

Electric, Inc. and Cebcor Service Corporation and International Brotherhood of Electrical Workers, Local Union 654. Case 4–CA–24429

August 27, 2001

SUPPLEMENTAL DECISION AND ORDER
BY CHAIRMAN HURTGEN AND MEMBERS
LIEBMAN
AND TRUESDALE

On March 20, 2000, Administrative Law Judge George Alemán issued the attached supplemental decision. The General Counsel 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, and conclusions as modified herein and to adopt the recommended Order as modified.

The General Counsel excepts to the judge's recommended Order that the amounts owed the backpay claimants be placed in escrow for a period of 1 year in order to afford the Respondents and/or the General Counsel an opportunity to produce evidence and/or examine them regarding their interim earnings. The General Counsel contends that the judge relied on case law which is not controlling and that his recommendation to place the backpay awards in escrow is contrary to Board policy.

For the following reasons, we find merit in the General Counsel's exceptions and reverse that part of the judge's recommended Order placing the backpay awards in escrow.

As noted by the judge, the Respondents did not contest the General Counsel's calculations of the gross backpay amounts for claimants James Conroy and Robert James, but it did deny the validity of the General Counsel's calculations regarding interim earnings. The two backpay claimants were not present during the compliance proceeding because neither the General Counsel nor the Respondents requested their appearance. The judge found that the General Counsel was under no obligation to produce Conroy and James at the hearing in order to be examined by the Respondents. Further, he rejected the Respondents' contention that the claimants' absence from the hearing impermissibly hampered the Respondents' efforts to prove that Conroy and James had interim earnings. Rather, the judge specifically found that "the burden of calling the discriminatees to prove they had interim earnings rested exclusively with the Respondents" and that there was "nothing in the record to suggest that the Respondents made any effort to insure, either through voluntary compliance or through issuance of

subpoenas, that the discriminatees would appear to testify." The judge concluded that, "to the extent Respondents felt disadvantaged by the discriminatees' absence from the hearing, this was a product of their own neglect and nothing more." The record supports, and we affirm, this part of the judge's analysis and findings.

However, we do not agree with the judge's subsequent determination to place the backpay awards in escrow. The implementation of an escrow process would have the unwarranted effect of negating the judge's analysis set forth above, by providing the Respondents a further opportunity to prove what they, without any basis, failed to prove at the hearing. The hearing was held in Philadelphia, Pennsylvania, not far from where the discriminatees apparently lived. There is no indication that the General Counsel was hampered in obtaining the information relevant to the compliance specification. The record also shows that the Respondents knew where the claimants were and how to contact them, because the Respondents had made telephonic offers of employment to both. Notwithstanding that knowledge and the proximity of the hearing to the employees' place of residence, the Respondents made no effort to procure the employees' attendance at the hearing, either by request or subpoena. In those circumstances, the escrow procedure used primarily in cases where discriminatees are missing or fail to respond to a subpoena by one or both parties is not warranted.

Woonsocket Health Centre, 263 NLRB 1367 (1982), on which the judge relied, involved unusual circumstances not present here. There, two discriminatees, who had moved to Florida, did not attend the hearing in Rhode Island. The judge, finding that the backpay specification contained too many factual uncertainties, refused not only to issue a backpay award, but even to order that the estimated award as set out in the specification be placed in escrow. The Board found merit to the General Counsel's exception challenging the judge's failure to place the estimated backpay due in escrow. In directing the employer to pay the estimated amount of backpay due into escrow, the Board disagreed with the judge that the backpay specification was too uncertain factually for the amounts set forth to be placed in escrow. The Board did however note that it could not then determine whether the employees' moving to Florida should toll the backpay period. *Woonsocket* is therefore distinguishable from this case in significant respects. Not only did the discriminatees live at a great distance from the location of the hearing, but their move had created issues not resolved by the record before the Board. Further, the General Counsel sought placement of money in an escrow account because the judge had resolved uncertainties

against the discriminatees and had placed the burden on them, and at least implicitly on the General Counsel, to establish the net backpay due.¹

In sum, the Respondents did not carry out their responsibility to obtain Conroy's and James' appearance by either asking or subpoenaing them to attend the hearing. Without any notice or request that they be present, we do not agree that there was any "failure to appear" on either Conway's or James' part that would warrant the implementation of an escrow process.

