Local 3, International Brotherhood of Electrical Workers, AFL–CIO (Fischbach and Moore, Inc.) ***and*** **Norman B. McMichael Sr.** Case 29–CB–7625

January 11, 1995

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND TRUESDALE

On December 16, 1992, the Board issued its Decision and Order in this case finding, inter alia, that the Respondent had violated Section 8(b)(1)(A) and (2) of the Act by causing Fischbach and Moore, Inc., the Employer, to terminate Norman McMichael, the Charging Party, on April 2, 1990.[1] The Board ordered the Respondent to make whole McMichael for any loss of wages or other rights and benefits he may have suffered as a result of the discrimination against him.

The Respondent and the General Counsel disagree about the backpay amount owed to McMichael and about whether the Respondent is required to make certain payments to the Pension Fund, the Dental Plan, the Annuity Plan, the Vacation Holiday Plan, and the Educational Fund (collectively referred to as the Funds). On July 29, 1994, Administrative Law Judge Joel P. Biblowitz issued the attached supplemental decision. Subsequently, the General Counsel filed exceptions and a supporting brief and the Respondent filed an answering brief and cross-exceptions and a brief in support of dismissal of the backpay specification.

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

The Board has considered the judge's supplemental decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Supplemental Decision and Order.

The judge found that the Respondent is required to make the payments to the Funds, as set forth in the backpay specification; that the backpay period is from April 2, 1990,[2] through September 30; that backpay for McMichael was properly calculated at the rate of $27 through June 13 and the rate of $28 thereafter; and that during the second quarter McMichael would have worked 3.07 hours of weekly overtime, and during the third quarter he would have worked .80 hours of weekly overtime. The judge, however, concluded that McMichael should be denied backpay for the *entire* backpay period because he found that McMichael did not make a good-faith effort to obtain interim employment. The General Counsel has excepted to the judge's latter finding and argues that McMichael exercised reasonable diligence in searching for work. We agree with the General Counsel.

The Employer discharged McMichael on April 2. In April, McMichael inquired about work with an employer who installs car sound systems and about work with a mattress company. In May, McMichael inquired at J. Rosenberg Electric and, in June, he inquired at an auto collision shop. None of the establishments hired McMichael. On June 4, McMichael reported to the Respondent's employment department and registered for referral for work. The Respondent referred McMichael to a job at Coyne Electric Contractors from June 18 to July 20 and to a job at Allran Electric from July 24 through November 19.

It is well established that a discriminatee must make reasonable efforts to secure interim employment in order to be entitled to backpay. *Mastro Plastics*, 136 NLRB 1342 (1962), enfd. in relevant part 354 F.2d 170 (2d Cir. 1965), cert. denied 384 U.S. 972 (1966). The burden, however, is on the Respondent to establish that the discriminatee failed to exercise reasonable diligence in searching for work. *Arlington Hotel*, 287 NLRB 851 (1987), enf. denied 876 F.2d 678 (8th Cir. 1989). We emphasize that the standard is that of *reasonable* diligence, not the highest diligence. Id. Further, the sufficiency of a discriminatee's efforts to mitigate backpay are determined with respect to the backpay period as a whole and not based on isolated portions of the backpay period. *I.T.O. Corp. of Baltimore*, 265 NLRB 1322 (1982). In addition, a discriminatee is not required to seek work instantly. Id.

Examining the entire 6-month backpay period as a whole, we find that the record establishes that McMichael worked for 3-1/2 months of the period and inquired about work with four employers during the other 2-1/2 months of the period. Contrary to the judge's statements, it is immaterial that the four employers were located in different parts of New York or that the employers are engaged in different types of work. The important consideration is that McMichael made an effort to find work and actually found other work for more than half of the backpay period, thereby mitigating the Respondent's backpay payment. We find that, in these circumstances, the Respondent has failed to show that the discriminatee's search was not reasonably diligent. The Respondent's showing of the mere existence of potential employers is not sufficient to show that McMichael willfully eschewed employment. Thus, we reverse the judge's finding regarding this issue and order the Respondent to pay the amount set out in the backpay specification to make McMichael whole for the discrimination practiced against him.[3]

[1] 309 NLRB 856.

[2] All dates hereinafter refer to 1990 unless otherwise noted.

