

Canterbury Educational Services, Inc., and its wholly owned subsidiary, Canterbury Career Schools of Pittsburgh, Inc. and Edward J. Slifka. Case 6-CA-23121

February 7, 1995

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS BROWNING, COHEN, AND TRUESDALE

On August 31, 1992, the National Labor Relations Board issued a Decision and Order in this proceeding,¹ which, among other things, orders the Respondent, Canterbury Educational Services, Inc., and its wholly owned subsidiary, Canterbury Career Schools of Pittsburgh, Inc., to make whole employees for their losses resulting from its unfair labor practices. The United States Court of Appeals for the Third Circuit enforced the Board's Order on April 20, 1993.² A controversy having arisen over the amount of backpay due under the terms of the Board's Order, as enforced by the court of appeals, the Regional Director for Region 6 issued a backpay specification and notice of hearing on December 3, 1993. The Respondent filed an answer. A hearing was held on March 2 and April 5 and 6, 1994,³ before Administrative Law Judge Peter E. Donnelly.

On August 12, 1994, the judge issued the attached Supplemental Decision and Order. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a limited exception and supporting brief and a brief in response to the Respondent's exceptions.

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

The Board has considered the record and the attached supplemental decision 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.⁴

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Canterbury Educational Services, Inc., Medford, New Jersey, and its wholly owned subsidiary, Canterbury Ca-

reer Schools of Pittsburgh, Inc., Pittsburgh, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the following as the total amount of backpay due Edward Slifka: "\$28,229.80."

Sandra Beck Levine, Esq., for the General Counsel.

Martin N. Howe and Benjamin J. Fitzgerald, Esqs., of Greenwood, Indiana, for the Respondent.

SUPPLEMENTAL DECISION AND ORDER

STATEMENT OF THE CASE

PETER E. DONNELLY, Administrative Law Judge. In a Board decision in the above-captioned case,¹ the Respondent was found to have discriminated against Edward Slifka, Dwight W. Wolff, and Steven B. Karnek and was ordered to reinstate them with backpay. The Board's Order was subsequently enforced by the U.S. Circuit Court of Appeals for the Third Circuit. By letter dated May 12, 1993, Respondent purported to offer "full and immediate reinstatement" to these three discriminatees. However, since reinstatement provided wages which were 50 cents per hour less than they were earning when they were discriminatorily discharged, reinstatement was deemed insufficient. The matter was referred to the Board's Contempt Litigation Branch whereupon the matter was resolved by agreement and new offers of reinstatement providing appropriate wages were made to the discriminatees by letter dated October 1, 1993, and all three declined reinstatement at that time.

With respect to the matter of backpay, the parties were unable to reconcile their differences and on December 3, 1993, the Regional Director for Region 6 issued a backpay specification and notice of hearing setting forth the backpay formula determined appropriate and the computations used to arrive at the backpay figures owing to each of the three discriminatees. On December 21, 1993, Respondent timely filed an answer, and the case was heard before me on March 2, 5, and 6, 1994, in Pittsburgh, Pennsylvania. Briefs have been timely filed by Respondent and the General Counsel which have been duly considered.

A. Facts

1. Gross backpay formula

Slifka, Karnek, and Wolff were hired as full-time instructors working at least 80 hours at the time they were discriminatorily discharged. Had they continued in Respondent's employ, they would have become Respondent's most senior instructors. The compliance supervisor for Region 6, John P. O'Connell, determined that the most appropriate method to determine backpay in the circumstances of this case was a backpay formula utilizing representative instructor employees for each of the discriminatees. The appropriate measure of gross backpay due to Slifka, Karnek, and Wolff being the number of hours worked by the representative instructor employee employed during each week of the backpay period on a quarterly basis. O'Connell testified that it was his considered judgment that the representative em-

¹ 308 NLRB 506.

² *Canterbury Educational Services v. NLRB*, Docket No. 92-3732 (3d Cir. 1993) (unpublished).

³ The judge's Supplemental Decision and Order erroneously reported the April hearing dates as having occurred in March.

⁴ The General Counsel excepted to the judge's inadvertent failure to include health insurance premiums in the backpay award to discriminatee Slifka. We find merit in this exception and will amend the order to include this amount. *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980).