Our dissenting colleague acknowledges that Board law placed the burden on the Respondents to call Conroy and James, regardless of their status as "salts." See *Ferguson Electric Co.*, 330 NLRB 514, 518-519 and fn. 16 (2000). He suggests, however, that Respondent's status as pro se litigants justifies on equitable grounds the judge's giving "the Respondents another chance to produce the witnesses." But the judge himself did not invoke this rationale, nor does the record here support it. Indeed, as already pointed out, the judge cited Respondents' "own neglect and nothing more" as the reason Conroy and James did not testify.² Respondents have filed no exceptions to this finding and no brief with the Board. We have explained why the rationale on which the judge *did* rely was incorrect. The partial dissent does not dispute our reasoning in this respect.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondents, Electric, Inc. and Cebcor Service Corporation, Royce City, Texas, their officers, agents, successors, and assigns, shall make whole James Conroy by paying him \$20,871.00 and shall make whole Robert James by paying him \$6449.20. Both backpay amounts shall be with interest to be computed in the manner prescribed in *New*

¹ The judge's reliance on *Beckley Belt Services & Roofing Co.*, 289 NLRB 1179 (1988), is also misplaced. There, the claimant's backpay was placed in escrow when the backpay claimant did not comply with General Counsel's subpoena to testify at that proceeding, thereby denying the respondent an opportunity to cross-examine the claimant.

² With respect to a compliance proceeding, the Board's Casehandling Manual Sec. 10629.4 states that:

Although the General Counsel may not call all or even any discriminatees as witnesses, the respondent will often desire to call discriminatees to prove its case. The Region's trial attorney should cooperate with the respondent in its efforts to obtain the presence of the discriminatees to the extent that it is practicable and reasonable to do so. [Footnote omitted.]

The General Counsel's role, as the Board has observed, is "merely advisory and cooperative." *Cornwell Co.*, 171 NLRB 342 fn. 2 (1968). There is no suggestion here that the General Counsel failed to fulfill this limited function.

Horizons for the Retarded, 283 NLRB 1173 (1987), less any taxes withheld pursuant to Federal and State law.

CHAIRMAN HURTGEN, dissenting in part.

The judge decided to hold backpay in escrow, pending appropriate examination of issues concerning interim earnings by discriminatees Conroy and James. My colleagues reverse the judge. I would affirm.

In *Ferguson Electric Co.*, 330 NLRB 514 (2000), I concluded, inter alia, that the charging party (union) should have the burden of producing evidence concerning whether and to what extent the union had placed limitations on the discriminatees' search for work, where the discriminatees were "salts." My position was based on the fact that the union was the possessor of such evidence. In the instant case, the issue is admittedly different. The issue concerns the *amount* (if any) of interim earnings. However, the principle is the same. It is the Union and the discriminatees who are the possessors of the evidence.¹

Thus, it would seem equitable to place the burden of production of evidence on the Charging Party and the employees. I recognize the Board law is to the contrary.² However, Respondents appeared pro se at the hearing, and was apparently unaware of its obligation to produce the discriminatees. Thus, the discriminatees were not present. In these circumstances, the judge essentially gave Respondents another chance to produce the witnesses and to examine them regarding interim earnings. The judge ordered that the backpay be held in escrow pending that examination. I believe that the judge's order was correct, and I would not reverse him.

My colleagues note that the judge did not cite Respondents' pro se status as the basis for his "escrow" order. They also note that, under Board law, Respondents had the burden of calling Conroy and James. However, as pro se parties, Respondents could reasonably expect that the General Counsel (who proceeded on behalf of Conroy and James) would bring them to the hearing at which their backpay would be litigated. However, they did not appear. Accordingly, as a matter of fundamental fairness, I would give Respondents a chance to request their presence. Under the Casehandling Manual, the General Counsel would then likely produce the two employees, and the backpay issues would be fairly litigated. My colleagues have closed that avenue.

¹ The Union refers the employees to jobs, and the employees earn the wages

² I am *not* suggesting that this was the fault of the General Counsel.

Elana Hollo, Esq., for the General Counsel.
Charles Stevenson, for Cebcor Service Corp.
Carolyn Thumann, for Electric, Inc.

SUPPLEMENTAL DECISION

GEORGE ALEMÁN, Administrative Law Judge. A hearing in the above-captioned matter was held on February 28, 2000, in Philadelphia, Pennsylvania, pursuant to a compliance specification issued on October 27, 1999 by the Regional Director for Region 4 of the National Labor Relations Board (the Board) alleging that the Respondents, Electric, Inc. and Cebcor Service Corporation, as joint employers, owed discriminatees James Conroy and Robert James certain backpay pursuant to an unpublished Order issued by the Board in this case on April 23, 1997, enforced by judgment of the United States Court of Appeals for the 5th Circuit on October 9, 1998. In their answer to the compliance specification, the Respondents admit that the formula used by General Counsel to determine the gross backpay amounts due the discriminatees is appropriate, but denies that the amounts alleged to be owed to Conroy and James are accurate because they do not reflect the interim earnings of these individuals.