[3] We adopt the judge's decision in all other respects.

ORDER

The National Labor Relations Board orders that the Respondent, Local 3, International Brotherhood of Electrical Workers, AFL–CIO, its officers, agents, and representatives shall make whole Norman B. McMichael Sr. by paying him $15,283.71, plus interest accrued to the date of payment, less the tax withholdings required by law. Interest shall be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). In addition, the Board orders the Respondent to make the payments to the Funds as set forth in the second amended backpay specification.

Jonathan Leiner, Esq., for the General Counsel.
Norman Rothfeld, Esq., for the Respondent.

SUPPLEMENTAL DECISION

JOEL P. BIBLOWITZ, Administrative Law Judge. This supplemental proceeding was initiated by a second amended backpay specification, which issued on April 14, 1994. Respondent filed a timely answer, and this matter was heard by me on May 5 and June 9, 1994.

In the underlying case, at 309 NLRB 856, the Board found that Local 3, International Brotherhood of Electrical Workers, AFL–CIO (the Respondent) violated Section 8(b)(1)(A) and (2) of the Act by causing Fischbach and Moore (the Employer) to terminate Norman McMichael on April 2, 1990.[1]

It is admitted that the backpay period begins on April 2; the backpay specification alleges that the backpay period continues until September 30, when the project to which McMichael had been assigned was completed, but Respondent denies this, alleging that McMichael would have been terminated (or laid off) from the project prior to this time. In its answer, Respondent also defends that McMichael is not entitled to any backpay because he did not make ''a real and sincere offer to obtain work.'' Finally, Respondent, in its answer, denies that it is responsible for contributions to the funds because the funds have made no claims for money, the Board may not force the funds to accept money, and that payments to the funds would not benefit McMichael.[2]

Gross Backpay

McMichael was a journeyman A electrician during the period in question. The Employer was bound by a collective-bargaining agreement with the Respondent for the period June 8, 1989, through June 11, 1992 (the contract). The contractual wage rate for journeymen A electricians was $27 an hour for the period June 8, 1989, through June 13. The rate for the period June 14 through June 12, 1991, was $28 an hour. The contract also provides that all hours worked in excess of 7 hours shall be paid at the rate of time and a half.

McMichael began working for the Employer the workweek ending March 16. He began on the third day of that workweek and worked for the remaining 3 days of that week, 7 hours each day. He worked 35 hours regular time for each of the following two workweeks and 4 days of 7 hours each day on his final week, when he was fired prior to his fifth day of work that week. The backpay specification alleges that McMichael averaged 35 regular hours a week and is therefore entitled to 35 hours at $27 an hour through June 13, and 35 hours at $28 an hour for the remaining backpay period. As McMichael worked 7 hours a day for the Employer every day from March 16 until his termination, there can be no question as to the merits of this allegation.

McMichael worked 16 overtime hours during his third week of employment with the Employer and one-half hour of overtime during his final week of employment. The backpay specification alleges that during the backpay period, ''employees similarly situated to McMichael earned average weekly overtime hours'' of 3.07 for the second quarter of 1990, and .80 in the third quarter. Richard Epifanio, the supervisory compliance officer for Region 29, testified to the manner that the Region employed in arriving at that conclusion. First, since McMichael worked 16 overtime hours in one pay period and a half hour in another period, the Region determined that the Employer was willing to give him overtime work, and that he was willing to work overtime. Since he was unlawfully terminated early in the backpay period, they had to determine how much overtime work he would have worked if he had not been fired. In order to determine similarly situated employees, the Region examined the Employer's payroll records for the period and divided each of the employees gross regular earnings by the number of regular hours employed and thereby determined who was earning $27 and $28 an hour—journeymen A electricians. After arriving at this ''pool'' of employees, the Region dropped any of these employees who were employed for 14 hours or fewer per month, as not being properly representative. They then took the number of employees remaining and divided that number into the total monthly overtime hours that they worked and thereby determined the average number of overtime hours that these employees worked, and that McMichael would have worked. Counsel for Respondent, in his brief, refers to this method of computation as ''bizarre.'' I find that it is a reasonable method of determining the amount of overtime that McMichael would have worked during this period if Respondent had not caused him to be terminated unlawfully.