¹ *Canterbury Educational Services*, 308 NLRB 506 (1992).

ployee formula was more fair than the average earnings formula proposed by Respondent since the Respondent's instructor work force had experienced such a large turnover during the backpay period.² According to O'Connell, the averaging formula would have unfairly reduced gross backpay figures. In this regard, O'Connell testified that the high turnover of instructors resulted in frequent hirings late in pay periods and terminations early in pay periods, which artificially reduced average backpay for the pay periods and was an unfair basis of comparison to use in arriving at gross backpay figures for these individuals. O'Connell also testified that several employees used by Respondent in its proposed averaging formula were part-time employees working only a few hours in some pay periods.³

2. Yard/road instructors and classroom instructors

It is undisputed that all instructors employed by Respondent are hired as yard/road inspectors. As their name suggests, yard/road instructors work in the yard with students, instructing them in the operation and maintenance of trucks. Classroom instruction includes instruction in the operation of the trucks and state and Federal rules and regulations and other information necessary in order to operate trucks on the highways. Classroom instructors are selected from among the yard/road instructors. There are three classroom instructors, one for daytime, one for nighttime, and one on weekends.

3. Backpay period

As noted above, Respondent, by letter of May 12, 1993, offered reinstatement at reduced wages to the discriminatees. In spite of the inadequacy of the reinstatement, Slifka and Karnek returned to work as yard/road instructors, but both subsequently left their employment shortly thereafter. A second and valid offer of reinstatement was made by letter of October 1, 1993.⁴

B. Analysis and Recommendation

1. Gross backpay formula

As a matter of Board and court law, the Board, in determining appropriate formulas for arriving at gross backpay figures is vested with a substantial degree of discretion inasmuch as it is impossible to arrive at precise figures because the discriminatees were not employed during the backpay period. *NLRB v. Brown & Root*, 311 F.2d 447 (8th Cir. 1963).

In the instant case, the formula used by the General Counsel was a representative employee formula wherein the earnings of specific individual employees with similar employment during the backpay period are traced and used as the basis for computing the backpay for the individual discriminatees. O'Connell used this formula rather than the averaging formula proposed by the Respondent, since an

²The averaging formula, as proposed by Respondent, would determine a gross backpay for the discriminatees based on the average number of hours worked by 30 employees selected by Respondent during each pay period on a quarterly basis.

³Four of the employees in the averaging formula suggested by Respondent were part-time employees.

⁴The General Counsel seeks no backpay for Wolff after the second quarter of 1992, since he had no commercial driver's license or current medical certification after that date.

averaging formula, which might otherwise be acceptable, is not equitable in the circumstances of the instant case due to the high turnover rate among Respondent's instructors, that is, the averaging formula based on pay periods, as proposed by Respondent, would not take into account frequent hirings late in pay periods or terminations early in pay periods, thus resulting in shorter pay periods for the computation of gross backpay. In my opinion, the backpay formula selected by the General Counsel is fair and reasonable and the better method of establishing gross backpay figures for these employees.

2. Yard/road instructors and classroom instructors

Respondent also objected to the General Counsel's use of classroom instructors as representative employees for the computation of gross backpay. According to Respondent, classroom instructors and yard/road instructors are two separate and distinct classifications of employees and the use of classroom instructors as representative employees was incorrect since only employees from the same job classification should be used as representative employees. I do not agree. The employees used by the Board in this formula were instructors, whether doing classroom or yard/road instruction. There appears to be no special educational or differentiating criteria for employment as a classroom instructor and all are selected from the ranks of yard/road instructors. Yard/road and classroom instructors were sufficiently comparable so as to warrant the inclusion of both in the group of representative employees selected by the General Counsel.⁵

While the Respondent also appears to contend that representative employees Donald Grunden and Gary Vuchinich were supervisors as well as classroom instructors, the record shows only that they occasionally exercised some additional responsibility and is insufficient to support the conclusion that they were supervisors. As to Robert Langhurst, while the record shows that he acted as placement officer for the Respondent, he was still employed as an instructor, and his selection as a representative employee was reasonable.

Respondent also contends that the assumption made by the General Counsel in arriving at the amounts of the raises for the discriminatees during the backpay period was unreasonably high since relatively few of the instructors received the pay raises that were granted to the discriminatees. In my opinion, this allocation was not unreasonable since, except for their unlawful discharges, they would have become Respondent's most senior instructors and the Board's projections of the raises they would have received were reasonable.

3. Backpay period

As noted above, Respondent, by letter dated October 1, made its first valid offer of reinstatement. Respondent contends that the date of that letter should end the backpay period rather than October 14, the date used by the General Counsel. In my opinion, it was acceptable for the General Counsel to allow the discriminatees a reasonable time to consider and decline the offer, and I do not consider 2 weeks to be excessive.

⁵Even assuming two distinct classifications, I note that the discriminatees, except for their unlawful discharges, would have been the most senior of the instructors, and it is reasonable to assume that they would have been offered employment as classroom instructors.

C. *Willful Loss of Earnings and Availability of Work*

1. Steven Karnek

The General Counsel seeks backpay in the amount of \$44,081 for Karnek for the period October 25, 1990, through October 13, 1993, when Karnek declined a valid offer of reinstatement from Respondent.

