

Mary Ann's Baking Company d/b/a Mary Ann's Bakery and Bakery & Confectionery Workers' Local Union No. 85. Cases 20-CA-13618, 20-CA-14363, and 20-CA-14447

26 August 1983

DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND DENNIS

On 30 September 1982 Administrative Law Judge Frederick C. Herzog issued the attached Supplemental Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.¹

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Mary Ann's Baking Company d/b/a Mary Ann's Bakery, Sacramento, California, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

¹ The Administrative Law Judge summarized his findings and conclusion in a section of his Supplemental Decision entitled "Conclusion." We take the findings and conclusions of that section to constitute his recommended Order.

SUPPLEMENTAL DECISION

FREDERICK C. HERZOG, Administrative Law Judge: This supplemental proceeding was heard at Sacramento, California, on July 1, 1982. The amended backpay specification, further amended at the hearing, was predicated on the decision of Administrative Law Judge Gerald A. Wacknov, issued on September 17, 1979. Judge Wacknov's decision was adopted by the National Labor Relations Board on November 2, 1979,¹ and was thereafter granted summary enforcement by the United States Court of Appeals for the Ninth Circuit.²

¹ In the absence of timely exceptions the Board's Order was not reported.

² The court's order, which was assigned docket number 80-7207, was not reported.

In his decision, Judge Wacknov found, *inter alia*, that Mary Ann's Bakery, the Respondent, violated Section 8(a)(3) of the Act by constructively discharging employee Judith Trotter and Section 8(a)(5) of the Act by unilaterally discontinuing pension benefits pursuant to an expired collective-bargaining agreement. Judge Wacknov recommended an order providing, *inter alia*, that the Respondent make whole employee Judith Trotter in the usual manner and reimburse the Bakery & Confectionery Union and Industry International Pension Fund in amounts necessary to make the Fund whole.

At the time of the trial herein the General Counsel's position was that the Respondent has made no payment of its obligations to either Trotter or the Fund. The Respondent contends that it has no monetary obligation toward either Trotter or the Fund.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of the General Counsel and the Respondent.

Upon the entire record³ of the case and from my observation of the witnesses and their demeanor, I make the following findings of fact and conclusions of law.

SUPPLEMENTAL FINDINGS OF FACT

A. General Principles

In either constructive or actual discharge cases caused by a violation of the Act, the Board's finding that an unfair labor practice has been committed is presumptive proof that some backpay is owed. *NLRB v. Mastro Plastics*, 354 F.2d 170, 175-176 (2d Cir. 1965), cert. denied 384 U.S. 972 (1966). The General Counsel's burden is to show the gross backpay due the discriminatee. *Rutter Rex Mfg. Co. v. NLRB*, 473 F.2d 223, 230 (5th Cir. 1973), cert. denied 414 U.S. 822. It then becomes the respondent's burden to prove any affirmative defenses which would mitigate its liability. *NLRB v. Brown & Root*, 311 F.2d 447, 454 (8th Cir. 1963). Matters such as unavailability of jobs, willful loss of earnings, and interim earnings to be deducted from the backpay award are matters which must be established by the respondent to the extent that they are not admitted by the General Counsel's pleading, the "Backpay Specification." *NLRB v. Mooney Aircraft*, 366 F.2d 809, 812-813 (5th Cir. 1966). Uncertainties, ambiguities, and doubts are to be resolved in favor of the wronged party, not the wrongdoer. *United Aircraft*, 204 NLRB 1068 (1973).

Thus, in this case it was up to the Respondent, the adjudicated wrongdoer, to come forward with competent, credible evidence to refute the reasonable allegations of the backpay specification. If it has failed to meet this burden, the facts and matters set forth in the backpay specification must be taken to be true.

³ Little of the evidence in this proceeding is in dispute; the great majority was placed into the record by stipulation of the parties and need not be set out in detail.

B. The Backpay Issue for Judith Trotter

The Respondent now contends that employee Judith Trotter is owed no backpay. It argues that she was ill throughout the backpay period found by Judge Wacknov, from January 28, 1978, through March 20, 1978. In support of this contention the Respondent points out that Trotter submitted an excuse from a physician, dated January 30, 1978, to be absent from work for 1 week. It also offered evidence that it heard nothing more from either Trotter or her physician during the backpay period, and that its attempts to contact her by phone were unsuccessful. Finally the Respondent points to an exchange of letters between it and Trotter's union representative as being indicative of her inability or unwillingness to work.

Clearly the Respondent is correct in its contention that proof of Trotter's unwillingness or inability to perform her work would toll the accrual of her backpay during the time that she remained incapacitated or unwilling to work.