Counsel for Respondent, in his answer to backpay specification, denied the allegation that the backpay period extends to September 30, when the project to which McMichael was assigned to, and terminated from, was completed. Respondent's answer states:

> Denies that the backpay period for McMichael continued until September 30. The assumption that McMichael would have been the last person terminated from the project is erroneous for many reasons. McMichael was terminated by 54 employers between 1981 and 1989, while there was a great shortage of construction electricians in New York City, 18 of which terminations were for absenteeism. McMichael showed evidence of drug abuse on a date during the backpay period.

[1] Unless indicated otherwise, all dates referred to relate to the year 1990.

[2] The General Counsel's motion to reopen the record to receive Respondent's fund contribution reports, dated July 8, 1994, is granted.

At the hearing, counsel for General Counsel moved that Respondent be precluded from presenting evidence at the hearing regarding the backpay period because this answer did not comply with Section 102.56(b) of the Board's Rules and Regulations. Because the answer lacked the required specificity, and because Respondent had the payroll records necessary to be specific (the documentation accompanying the Employer's fund contributions), I granted General Counsel's motion.

I find that the backpay period is from April 2 through September 30 at the rate of $27 (through June 13) and $28 an hour, and that during the second quarter McMichael would have worked 3.07 hours of weekly overtime, and for the third quarter, he would have worked .80 hours of weekly overtime.

Fund Payments

The contract also required the Employer to contribute to the Pension, Hospitalization and Benefit Plan of the Electrical Industry (the Pension Fund), the Dental Benefit Plan of the Electrical Industry (the Dental Plan), the Annuity Plan of the Electrical Industry (the Annuity Plan), the Additional Securities Benefits Plan of the Electrical Industry (the Additional Securities Benefit Plan), the Vacation-Holiday Expense Plan (the Vacation Holiday Plan), and the Educational and Cultural Trust Fund (the Educational Plan). The contract provides that for each of these plans the Employer (and others similarly situated) was to send to each fund a specified percentage of its payroll with the caveat that it was to be ''paid on straight time and on the straight time portion of overtime only.'' The percentages are as follows: for the Pension Fund, 14.6 percent through June 13 and 16.8 percent effective June 14. For the Dental Plan, 2 percent. For the Annuity Plan, $4 a day. For the Annuity Plan, an amount equal to the employee's weekly payroll deduction for FICA (Social Security, 7.65 percent). For the Vacation Holiday Plan, 10.5 percent through June 13 and 11.2 percent beginning June 14, and for the Educational Plan, 0.4 percent.

As the contract provides for these payments, and as Respondent admits that McMichael was a journeyman A electrician, Respondent would be responsible to make these payments during the backpay period. In his answer, counsel for Respondent defends that it is not obligated to pay to the funds because the Joint Industry Board, which administers the funds, ''has not made any claim for such funds, and the Board may not force the JIB to accept moneys it has not requested and the receipt of which would not benefit McMichael.'' In this latter regard, in his brief, counsel for Respondent states that the fact that the Employer did not contribute to these funds did not affect the amount of vacation that he received from the Vacation Holiday Plan, did not affect his eligibility for dental benefits or educational benefits under the Dental Plan or the Educational Plan, and will not affect his pension, under the Pension Fund.

After it has been determined that an employee has been unlawfully discharged, it is the Board's function to determine the amount of backpay required to make the discriminatee whole for all his/her losses. It is clear that this make-whole remedy is not simply limited to wages, but includes fringe benefits and other emoluments of employment as well. *Richard W. Kasse Co*., 162 NLRB 1320 (1967). It is also clear that this make whole remedy applies equally to unions as well as employers. *Sheet Metal Workers Local 38*, 194 NLRB 76 (1971). In *Carpenters Local 1913*, 213 NLRB 363 (1974), the Board, inter alia, ordered the union to pay to the pension fund the required amount, and further ordered that the trust and the trustees accept payments of this amount and credit it to the discriminatee's account. On appeal to the court, at 531 F.2d 424 at 427 (9th Cir. 1976), the trustee intervenors alleged that the Board had no authority to order it to accept the union's contribution on behalf of the discriminatee, because to do so would violate Section 302 of the Labor Management Relations Act. The court stated:

> Section 302 was intended to regulate payments by employers to employee representatives, and was aimed at forestalling practices Congress considered injurious to the collective-bargaining process such as bribery of employee representatives by employers, extortion by employee representatives, and the potential abuse of power by union officials armed with sole control of welfare funds. The case at bar involves a payment by a union to an existent trust account as part of a Board ordered backpay award. The mischief which Section 302 was designed to eliminate is clearly not present under these circumstances, and there is no need to invoke the safeguards of this statute.

