

**Mid-State Ready Mix, Inc., a Division of Torrington Industries, Inc. and Teamsters Local Union No. 182, a/w International Brotherhood of Teamsters, AFL-CIO.** Case 3-CA-14517

February 27, 1995

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS  
AND TRUESDALE

On November 23, 1994, Administrative Law Judge Joel P. Biblowitz issued the attached supplemental decision. The Respondent has filed exceptions and a supporting brief.

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,<sup>1</sup> and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Mid-State Ready Mix, Inc., a Division of Torrington Industries, Inc., Glens Falls, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

<sup>1</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established practice is not to overrule an administrative law judge's credibility resolutions unless a clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent contends that its letter to employee Alton Blair dated Sept. 1988, contained a valid offer of reinstatement for spring 1989. We disagree. Even assuming, arguendo, that the Board and the judge made no formal finding on this issue in the underlying case, we here find that the letter did not constitute a valid offer of reinstatement sufficient to toll the Respondent's backpay liability to Blair.

*Alfred M. Norek, Esq.*, for the General Counsel.  
*Theodore Zoli Jr.*, President, representing Respondent.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me in Albany, New York, on September 28, 1994. By Decision and Order, dated May 29, 1992, the Board found, inter alia, that Mid-State Ready Mix, a Division of Torrington Industries, Inc. (Respondent), violated Section 8(a)(1)(5) of the Act by failing and refusing to provide notice to, and bargain with, Teamsters Local Union No. 182, affiliated with International Brotherhood of Teamsters, AFL-CIO (the Union), concerning its decision to lay off

William Marshall on about July 11, 1988, and Alton Blair on about July 27, 1988, and replace them with nonbargaining unit employees and independent contractors. The Board ordered Respondent to offer them reinstatement and to make them whole for any loss they may have suffered.

Respondent raises a number of defenses herein that will be discussed individually. While admitting some liability for its unfair labor practices, Respondent alleges that it should not be liable for about 6 years' interest because much of the delay herein was caused by the Board itself. The administrative law judge issued his decision herein on December 22, 1989, and the Board issued its Decision and Order on May 29, 1992. The parties executed a stipulation in which Respondent waived its rights under Section 10(e) and (f) of the Act and the parties agreed that the Regional Director would issue a backpay specification herein. This stipulation was approved by the Acting Regional Director for Region 3 on November 26, 1993. The compliance specification and notice of hearing is dated November 29, 1993, with the hearing set for June 22, 1994. By order rescheduling compliance hearing dated March 1, 1994, the hearing herein was rescheduled to September 28, 1994, when it was held. It is Respondent's position that, because these delays were not its fault, he should not have to pay for these delays in the form of interest.

The principal cases on this issue are *Carrothers Construction Co.*, 274 NLRB 762 (1985), and *Smyth Mfg. Co.*, 277 NLRB 680 (1985). *Carrothers* stated at 763: "In general, laches may not defeat the action of a governmental agency in enforcing a public right." It also quoted from a Supreme Court decision, *NLRB v. J. H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 264 (1969), which stated: "Wronged employees are at least as much injured by the Board's delay in collecting their backpay as the wrongdoing employer." The Board in *Smyth* at 692 came to the same conclusion, quoting from another sentence from *J. H. Rutter-Rex*, supra: "[the Court] has held before that the Board is not required to place the consequences of its own delay, even if inordinate, upon wronged employees to the benefit of wrongdoing employers." Respondent attempts to differentiate these cases from the instant matter alleging that the reasoning of those cases was that the wrongdoing companies were earning interest on the moneys during the period of the delay and therefor were not hurt by the delay, whereas in the instant matter, Respondent alleges that "the money was not in the company's coffers drawing interest, but would have to have been borrowed to pay any back wages." Even if that were true, it is no defense to the payment of interest for the backpay period herein. In *NLRB v. International Measurement & Control Co.*, 978 F.2d 334, 337 (7th Cir. 1992), the court, after stating that interest is not a penalty, but is the method of reimbursing victims for the time value of the money that they lost and that the employer had, stated that the funds

have been earning a return for them [respondent] since 1984 and 1985, or, equivalently, have enabled the [employer] to avoid the interest they would have had to pay to borrow the same amount. Meanwhile the wronged employees have lacked funds that they could have invested (or that would have enabled them to avoid the expense of borrowing). The return on the money be-

longs to the victim, not the wrongdoer, and interest is the means by which this transfer is accomplished.