However, I cannot agree with its argument that the evidence mentioned above is sufficient to toll any part of its backpay obligation to Trotter. As Judge Wacknov pointed out in his Decision, it was the Respondent's coercive and discriminatory actions which brought about Trotter's emotional confusion and sense of being harassed which, in turn, apparently led Dr. Hadley to say that she needed a week off. The Board cannot permit a wrongdoer to escape liability for lost wages because of factors which it unlawfully set in motion. Cf. *Becton-Dickinson Co.*, 189 NLRB 787 (1971); *M.F.A. Milling Co.*, 170 NLRB 1079 (1968). Since Judge Wacknov's Decision has now been affirmed by the Board and enforced by the court it is not now subject to alteration by me. *Brown & Root*, 132 NLRB 486 (1961).

Thus, I find that the Respondent may not deduct 1 week from the backpay period of Judith Trotter, and that the Respondent may not be permitted to relitigate in the compliance stage matters which have been previously litigated, decided, and enforced.

Based on such considerations, and taking cognizance of the stipulations of fact between the parties hereto, I find and conclude that Judith Trotter's backpay period began on Saturday, January 28, 1978, and ended on Monday, March 20, 1978, that had she worked, Trotter would have earned \$4 per hour while working 40-hour weeks, and that during this period she had no interim earnings. Thus, Trotter's calendar quarter net backpay amounted to \$32 per day for 36 working days, a total of \$1,152. The Respondent shall be required to pay this sum to her, with interest, less any taxes which the Respondent is required to withhold according to Federal or state law. Additionally, I find and conclude that the Respondent shall pay to the pension Fund mentioned hereinafter, on Trotter's behalf, the sum of 40.5 cents for each of the 288 hours she would have worked during the backpay period, a total sum of \$116.64.

C. The Pension Fund

The Respondent contends that if there was an obligation to make pension contributions to the Fund⁴ after June 1, 1978, the obligation ended on December 12, 1978, due to an impasse in negotiations and implementation of the Respondent's "final offer." Additionally, the Respondent contends that no contributions to the Fund were legally permissible after expiration of the written agreement between it and the Union, in June 1978.

I consider myself foreclosed, however, from examining the validity of the Respondent's arguments concerning the period from June to December 1978. As with the issue of Trotter's backpay, this matter involves arguments which were or could have been advanced before Judge Wacknov. And Judge Wacknov concluded that, "It is well established that Respondent was obligated to continue such contributions even after the expiration of the contract I therefore find that by discounting the pension contributions, Respondent violated Section 8(a)(5) of the Act as alleged." In accordance with his findings of fact and conclusions of law Judge Wacknov recommended that the Respondent be required to "reimburse the Bakery and Confectionery Union & Industry International Pension Fund in amounts necessary to make the Fund whole." The order, later affirmed and enforced, provided that the Respondent was to cease and desist from "unilaterally discontinuing pension fund payments"; and affirmatively "reimburse the Bakery and Confectionery Union & Industry International Pension Fund in the amounts necessary to make the fund whole." Thus, it is well settled that the Respondent is required to make the Fund whole, for a period of time, at least until an intervening circumstance has been demonstrated.⁵ *Brown & Root, Inc.*

Here the Respondent has sought to demonstrate that the parties negotiated to an impasse, both in June 1978 and in December 1978. It argues that by demonstrating the existence of an impasse the Respondent also has shown that further accrual of liability to the Fund terminated.

I am not persuaded.

First, it cannot be denied that Judge Wacknov has already rejected the impasse argument, finding that "the record evidence affirmatively establishes that no bargaining impasses existed when the Respondent commenced to discontinue its pension contributions. Indeed it appears that the pension plan was not seriously discussed until September or October at which time Respondent first submitted a proposal on this contract item."

Second, the existence of an impasse on December 1, 1978, or December 12, 1978, has not been established,

⁴ The Bakery & Confectionery Union & Industry International Pension Fund.

⁵ The Respondent's citation of *Moglia v. Geoghegan*, 403 F.2d 110 (2d Cir. 1968), cert. denied 394 U.S. 919 (1969), is plainly inapposite to the circumstances of the instant case. There, unlike this case, the employer had never been a party to a collective-bargaining agreement, expired or otherwise. The Board has repeatedly rejected the argument that Sec. 302 of the Act prescribes contributions such as those in issue here absent an effective written contract, even in cases where *Moglia, supra*, has been cited. See *Crest Beverage Co.*, 231 NLRB 116, 119 (1977), and cases cited therein.

either before Judge Wacknov or me. Indeed, an examination of the record established by the Respondent before Judge Wacknov shows that the issue of whether or not an impasse existed on December 12, 1978, was litigated unsuccessfully from the Respondent's viewpoint, before Judge Wacknov,⁶ and has clearly not been established here. In fact, the evidence tends to demonstrate just the contrary result.

