Eye, Ear & Throat Hospital v. NLRB*, supra; (b) the ''windfall'' that such contributions would create in the funds since the alleged discriminatees, during the backpay period, had no future interest in the funds and the funds had no responsibility to the discriminatees; and (c) even if the employees had a future interest in the funds, Respondent's obligation to make backpay period contributions would be limited to the 16 of the 33 Group A discriminatees who accepted Respondent's September 29, 1993 offer of reinstatement.

Respondent's broadest argument, as above-noted, is that the payment of such contributions would constitute an unjustifiable windfall to the funds and would be punitive in nature to the Respondent. According to Respondent, the windfall and punitive elements of any required contributions would flow from General Counsel's failure ''to demonstrate that any of the employees had an economic stake in the future vitality of the funds.'' (R. Br. 7).[7] Respondent points to the requirement that any award of payments to the funds must rest on ''concrete evidence'' that the employees on whose behalf the contributions would be made have an economic interest in the future of those funds, *Manhattan Eye, Ear & Throat Hospital v. NLRB*, supra at 157, citing *Sure-Tan, Inc., v. NLRB*, supra. In that case, the Court of Appeals for the Second Circuit denied enforcement of the Board Supplemental Decision and Order in the compliance case, *Manhattan Eye, Ear & Throat Hospital*, 300 NLRB 201. The court ruled that the obligation to pay into the funds would result in a windfall to the funds because the employees had been compensated during the backpay period by the employer's substitute benefit plans, had disclaimed any present or future interest in being covered by the union-negotiated funds, and the Union had withdrawn its desire to represent the employees. Hence, the employees had little economic stake in the future financial stability of those funds. Indeed, the court of appeals remanded the case to the Board to permit the employer to submit evidence showing the actual losses, if any, suffered by the health and welfare and pension funds in view of the fact that the employees had benefited from unilaterally substituted pension and health and welfare funds. The court of appeals, however, was careful to observe (942 F.2d at 159):

> By refusing to enforce the Board's decision in this case we do not hold that in the exercise of its broad remedial power, it is not empowered to order imposition of the *status quo ante* in other cases where an employer unilaterally discontinues payments to union-sponsored benefit funds. . . . We simply rule that, in the matter at hand, where the employees—who were compensated during the relevant period by substitute benefit plans and who, prior to Board's decision, disclaimed any present or future interest in being covered by the Joint Funds—have little economic stake in the future financial stability of those funds, imposition of the *status quo ante* does not serve the remedial purposes of the Act because it failed to benefit the employees, is unduly harsh on the Employer and results in a windfall for the union funds.[8]

The Board, however, in *Manhattan Eye, Ear & Throat Hospital*, supra, 300 NLRB at 202, stated that in adopting the judge's recommended Order, ''we underscore our adherence to the remedial principles of *Stone Boat Yard*, 264 NLRB 981 (1982), enfg. 715 F. 2d 441 (9th Cir. 1983), cert. denied 466 U.S. 927 (1984).'' Quoting the Ninth Circuit in *Stone Boat Yard* the Board (300 NLRB at 202 fn. 5) stated that ''the diversion of contributions from the union funds undercuts the ability of those funds to provide for future needs.''[9]

Contrary to the court of appeal's position in *Manhattan Eye, Ear & Throat Hospital v. NLRB*, supra, which remanded for the purpose of permitting the employer to submit evidence showing actual losses to the funds based on the difference between the unilaterally substituted new benefit plans and the union-negotiated plans, the court, in *Stone Boat Yard v. NLRB* (714 F.2d at 446) specially rejected the employer's defense: that the make-whole remedy was punitive (in requiring payment of past due contributions to the Union's health and welfare and pension funds) because the Board Order did not ''reflect employee loss and provides no offset for benefits provided through the employer-sponsored alternative plan.''

In view of the above dispute engendered by the court of appeal's decision in *Manhattan Eye, Ear & Throat Hospital*, supra, and notwithstanding its refusal to enforce the Board's Order, I am necessarily bound by the Board's view as expressed in the underlying case in *Manhattan Eye, Ear & Throat Hospital*, supra, as the manifested Board policy. *Iowa Beef Packers*, 144 NLRB 615 (1963). The Board rule, as far as I am concerned, is reflected in the court of appeals' *Stone Boat Yard* decision, cited repeatedly by the Board in *Manhattan Eye, Ear* and other cases: that a make-whole order requiring status quo ante contributions is not punitive notwithstanding that it does not reflect employee loss or provides no offset for benefits provided through the employer-sponsored

[7] General Counsel's specification asserts that, for Group B, there is only a 30-day default to the funds. After 30 days as ''new hires,'' the Group B employees enjoyed NMFA fund coverage.

[8] As far as presently known, the Board has not acted on the court of appeal's remand in that case.