It has been determined that Respondent violated the Act by laying off Blair and Marshall. Respondent was the wrongdoer here; Blair and Marshall were the "wronged employees" who did nothing to deserve being laid off. The mere fact that justice may have taken more time than it should have to give them the remedy they deserve, does not excuse Respondent, even in part, from reimbursing them fully for its wrongdoing. I therefor reject this defense of Respondent.<sup>1</sup>

The compliance specification, in determining the gross backpay due to the discriminatees for the period prior to November 12, 1988, when Marshall returned, used the number of hours worked by the employee who replaced them at the facility and divided this number in half, so that Blair and Marshall shared these hours. This hourly figure was then multiplied by the hourly rate of pay they would have earned. For the balance of the backpay period, the Region determined the average number of hours worked on a weekly basis by truck drivers at Respondent's Oneida, New York facility, multiplied by the hourly rate Blair would have earned. *La Favorita, Inc.*, 313 NLRB 902, 903 (1994), citing the Board's well-established cases on the subject, stated:

Any formula which approximates what discriminatees would have earned had they not been discriminated against is acceptable if it is not unreasonable or arbitrary in the circumstances. The formula should be representative of the discriminatee's employment history and take into account intermittency of employment. Where awards may be only close approximations, the Board may adopt formulas reasonably designed to produce such approximations. Another well-established principle is that "the backpay claimant should receive the benefit of the doubt rather than the Respondent, the wrongdoer responsible for the existence of any uncertainty and against whom any uncertainty must be resolved." [Citations omitted.]

These factors are certainly present herein. For the period from their layoff to November 12, 1988, when Marshall was recalled, the Region employed the number of hours worked by their replacement, divided by two, multiplied by their hourly rate at the time. For the balance of the backpay period, the Region used the average number of hours worked by Respondent's drivers at the facility involved, multiplied by Blair's hourly wage rate. This method of computation is the best possible one under the circumstances, and I so find.

Respondent also defends that it had made a valid offer of reinstatement to Blair. General Counsel's position is that Respondent's letter to Blair dated September 12, 1994, was the first and only valid offer of reinstatement that Respondent made to Blair and that Blair's backpay ended on that day. At the hearing, Blair stated that he did not wish to return to

<sup>1</sup> At the hearing the parties stipulated to the amounts owed to Marshall, whose backpay ended on about Nov. 12, 1988, when he was reinstated: \$2331 for the third quarter of 1988 and \$1267 for the fourth quarter of 1988, plus interest. Counsel for General Counsel's brief states that subsequent to the close of the hearing Respondent sent Marshall a check for this amount, exclusive of the interest, which Respondent disputes.

work with Respondent. Respondent, however, alleges that orally in July 1988 and by letter dated September 8, 1988 Respondent made an immediate and future offer of reinstatement to Blair. The hearing in the underlying matter took place on January 9, 1989. The administrative law judge, in his decision dated December 22, 1989, discussed Respondent's conversations with Blair on July 26 and 27, 1988, and the letter of September 8, 1988. Both the judge and the Board ordered Respondent to offer Blair reinstatement to his former position of employment and to make him whole for the loss he suffered due to the layoff. The judge found that Marshall had been recalled to work by the date of the hearing, but that Blair had not. Although the judge never specifically stated in his decision whether the July conversations and the September 8, 1988 letter constituted valid offers of reinstatement, by finding that Blair, unlike Marshall, had not been recalled to work at the time of the hearing, and by recommending that Respondent be ordered to offer Blair reinstatement and be made whole, the judge, and the Board by affirming his decision, by implication, found that the July 1988 conversations, and the September 8, 1988 letter did not constitute valid offers of reinstatement to Blair. Respondent, in its brief, alleges that I improperly excluded him from presenting evidence of valid reinstatement offers that were made subsequent to the date of the underlying hearing. At the hearing herein, I told Respondent that it was my belief that the judge and the Board had already determined that its July 1988 conversations and the September 8, 1988 letter were not valid reinstatement offers, but that if Respondent could establish that it made a valid offer of reinstatement to Blair after January 9, 1989, I would consider that evidence. The evidence that Respondent alleges that I improperly excluded was not a post-January 9, 1989 offer, but was the final paragraph of its September 8, 1988 letter which states:

We continue to search for a tractor with a permit. It's our hope that we will be successful in acquiring a unit in the spring, at the latest, at which time we can offer you a job operating it.

The judge and the Board found that the September 8, 1988 letter, of which this paragraph is a part, did not constitute a valid reinstatement offer. Respondent produced no evidence of a post-January 9, 1989 reinstatement offer prior to the September 12, 1994 offer discussed above. I therefor reject this allegation by Respondent.

The principal issue litigated at at the hearing herein relates to the scarcity of interim earnings on the part of Blair. Blair was unlawfully laid off on July 27, 1988. He had been employed by Respondent and its predecessor since about 1974 as a tractor-trailer driver. At the time of his layoff he was about 55 years old and had been a driver for his entire professional career. Respondent's facility was located in Oneida, New York, a small city surrounded by rural area, and Blair lived in Vernon Center, New York, about 30 miles from the closest city. From July 27, 1988 through April 11, 1989, he called and visited potential employers, but found no work. He also filed for, and collected, unemployment [benefits] after completing the required documents. In April 1989 he purchased a 1977 Transtar tractor for \$5000. He borrowed about \$2500 from his daughter, Jill Blair, and the balance from the Vernon National Bank to pay for the tractor as well

as plates and insurance. Beginning at that time he performed work for A & T Transportation (A & T), which paid him a fixed sum dependent on the distance that he drove for them. He paid A & T a 95-cent-per-mile fee for the rental of their trailer, and he was responsible for all expenses of the tractor, including fuel, oil, tires, tolls, and repairs. In about the summer of 1989 the motor of the 1977 Transtar was destroyed and he repaired it and, subsequently, traded it in for a 1983 Peterbilt. In early 1990 the motor on this tractor was also destroyed and it became unusable. He returned it to the company that he purchased it from and stopped making payments for it at that time. Also at about that time he became employed by Albanese Redi-Mix (Albanese), as an hourly paid driver and, at the time of the hearing herein, was still employed at that facility by the successor to Albanese. Like his employment with Respondent, his employment at Albanese was seasonal, usually lasting from about April through November.