As stated, Respondent also defends that it should not be required to make these payments to the funds because McMichael's rights to the funds had already vested and he therefor was not affected by the Employer's failure to make these contributions during the backpay period. However, as stated in *Acme Wire Works*, 251 NLRB 1567 at 1571 (1980): ''Moreover, the right of an employee to a pension benefit also implies, of necessity, the right to a viable pension fund.'' It is reasonable to assume that the amount of fund contributions and fund benefits is determined by actuaries taking into account all covered employees. Even if McMichael's benefits had vested prior to the backpay period, it is possible that the benefits of others had not and the funds needed the Employer's contributions during the backpay period to cover these contingencies. *Finishline Industries*, 181 NLRB 756, 760 (1970). Respondents cannot be permitted to litigate in backpay proceedings whether discriminatees will ever receive moneys that went into the funds. If this were allowed, these supplemental proceedings would be greatly expanded by a trial within a trial of a speculative nature. *Iron Workers Local 378*, 213 NLRB 457 (1973). I therefore reject Respondent's defenses regarding the fund payments, and I find that it is required to make the payments to these funds as set forth in the backpay specification here during the backpay period.

The Search for Interim Employment

McMichael obtained employment with two employers during the backpay period; he was employed at Coyne Electrical Contractors, Inc. (Coyne), from June 18 through July 20 earning $4,568.55 and at Allran Electric Corp. (Allran), from July 24 through November 19, earning $12,418. Respondent referred him to both of these jobs. In determining interim earnings for the backpay specification, the Region allocated two-fifths of McMichael's earnings at Coyne ($1,827.42) to the second quarter of the year, and the remaining three-fifths

($2,741.13) to the third quarter. As for McMichael's earnings at Allran, it covered 17 weeks of employment, 10 of which occurred during the backpay period. Therefor, the Region took ten-seventeenths of $12,418, or $7,305.11, and allocated this amount as interim earnings in the third quarter. These determinations were, of course, fair and reasonable and Respondent does not appear to argue otherwise. The sole question remaining is whether McMichael made an adequate search for work during the backpay period. This breaks down into two areas: his search for work through the Respondent and the search on his own.

On direct examination McMichael testified that he called Respondent's Joint Industry Board, (JIB), on six or seven occasions between April 2 and June, apparently when he obtained employment with Coyne. On these occasions he spoke to John McCormick, the secretary, who was in charge of employment. McMichael asked him if he would be sent out to work and McCormick told him that it would be several weeks. On cross-examination his testimony became somewhat confused. He testified that the procedure is for individuals to go to the JIB on the third floor of Respondent's building where they fill out an orange colored card to apply for employment through the Respondent. He originally testified that he went to the JIB on April 2 at about 7:30 a.m. He then testified that he first went to the Employer's jobsite that morning and did not go to the JIB until about 10:30. From there he went to see William Blain, Respondent's financial secretary. He testified that Blain took his card away, presumably, his union membership card. He told Blain that he was going to fill out a card at the JIB for employment and Blain told him that ''as of that moment I was not a member of Local 3.'' He further testified that he next went to the JIB on about June 1. However, shortly thereafter, his testimony changed. He testified that when you fill out the orange card at the JIB, you have to turn in your termination notice. He received his termination notice from the Employer on about April 6:

> Q. When did you give it to the receptionist at the Joint Board?
> A. After I got it through the mail, sir...
> Q. After you got the termination notice?
> A. Yes.
> Q. And was that the first or the second time that you went down to the Joint Industry Board to fill out the orange card?
> A. No, that was the first time, sir.
> Q. So, it's after you got it in the mail?
> A. Yes.
> Q. Was that sometime after April 6?
> A. Yes, sir.
> Q. So, you did not see Bill Blain that day, did you? You went straight to the Joint Board?
> A. No.
> Administrative Law Judge: No what? You did see Mr. Blain or you did not see Mr. Blain?
> A. No, I didn't see Mr. Blain.
> Q. The only thing you did in the building that day is you got the termination notice and you went to the Joint Board/
> A. Yes.
> Q. And filled out the orange card?
> A. Yes
> Q. You did not speak to Mr. Blain at all?
> A. No.