[9] Immediately prior to the Board's quotation from *Stone Boat Yard* in the circuit court, the court stated (715 F.2d at 446): ''[A]n employer cannot complain of the extra cost of improperly created, substitute fringe benefits. . . . The company is merely required to repay what it has unlawfully withheld. . . . [It] was the Company that unlawfully chose to incur the additional expense of a private insurance program.''

alternative plan. The fact that the court of appeals for the Second Circuit takes a different view and the Board, without adopting that view, has accepted the decision as the law of the case does not affect my obligation to observe the Board rule.

The court of appeals in *Manhattan Eye, Ear & Throat Hospital*, also stated (942 F.2d at 157–158) that *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984), ''mandates that before the Board may award back payments for failure to pay into the Joint Funds, it must have concrete evidence that the nurses have an economic interest in the future of those Joint Funds.''[10] In that case, as above noted, the court of appeals specifically held that the involved employees, unit nurses, did not have an interest in the future of the funds because (at the time of the hearing) the union no longer represented the nurses, the nurses had previously disclaimed any present or future interest in the funds and they had been compensated by coverage under the employer's own funds. The court held that the nurses' interest in the future was limited to the difference, if any, in pension coverage under the two funds which would be discovered on remand; and that the nurses had no interest in the health and welfare fund because, with the ending of contributions, the fund no longer had any obligation to pay benefits to the nurses.

In the instant case, the employees of Group B, continually employed in the backpay period were, except for the first 30 days of employment, covered by NMFA fund contributions. There was no dispute that the NMFA contains the same health and welfare plan as that which existed under the preexisting White Paper Agreement under which all employees worked when employed by D & S Service Inc. In addition, the parties, in their 1992 collective-bargaining agreement, have continued the existence of, and contributions to, these funds. Thus, the 26 Group B employees were subject to an unlawful unilateral change in their coverage; should not have been treated as ''new employees'' and at all times retained a present and future interest in both funds. Since, after 30 days of deprivation, they were covered by contributions under NMFA, their loss is limited to 30 days' worth of contributions.

The employees in Group A, as exemplified by the experience of John J. Mulroy, have a particular interest in the vitality and in the future functioning not only of the pension plan but of the health and welfare plan. Mulroy plans to retire in 1994 on a 30-year pension. The record does not show the retirement plans of Group A employees other than Mulroy. Respondent has failed to make 6 years of health & welfare contributions on behalf of all of Group A. However, Mulroy, as ''concrete evidence'' of a future interest, *Manhattan Eye Ear & Throat Hospital v. NLRB*, 942 F.2d at 157, in the health and welfare plan, needs not only a discriminatee's right to ''purchase'' 2 years of pension coverage, but the coverage provided by Respondent's defaulted 6 years of contributions into the health & welfare plan. Failing health and welfare plan coverage in 5 years out of the last 5 years of employment or 7 years in the last 10 years of employment, the value of his 30-year pension is clearly diminished by the loss of lifelong health and welfare plan coverage. If he retires in 1994, he will not have the requisite health and welfare plan coverage because of Respondent's defaulted payments in that fund. The inchoate retirement plans of the others of Group A may or may not constitute ''concrete evidence'' of a future interest in the pension and health and welfare plans. The reason for the indecisive nature of the evidence in this regard, may well be due to the fact that, unlike Mulroy, other Group A employees have so far manifested no concrete retirement date. Such a failure, however, of a specific retirement date in the next half-dozen years for the remaining 32 Group A employees may or may not demonstrate ''concrete evidence'' but it is not a mere speculative interest. *Manhattan Eye, Ear & Throat v. NLRB*, 942 F.2d at 157. Since they are current Respondent employees, they not only have rights in pension and health and welfare similar to Mulroy's, but, quite apart from pension and retirement, they have present and future interest in the health and welfare fund vitality unlike the *Manhattan Eye, Ear & Throat* nurses.

To the extent Respondent argues that, in any event, the limit of its obligation to Group A is only to the 16 (of 33) discriminatees who accepted its September 29, 1992 offer of reinstatement, and not to the 17 who rejected the offer, it necessarily relies on the analogy to the nurses in *Manhattan Eye, Ear & Throat Hospital v. NLRB*, who foreswore future interest in fund coverage and representation by the union. But there is no proof that the 17 Group A employees who refused reinstatement either ceased being union members or sought to surrender coverage in either fund. Like Mulroy, they may wish to retire with health and welfare coverage but are excluded by failure of Respondent's contributions to the plans during the 6-year backpay period. Like Mulroy, they may also be 2 years short of qualifying for the 30-year pension or other pension and need the pension contributions to ''purchase'' requisite pension time in order to meet retirement requirements. The evidence in this record shows that other employers are covered by and contribute to the instant pension and health and welfare plans. Rather than accept Respondent's offer of employment, these 17 Group A discriminatees are working for other employers (R. Br. 12) who may be contributing to the plans. There is no evidence that such employees have no future interest (whether for retirement or other purposes) in Respondent's defaulted 6 years of contributions insofar as they affect the vitality of the plans and all the Group A employees present and future protection thereunder.