At the hearing, Respondent introduced into evidence classified ads appearing in numerous issues of the Pittsburgh Tribune Review seeking truckdrivers. Respondent argues that given the availability of driving jobs as disclosed by the ads, it is logical to assume that Karnek as well as Slifka and Wolff could have obtained employment and that their failure to do so constituted willful loss of earnings. I do not agree. The three discriminatees here were employed by Respondent as instructors, not truckdrivers. The fact that some companies may have been advertising for truckdrivers is totally insufficient to establish that they were rejecting comparable employment. Moreover, these ads disclose little about wages or other terms of condition of employment, all facts bearing on the suitability of those positions.

As noted above, Karnek accepted Respondent's original offer of employment of May 12, 1993, and returned to work. According to Respondent, Karnek refused to work the hours assigned to him and quit over this on about May 28. Respondent contends that Karnek thus quit this substantially equivalent employment without just cause and should therefore be presumed to have earned interim wages from the time he quit through the backpay period. I do not agree.

Karnak was reinstated as a yard/road instructor at a lower rate of pay than he enjoyed when he left. Regardless of why he quit, it is clear that the Respondent's May 12 offer of reinstatement was invalid and Karnek was free to leave such employment without sacrificing his backpay rights. Of course, whatever he earned during his employment with Respondent between May 12 and 24 should, and has been, treated as interim earnings for backpay purposes.⁶

2. Edward Slifka

After Slifka was discharged on October 25, 1990, he began a job search to obtain the same type of employment from which he had been discharged, i.e., truckdriving instructor. He took work as a security guard for several companies and did maintenance/janitorial work for two other employers. After a lengthy wait, he obtained employment as a truckdriving instructor with Swanson's Driving Schools, Inc., where he was employed at the time he returned to Respondent pursuant to its offer of reinstatement of May 12, 1993. Slifka left Respondent's employ in July on the recommendation of his physician that he not work for a period of time "because of exhaustion." Thereafter, he was reemployed

⁶Respondent also contends, as to Karnek, that he willfully failed to appear at the hearing pursuant to subpoena by the General Counsel and an unfavorable inference should be drawn that any testimony he would have provided about his search for work would have diminished his backpay claim. In my view, this position is not well taken, and I am unwilling, based on representations made by counsel at this hearing, to conclude as a fact that Karnek's failure to appear was "willful." Additionally, the gross backpay interim earnings and net backpay figure arrived at for Karnek were determined after an investigation by the Region. Respondent has the burden of proving any further offsets to Karnek's backpay.

with Swanson. Slifka received a valid offer of reinstatement on October 1, 1993.

Respondent contends that Slifka had an obligation to accept employment as a truckdriver and that truckdriving positions were available for which he should have applied and that employment in lower paying maintenance/janitorial work amounted to a willful loss of earnings. In my opinion, Respondent has failed to establish that Slifka incurred any willful loss of earnings. First, it is important to note that Slifka was not employed by Respondent as a truckdriver but as an instructor, and the record shows that Slifka sought employment in that capacity which, after employment in lower paying maintenance/janitorial positions, he was eventually successful in obtaining. He was not obligated to seek employment as a truckdriver. In my opinion, Slifka's efforts to obtain employment were reasonable.

Respondent also contends that after July 16, 1993, when he left Respondent's employment, Slifka was on an indefinite term of disability, and that no backpay should accrue after that date since he was unavailable for work. As noted above, Respondent's offer of reinstatement in May was invalid and Slifka had no obligation to continue in the employ of Respondent, and Respondent's backpay obligation is not diminished by his departure. Nor has Respondent established that Slifka thereafter was unavailable for employment, particularly since he was reemployed by Swanson shortly thereafter.

In summary, I conclude that the General Counsel's backpay figure for Slifka is a reasonable calculation.

3. Dwight Wolff

Wolff testified that he suffered a herniated disc in 1985; however, he was not on disability during his original employment with the Respondent. Wolff also testified that his conditioned worsened and that as of November 1, 1992, he began to receive social security disability benefits on temporary disability and thereafter was unable to work. As noted above, the General Counsel concedes that it is not seeking backpay for Wolff after approximately May 19, 1993, since Wolff had no commercial driver's license or current medical certificate necessary for his employment with the Respondent.

This leaves in issue whether or not Wolff's backpay should be reduced by reason of his inability to work from November 1, 1992, until approximately May 19, 1993. Since Wolff himself, in his testimony, conceded that he was not qualified to perform any work during that period of time, backpay should be tolled for that period, resulting in a revised backpay amount of Wolff for \$41,679.