In addition, he testified that in his telephone calls to the Respondent's employment department, he gave his name, social security number, and job classification. The person he spoke to told him approximately when he could anticipate getting a job. Blain testified that he saw McMichael at Respondent's office on about April 2, and did not see him again until about a year later. Joseph Mandel, employment director for the JIB, testified that Respondent's records state that the first time that McMichael reported to Respondent's employment division after being terminated by the Employer was on June 4. After being terminated by Coyne, he again reported to the employment office on July 23.

McMichael testified that in April he visited a company, ''M and A'' in Valley Stream, Long Island, and had them install a sound system in his car. While he was there, he asked them if they had a job available. He was told that they could not hire him because work was slow due to the economy. Also in April, he visited ''P and E,'' a mattress company in the Bronx. He was not purchasing a mattress, but he was in the area and stopped and asked if they had a job available. They told him that they could not hire him because they were firing staff. In May, he visited J. Rosenberg Electric in Brooklyn; they told him that they couldn't hire him because he did not have a union card. This was the only electrical contractor, union or nonunion, that he visited during this period. In June, he visited Lewin Collision in Springfield Gardens, Queens, New York, which was performing some work on his car. He asked if they had any work available and was told that they could not hire him because work was slow. In addition, as stated above, he contacted the JIB to obtain employment.

Respondents bear a heavy burden in backpay cases. In order to mitigate its backpay liability, Respondents have the burden of establishing that the discriminatee ''willfully incurred'' losses by ''clearly unjustifiable refusal to take desirable new employment.'' *Phelps Dodge Corp. v. NLRB*, 313 U.S. 117, 199–200 (1941). The test of the sufficiency of a discriminatee's search is not the success of that search; rather the law ''only requires honest good faith effort.'' *NLRB v. Cashman Auto Co*., 223 F.2d 832, 836 (1st Cir. 1955); *NLRB v. Arduini Mfg. Corp*., 394 F.2d 420, 423 (1st Cir. 1968). As stated in *Otis Hospital*, 240 NLRB 173 at 175 (1978): ''While the evidence may leave a question of whether [the discriminatee] could have been more diligent in seeking other employment, the highest standard of diligence is not required and doubts must be resolved against Respondent.''

I did not find McMichael to be a credible or a believable witness. His testimony was often confusing and exasperating. Without crediting or discrediting McMichael's testimony on his telephone calls to the Respondent's Employment Department, I find that in order to register to be referred to work, an employee must report to Respondent's office. I credit Mandel's testimony, as supported by Respondent's records that McMichael did not report in person until June 4, and was referred to Coyne 2 weeks later. McMichael testified that he visited four potential employers looking for work between April 2 and June 18, when he began working for Coyne. Even were I to credit McMichael, and find that these

were good-faith efforts to find work, I would still find that he did not exercise sufficient diligence in finding work and mitigating backpay. *American Bottling Co*., 116 NLRB 1303, 1307 (1956). Of the four places he visited over the 11 weeks before he began working at Coyne, two (M and A and Lewin) were for personal reasons. Although one might argue that an employer who installs car sound systems might have some use for a licensed electrician, no such argument could be made for an auto collision shop or a mattress company. Considering McMichael's skills, the only appropriate company that he visited during this period was J. Rosenberg Electric. *EDP Medical Computer Systems*, 302 NLRB 54 (1990). Additionally puzzling is the fact that the four companies that he visited were all over the place: Queens, Long Island, Brooklyn, and the Bronx. I therefore find that McMichael did not make a good-faith effort to obtain interim employment after he was terminated on April 2, and I therefore recommend that he be denied backpay for the entire period. *NLRB v. Mercy Peninsula Ambulance Service*, 589 F.2d 1014 (9th Cir. 1979); *Arlington Hotel Co. v. NLRB*, 876 F.2d 678 (8th Cir. 1989).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

It is recommended that the backpay specification be dismissed in its entirety.

[3] If no exceptions are filed as provided by Sec. 102.46 of the Boards 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.