The actual calculations of fund responsibility to the 17 Group A discriminatees who rejected the reinstatement offer may or may not be ''concrete evidence'' of future interest of these employees. But the funds, as fiduciary third-part beneficiaries, *Ron Tirapelli Ford v. NLRB*, 987 F.2d 433, 444 (7th Cir. 1993) (citing *Robbins v. Lynch*, 836 F.2d 330 (7th Cir. 1988)) may well be liable to these 17 employees when and if they make retirement decisions similar to Mulroy's. Respondent's 6 years of defaulted pension and helath and welfare contributions will not then be affecting mere speculative future interests.

In any event, since General Counsel has proved a prima facie case of Respondent's obligation to pay into the funds

[10] This also seems to be the Seventh Circuit's view. *NLRB v. Transport Service Co.*, 978 F.2d 562 fn. 5 (7th Cir. 1992). *Stone Boat Yard* may be reconciled with the court's decision in *Manhattan Eye, Ear & Throat* in that in *Stone Boat Yard*, the employees had an economic future interest in the funds. Unlike the nurses who left the union and the funds in *Manhattan Eye, Ear & Throat*, the *Stone Boat Yard* employees, as in the instant case, remained in the union and did not foreswear their interest in the funds.

the amounts alleged in the amended compliance specification, the burden of proof then shifts to Respondent to negate or limit its liability. Certainly General Counsel has proved that a member (Mulroy) of Group A has a concrete future interest in those defaulted 6 years of contributions. Respondent evidently concedes that the 16 Group A employees who accepted reinstatement have a future interest in the funds (compare R. Br. 12 with p. 22). With regard to the 17 who rejected, Respondent asserts that they ''effectively disclaimed any present or future interest in being covered by the health and welfare fund (Br. 12). I have found to the contrary that, through intermediate employment by employers bound to the funds, there is evidence (R. Br. 12; G.C. Exhs. 2A and 2B) of their present and future interest. On such General Counsel evidence, and the burden of proof to show lack of future interest having shifted to Respondent, Respondent has not supported its burden. See *Hansen Bros. Enterprises*, 313 NLRB 599 (1993).

All of which again brings us to the applicability of the Second Circuit's decision in *Manhattan Eye, Ear & Throat Hospital v. NLRB*, supra, on which Respondent appears to heavily rely. Respondent acknowledges only that that case is ''fact specific'' (Br. 8). I assume that description is equivalent to admitting its distinctive factual remoteness.[11]

In the instant case, unlike *Manhattan Eye, Ear & Throat*, for purposes of measuring employee future interest in the funds, the unit employees have not decertified the union nor, more important, have not foresworn their desire to be covered by the union-negotiated funds and are not covered by employer-sponsored funds. Thus, along with the continued fund coverage of Group B employees and the remedially based inclusion of the Group A employees under the funds, their future interest in the funds seems clear.

Conclusion

On the basis of the amended compliance specification and the evidence of record, I conclude and recommend that Respondent is responsible for and should pay its defaulted contributions into the Central States, Southeast and Southwest Area's Pension Fund and into the Central States Southeast and Southwest Area's Health and Welfare Fund a principal total of $1,278,268. This total is derived from and appears in the backpay specification for Group B employees (Appendices B-25, B-26): $6,403 to the health and welfare fund; $3168 to the pension fund; and in the amended schedules supplied for Group A employees by General Counsel (G.C. Exhs. 2(a) and (b)): $534,927 into the pension fund; $733,770 into the health and welfare fund. This total shall be augmented by the payment of interest, *Merryweather Optical Co.*, 240 NLRB 1213 (1979); *Roman Iron Works*, 292 NLRB 1292 (1989).

[11] Similarly, *Lawrenceville Ready-Mix Co.*, 305 NLRB 1010 (1991), cited by Respondent (Br. 8) is not persuasive. In that case, the entire purpose of the Board's remand was to inquire whether the employer concluded an agreement effective on or before the date it discontinued payment into the union-negotiated health and welfare plan. Such proof, if any, would limit the employer's obligation to benefits paid out by the fund before execution of the alleged agreement. But Respondent cites the case (Br. 8) apparently only for fn. 4, appearing at 305 NLRB at 1011:

> We note that the Indiana Teamsters Plan is solely a health insurance plan, and not a pension plan, so we are not dealing with the problem of protecting the stability of a fund in whose future viability the employees have a clear economic stake. Cf. *Manhattan Eye, Ear & Throat Hosopital*, 300 NLRB 201 and cases there cited (1990), enfd. denied and remanded 942 F.2d 151 (2d Cir. 1991).

Whatever else the Board held in *Lawrenceville Ready-Mix*, including the footnote, it has not held (R. Br. 8) ''that Health and Welfare Funds do not present situations where employees have an economic stake in the future vitality of the Fund.'' The Board, as is obvious, held that health and welfare funds present the problem of whether employees have a stake in the fund whose viablity is in issue because of a failure of contribution. While the law of the case in *Manhattan Eye, Ear & Throat* is that there was no concrete evidence of the nurses' stake in the future of that fund (they had renounced their interest and decertified the union), the same cannot be said of the Respondent's 59 Group A and Group B employees herein.