All parties were afforded a full and fair opportunity at the hearing to call and examine witnesses, and to present oral as well as written evidence. At the conclusion of the hearing, I issued a bench decision, found at transcript page 43, line 7 through page 47, line 20, pursuant to Section 102.35 of the Board's Rules and Regulations, finding that the Respondents had not shown that James Conroy and Robert James had interim earnings which should be deducted from their gross backpay amounts, and that the Respondents therefore remained liable to James Conroy and Robert James for the amounts of backpay set forth in the Compliance Specification, with interest.¹ That decision, as corrected, is hereby certified as accurate and is attached hereto and marked "Appendix."

¹ During the hearing, I denied the Respondents' request for a "recess" purportedly to obtain documentary evidence to show that Conroy, in his capacity as union president and organizer, had received wages from the Union which they claim constituted interim earnings which should have been, but were not, deducted from his gross backpay amount. The Respondents had ample time before the start of the hearing to obtain any such documentary evidence but failed to do so, and offered no explanation as to why they could not have done so. In light of these facts, the Respondents' belated request for a "recess" to obtain such evidence was properly denied. See, *United Enviro Systems*, 323 NLRB 83, 86-87 (1997). More importantly, however, in *Ferguson Electric Co.*, 330 NLRB 514 (2000) the Board, as the General Counsel correctly pointed out at the hearing, held that such earnings by a union organizer is akin to earnings obtained by employees who engage in "moonlighting" outside their regular employment and are not "interim earnings" which must be deducted from gross backpay. Here, the Respondent conceded at the hearing that Conroy had held the position of union president/organizer since 1988. Therefore, assuming arguendo that Conroy did receive wages from the Union in connection with his activities as union president and organizer, said wages presumably were being paid to him long before he applied, and was unlawfully rejected, for a position with the Respondents. In these circumstances, I find, as argued by the General Counsel at the hearing, that the evidence the Respondents sought to obtain during the requested "recess" pertaining

[Recommended Order omitted from publication.]

APPENDIX

[Errors in the transcript have been noted and corrected.]

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Okay, having heard—having allowed the parties an opportunity to present their case, I'm issuing a Bench Decision in the matter. Typically I'll issue a written decision, but I think the issues are not very complicated here and are pretty straight forward, so I'm issuing the following Bench Decision.

This matter was first raised before Administrative Law Judge Michael J. Miller back in 1997, March 7th, to be exact. Judge Miller issued a decision in the matter against Electric, Inc. and Cebcor Services finding that the Respondents had violated Section 8(a)(1) and (3) of the National Labor Relations Act by refusing to offer discriminatees Robert James and James Conroy employment because of their membership in the union, the Brotherhood of Electrical Workers of Local Union 654. The parties were afforded an opportunity at that time to present evidence, after which the Judge issued his decision to which no exceptions were filed. The Board thereafter affirmed Judge Miller's decision in 1997.

to Conroy's union wages was irrelevant as such wages did not constitute interim earnings under *Ferguson Electric*, supra.

I reject as without merit the Respondents' implicit suggestion at the hearing that the discriminatees' absence from the hearing hampered their efforts to prove that the discriminatees had interim earnings. The General Counsel, it should be noted, was under no obligation to produce the discriminatees at the hearing to be examined by the Respondents regarding their interim earnings. *Steve Alois Ford*, 190 NLRB 661 (1971); also, *Domsey Trading Corp.*, 325 NLRB 429, 430 (1998); *Colorado Forge Corp.*, 285 NLRB 530, 541 (1987); *O.K. Machine & Tool Corp.*, 279 NLRB 474, 480 (1986). Rather, the burden of calling the discriminatees to prove they had interim earnings rested exclusively with the Respondents. *Superior Warehouse Grocers*, 282 NLRB 802, 804 (1987); *Ace Electric Construction Corp.*, 281 NLRB 584, 585 (1986). I find nothing in the record to suggest that the Respondents made any effort to insure, either through voluntary compliance or through the issuance of subpoenas, that the discriminatees would appear to testify. Thus, to the extent Respondents felt disadvantaged by the discriminatees' absence from the hearing, this was a product of their own neglect and nothing more.

In light of Conroy's and James' failure to appear at the hearing, and consistent with established Board policy, I shall recommend that the amounts of backpay set forth in the Compliance Specification for these individuals be paid to, and be held in escrow by, the Regional Director for Region 4 for a period not exceeding 1 year from the date of this supplemental decision. *Woonsocket Health Centre*, 263 NLRB 1367 (1982); also *Beckley Belt Services And Roofing Co., Inc.*, 289 NLRB 1179 (1988). The 1-year period will commence when the Respondents comply by depositing the backpay in escrow, or on the date the Supplemental Decision and Order in this case becomes final, including enforcement, whichever is later. *Starlight Cutting*, 284 NLRB 620 (1987); *Iron Workers Local 373 (Building Contractors)*, 295 NLRB 648, 656 (1985). In the event any or both of the discriminatees appear to collect their backpay, the parties will be offered an opportunity by the Regional Director to produce evidence and/or examine said discriminatees regarding their interim earnings. *Woonsocket Health Centre*, supra.