With respect to Wolff, there remains for consideration whether or not, as Respondent contends, Wolff incurred a willful loss of earnings from the time of his unlawful discharge until November 1, 1992, when his back injury became disabling and he began to receive social security disability payments. Wolff testified that after his discharge, he sought work without success as a truckdriver through Teamsters Local 249 and that he also sought work as an instructor. He also consulted the classified ads in the newspapers and looked into opportunities overseas. He also looked for plumbing and carpentry work, also without success. He made trips to Florida from time to time where he searched for work with Florida job services and in the newspapers. Respondent contends that because of his "transient existence,"

between Florida and Pennsylvania, Wolff was incurring a willful loss of earnings. However, Respondent offered nothing to refute Wolff's testimony.

Wolff, while he is obliged to make a reasonable effort to obtain interim employment, is not obliged to observe the highest standards of diligence in that search. Moreover, any doubt with respect to the adequacy of the discriminatee's search must be resolved against the wrongdoer, that is, the Respondent whose unlawful discharge of that employee made the search necessary. Applying this standard, I conclude that Wolff's job search was sufficient. *NLRB v. Westin Hotel*, 758 F.2d 1126, 1130 (6th Cir. 1985).

It appears that after his discharge on October 26, 1990, Wolff was in possession of two operating permits which allowed him to drive commercial vehicles. According to Respondent, this was a violation of Pennsylvania and Federal law. Respondent contends that Wolff's possession of two valid operating permits constitutes a willful loss of earnings since his difficulty in obtaining interim employment was due to his own willful conduct in making himself an undesirable employee by this unlawful conduct.

In short, this theory is total speculation. Wolff sought work in other fields where commercial trucking laws were irrelevant. Moreover, he could have divested himself of the second license at any time prior to his employment as an operator of commercial vehicles. Respondent has failed to show that Wolff's failure to obtain interim employment had anything to do with his possession of two commercial drivers.

Respondent also contends that as of April 1, 1992, operators of commercial vehicles were required to hire a "commercial driver's license" (CDL) clearly marked as such. Respondent required its instructors, including Wolff, to have a CDL even though they did not operate commercial motor vehicles. Respondent contends that Wolff's failure to have obtained a CDL constitutes a willful loss of earnings. I do not agree. Wolff's search for interim employment was not only for work as a truckdriver or instructor but also for other employment as well, for which a CDL would have been unnecessary. Wolff was not removing himself from all possible employment by not having a CDL. Essentially, Respondent is speculating, without showing, that Wolff's alleged lack of a CDL was somehow related to his failure to obtain employment. This is a totally insufficient premise for me to conclude that Wolff incurred a willful loss of earnings by failing to obtain a CDL.

Respondent also contends that Wolff's failure to obtain a current medical certificate constitutes a willful loss of earnings beginning from the time that his most recent certification expired on September 18, 1992. I do not agree.

Wolff's world of interim employment was not limited to just jobs driving commercial vehicles. It is not as if Wolff were disqualifying himself from all interim employment or from accepting other forms of employment for which a medi-

cal certificate would have been irrelevant. Accordingly, I conclude that Wolff did not incur any willful loss of earnings in this respect.

In summary, with respect to the question of interim earnings as to Slifka, Karnek, and Wolff, it is clear to me as a matter of Board and court law that while Respondent's backpay liability may be reduced or mitigated by showing that the discriminatees either incurred a willful loss of earnings or were unavailable for work during the backpay period, except for Wolff, no such showing has been made in the instant case. These are matters of affirmative defense. The Respondent must show that the discriminatees incurred a willful loss of earnings or were unavailable for work for whatever reasons, and this has not been done. *NLRB v. Miami Coca-Cola Bottling Co.*, 360 F.2d 569, 575-576 (5th Cir. 1966). Further, if there are doubts or uncertainties in the evidence, they must be resolved against the employer since the employer was the wrongdoer. In this case, it was the Respondent's unlawful discrimination in discharging these individuals that precipitated their job searches.

Conclusions

Based on the entire record here, I conclude that the total amount of backpay due to the individuals named in the backpay specification are the amounts set forth below opposite their name:

Edward Slifka	\$26,885
Steven Karnek	44,081
Dwight Wolff	41,679

Recommendations

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁷

ORDER

The Respondent, Canterbury Educational Services, Inc., and its wholly owned subsidiary, Career Schools of Pittsburgh, Inc., Pittsburgh, Pennsylvania, its officers, agents, successors, and assigns, shall pay to Edward Slifka the sum of \$26,885; Steven Karnek the sum of \$44,081; and Dwight Wolff the sum of \$41,679, the backpay provided for here with interest thereon to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *New Horizons for the Retarded*, 283 NLRB 1173 (1987). There shall be deducted from the amounts due any tax withholding required by law.

⁷If 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.