As stated in *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), and restated in *Allen W. Bird II*, 227 NLRB 1355, 1357-58 (1977):

Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed.

Thus, I note that the Respondent's proposal to eliminate the pension contributions altogether was a matter placed on the bargaining table late in negotiations, that it was not extensively discussed, and that the Union's immediate and vigorous response was that its understanding of the state of negotiations was that no impasse existed. I conclude that, instead of evidencing willingness to negotiate in good faith, the Respondent seemed intent upon rushing to implement its proposal.

The affidavit of the Respondent's attorney was placed in evidence at the hearing herein. Therein, the Respondent's attorney states that at the September 1, 1978, negotiating meeting, "I believe it was also noted that the company desired relief from the union's pension payments." Further, with regard to the next and final negotiating session on December 1, 1978, "We told him that this was our final offer on the contract We further advised the union that it was our intention, and part of our last proposal, to delete the pension plan from the agreement." Significantly, the affidavit fails to state that the Union ever rejected the offer, but only that the Union's negotiators could not recommend the Company's last offer to the employees and that "they [the Union's negotiators] *did not believe it would be accepted by the membership.*" Such evidence shows yet another reason to conclude that no impasse was reached; i.e., the Union has not been shown to have rejected the offer, only to have stated its opposition thereto and to have voiced a prediction that the membership would reject it.

⁶ I refer especially to the testimony of the Respondent's witnesses Ronald Henderson and John Demas to the effect that during the negotiations, including December 1, 1978, when it made a "final offer," the Respondent took a "strong position" against the Union's economic demands, including that dealing with pensions. I refer as well to the testimony of Al Platz, the Union's agent, that at the September 18, 1978, session the Respondent's attorney stated, "and we could use some relief on the pension," a statement repeated by Demas, and that at the December 1, 1978, negotiation session the Respondent's offer made no provision for pension benefits. Additionally, I make special reference to the Respondent's letter of December 12, 1978, to the Union, announcing an intent to put the Respondent's prior offer into effect, as well as the almost immediate mailgram responses from the Union protesting any such action, noting they had not rejected the Respondent's final offer and asserting that no impasse existed.

It is long settled that an employer may not unilaterally implement "rejected" proposals until they have, in fact, been rejected. *Allen W. Bird II, supra*; *Royal Himmel Distilling Co.*, 203 NLRB 370, fn. 3 (1973).

There is still another reason to reject the impasse argument. It derives from the fact that an employer's good faith is questioned when it asserts the existence of an impasse while simultaneously committing unfair labor practices which contribute to the deadlock in negotiations. Under such circumstances there can be no valid impasse. *Taft Broadcasting Co., supra*; *United Contractors*, 244 NLRB 72, 73 (1979). In this case the Respondent was ordered to provide the Union with information necessary to carry out its bargaining obligations, specifically "wage and employment information previously requested and . . . similar current information." Here, aside from the generalized evidence that it was willing to "open its books" to the Union to demonstrate its poverty, there has been no showing at all that the Respondent ever supplied the Union with the information found by Judge Wacknov to be due the Union. To the contrary, the evidence is more than clear that the Union continued to request such information from the Respondent over a period of many months following December 1978, and met with only sporadic success.

For all the reasons set out above I find that the Respondent has failed to persuade me that a valid impasse has ever existed in the bargaining between it and the Union. Accordingly, I find that it is now, due and owing, with interest, as ordered in the underlying decision.

At the trial herein the Respondent's attorney conceded that the Respondent was not disputing the computations of money claimed to be due by the backpay specification, and that, if the Respondent is liable at all, it is liable for the amounts set forth in the backpay specification, from which the attached Appendix A has been drawn [omitted from publication].

Conclusion

Accordingly, I find and conclude that the obligation of the Respondent under the terms of the Board's Order, as enforced, will be discharged by paying discriminatee Judith Trotter the sum of \$1,152, and by paying the applicable contractual pension trust fund the amount \$116.64 on discriminatee Trotter's behalf, plus interest accrued and paid in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977), on all unpaid balances of backpay computed for each calendar quarter from January 28, 1978, until paid in full pursuant to the Board's Order, as enforced, less withholdings required by state and Federal withholding agencies from backpay principal only; and the total amount of \$60,221.22 on behalf of, and in the amounts shown for, the employees named in the attached Appendix A [omitted from publication], with the exception of discriminatee Judith Trotter, for each applicable month from July 1978 through November 1981, as set forth in the attached Appendix A; together with such pension fund contributions as shall be, or shall become, due from December 1981 until the date

on which the Respondent commences making the contributions to the Fund, plus interest accrued and/or penalty payments assessed in accordance with *Merryweather Opti-*

cal Co., 240 NLRB 1213 (1979), on all unpaid pension contributions until paid in full in accordance with the Board's Order, as enforced.