Blair's tax return for 1989 shows that his gross income for the year, presumably all from A & T, was \$32,000. Under expenses is listed about \$3000 for insurance and other expenses, \$2500 for meals, \$15,000 for fuel, oil, tires, and tolls, and \$12,854 for repairs, leaving a net loss of \$2000. Respondent objects to the \$12,854 expense. Blair testified that this amount represented the cost of repairing the engine on the 1977 Transtar tractor. After "the motor went," he took it to a friend who rebuilt the engine for him. His tax return for 1990, when he was driving the 1983 Peterbilt for the first part of the year, shows income from A & T of \$15,000, fuel oil and tire expenses of \$8000 and repairs and maintenance of \$3510. He testified that these expenses were regular parts and labor expenses of keeping the tractor operational.<sup>2</sup>

Subsequent to the conclusion of the hearing, the parties entered into a stipulation regarding the \$12,854 expense that Blair incurred for the rebuilding of the engine on his 1977 tractor, and deducted from his gross income on his 1989 tax return. They stipulated that an Internal Revenue Service publication provides for two choices for implementing this deduction. Blair could have deducted \$10,000 and amortized the remaining \$2854 over a 5-year period, or \$570.80 a year for 5 years. Therefore he could have deducted \$10,570.80 for the first year under this option. Under the other option, he could have deducted twenty percent, \$2,570.80, each year for 5 years. Counsel for General Counsel chooses the first option.

Finally, Respondent defends herein on the ground that the quarterly method of computation as set forth in *F. W. Woolworth*, 90 NLRB 289 (1950), is inappropriate in this matter because of the seasonal nature of Respondent's operation, and that the use of the quarterly method of calculations unduly enriches Blair. I disagree. My analysis of the quarterly

<sup>2</sup>I was convinced by the testimony of Blair and his daughter, Jill Blair, that, while he was not a good recordkeeper and was not knowledgeable about tax law, he presented true and complete figures to his tax preparer. During this period, he had an extremely low net income, as set forth by his tax returns, necessitating that he borrow money from his daughter. I also find that, when one considers that Blair's education ended with the first year of high school, and that he lived and worked in an area rural in character, it is not surprising that he was unable to locate interim employment before becoming self-employed as a driver-owner.

periods herein establishes that it was only during the second and third quarters of the years beginning in 1991, when Blair was employed at Albanese and its successor, that his quarterly income exceeded his estimated quarterly income from Respondent. Respondent appears to argue that it should be credited with the "surplus" during these periods. The Board in *Woolworth* stated: Earnings in one particular quarter shall have no effect upon the backpay liability for any other quarter." See also *Groves Truck & Trailer*, 294 NLRB 1 (1989). The Board has followed the *Woolworth* formula, with Court approval, for 44 years. Absent any significant reason to deviate from this formula, and I find none here,<sup>3</sup> that formula should not be tampered with. I therefore reject this argument of Respondent.

Based on these findings and conclusions and on the entire record, I issue the following recommended<sup>4</sup>

### ORDER

The Respondent, Mid-State Ready Mix, Inc., a Division of Torrington Industries, Inc., Glens Falls, New York, its officers, agents, successors, and assigns, shall pay to William Marshall the interest on \$2331 for the third quarter of 1988 and \$1267 for the fourth quarter of 1988, these principal amounts having already been paid in about 1994.<sup>5</sup> The amounts due to Blair, plus interest, by quarter, are as follows:

3/88	2132.79
4/88	1303.75
1/89	0
2/89	4575.46
3/89	6312.56
4/89	4683.65
1/90	3053.37
2/90	0
3/90	0
4/90	2994.78
1/91	2210.50
2/91	0
3/91	0
4/91	1060.21
1/92	3862.41
2/92	0
3/92	0
4/92	126.02
1/93	3038.48
2/93	0
3/93	0

<sup>3</sup>Respondent alleges that there is a major difference between its backpay obligation as between *Woolworth* and what it considers a more equitable formula. By my calculations, the "excess" amount that Blair earned in the second and third quarters in 1991, 1992, 1993, and 1994 represents only about 10 percent of its total backpay obligation.

<sup>4</sup>If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

<sup>5</sup>It is suggested that the parties agree on a stipulation before the Board on the date that Respondent paid the principal to Marshall so that the Board can end the interest obligation on that date.

4/93	126.02
1/94	3862.41
2/94	0
3/94	0