The General Counsel thereafter petitioned for enforcement before the Fifth Circuit U.S. Court of Appeals. My understanding is that

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no opposition was filed thereto and the Fifth Circuit entered a judgment against the Respondents on October 9th, 1998.

The General Counsel thereafter, following an investigation, issued a compliance specification on October 27th, 1999 setting forth the amount of back pay owed to Mr. James and Mr. Conroy. As set forth in the specification, and correct me if I'm wrong Ms. Hollo, but Mr. James' back pay totals \$6,449.20 and that's not including interest?

MS. HOLLO: Correct.

JUDGE ALEMAN: And, the specifications set forth for Mr. Conroy's back pay entitlement in the amount of \$20,871 excluding interest.

MS. HOLLO: Correct, Your Honor.

JUDGE ALEMAN: The parties were served—duly served with a copy of the compliance specification as indicated by the return receipts showing proof of service. It was sent by certified mail, return receipt requested, and that's been entered into evidence as part of General Counsel's Exhibit GC-1.

The Respondents, in fact, filed an answer to the compliance specification in which they do not dispute and do not contest the manner in which the General Counsel arrived at the back pay figures—the gross back pay figures and the only issues raised by the Respondents in their answer goes to the question of whether or not these individuals had interim earnings which were not reflected in the compliance specification.

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The General Counsel presented no witnesses at the hearing and relied on the presumption that the General Counsel meets its burden simply by establishing that the gross back pay figures are accurate and that the manner in which they were computed was appropriate. The Respondent has not objected to that and, in fact, concedes as much in its answer. Therefore, I find that the General Counsel has met her burden of proof with respect to the amounts set forth in the compliance specification.

The burden under Board Law then shifts to the—it's not a shifting burden, it's really a burden of proof that gets imposed on an employer with respect to whether or not an individual has mitigated his liability. Let me just read from a decision issued by the Board, it's a supplemental decision issued by the Board on September 30th, 1997 in the case of *A.P.R.A. Fuel Oil Buyers Group, Inc.*, 324 NLRB 630 (1997). There, the Board adopted Administrative Law Judge Raymond Green's decision which set forth, as follows, the appropriate burdens of parties in a compliance proceeding. Thus, once the General Counsel has shown the gross back pay due, as occurred in this case, the Employer has the burden of establishing affirmative defenses which would mitigate its liabilities, including willful loss of earnings, and the interim earnings which must be deducted

from the back pay award. The Respondent and Employer does not meet its burden of

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proof by presenting evidence of the lack of employee's success in obtaining interim employment or so-called incredibly low earnings, but must affirmatively demonstrate that the employee did not make reasonable efforts to find interim work. Significantly, the judge also noted that an employer cannot merely rely on cross examination of the claimant and allegedly impeaching testimony. The evidence must establish that during the back pay period there were sources of actual or potential employment that the claimant failed to explore and must show if, where, and when the discriminatee would have been hired had they applied.

Basically that's the standard that the Board uses in compliance proceedings. Here, the Respondent has presented absolutely no evidence whatsoever to show that either Mr. James or Mr. Conroy had interim earnings which were not reflected in the compliance specification numbers. The Respondents suggest that because Mr. Conroy worked for the union, that somehow—that some inference should be drawn that therefore there were interim earnings. However, the Respondent's burden is to produce—to come forth with this evidence, and not just rely on speculation or conjecture, which, I find, is all that has been presented in this case.

The Respondent also suggest, implicitly, that because—is it Mr. Conroy that had all of this property, sir? Mr. Stevenson?

MS. THUMANN: Yes.

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JUDGE ALEMAN: Mr. Conroy had certain properties, he presumably would not have accepted a job offer in Texas; again the claim lacks evidentiary support and is based on sheer speculation. The bottom line is if you—if an Employer wishes to toll its back pay liability, it has an obligation to at least make a good faith offer of employment and not simply to speculate that it need not do so because the individual would not, in any event, have accepted any such offer. That argument, in my view, is a very feeble one which, as previously noted, was rejected in *United States Can Company*, 328 NLRB No. 45 (1999), which addressed that particular issue.

So, I find no merit whatsoever to the Respondent's defense. In fact, I find no defense whatsoever was presented in this case, that the General Counsel has made out a prima facie case, and that the Employer is, in fact, liable for the amounts set forth in the compliance specification.

ORDER

It is ordered that the Respondents comply with the Compliance Specification and pay the amounts owed to the individuals named therein.