

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE**

**MILLENNIUM MAINTENANCE &
ELECTRICAL CONTRACTING, INC.**

AND

CASE 2-CA-35054

**LOCAL UNION NO. 3 INTERNATIONAL
BROTHERHOOD OF ELECTRICAL
WORKERS, AFL-CIO**

*Darma A. Wilson Esq., and
Rita Lisko Esq.,* Counsels for
the General Counsel
*Mark S. Mancher Esq., and
Steven S. Goodman Esq.,* for the
Respondent

DECISION

Statement of the Case

Raymond P. Green, Administrative Law Judge. I heard this backpay case in New York City on July 12, 2004.

The Board issued a Decision and Order in the underlying unfair labor practice proceeding on September 11, 2003. That Decision required the Respondent to make whole, with interest, the discriminatee, Ilya Kleyn for any loss of earnings that he suffered by reason of his unlawful layoff on October 10, 2002 and an unlawful reduction in his pay.

Based on the evidence as a whole, including my observation of the demeanor of the witnesses and after consideration of the Briefs filed, I hereby make the following findings and conclusions.

Findings and Conclusions

At the opening of the hearing the General Counsel amended the Backpay Specification to lower the amount of net backpay during the first quarter of 2003 from \$13,800.00 to \$9,962.00. Needless to say, the Respondent did not object. The total amount of net wage earnings claimed is \$25,378.00.

There is no dispute concerning the General Counsel's calculations regarding gross backpay and this is set forth in Appendix A to the Specification. The parties also stipulated that the amount due to an Annuity Fund on behalf of Kleyn would be \$1408.00. Finally, the parties agreed that the backpay amount should include \$400.00, which is the amount of out of pocket

dental expenses that Kleyn incurred that would have been covered by the Respondent but for his layoff on October 10, 2002.

5 The parties agree that the backpay period commenced on October 10, 2003. The General
Counsels assert that the backpay period ended on June 24, 2003, when it is conceded that the
Respondent made a valid offer of reinstatement. As to interim earnings, the General Counsels
conceded that Kleyn obtained employment starting on February 10, 2003 and they calculated his
10 net backpay based on the difference between his gross earnings at the Respondent and the
earnings he received after February 10, 2003. As noted above, the General Counsel, at the
outset of the hearing, made an arithmetical correction, which reduced Kleyn's net interim
earnings for the first quarter of 2003.

15 There are two issues raised by the Respondent. The first is whether Kleyn refused a valid
offer of reinstatement made in or about November 2002. The second issue is whether Kleyn
made a genuine effort to look for other employment during the backpay period.

20 There was testimony to the effect that at some point after his layoff, Kleyn phoned
Respondent's owner, Marcelo Aspesi to complain about some statements that were allegedly
made about him to other employees in the Company. Aspesi claims that as part of that
conversation, he told Kleyn that he might have another job coming up and asked if Kleyn would
be interested in coming back. Aspesi asserts that Kleyn hung up without responding.

25 The record shows that the Respondent obtained a contract from MKG Construction and
Consulting for a job at 99 Park Avenue, New York City. But that contract was signed well after
the alleged offer was made to Kleyn. Further, the Respondent did not confirm this alleged
employment offer in writing at any time either before or after the contract was signed. Kleyn
credibly testified that he never received an oral offer of employment in connection with the 99
30 Park Avenue job or in the context of the phone conversation described above. Finally, I note that
the record shows that there were settlement discussions that took place between the
Respondent's attorneys and the Regional Office in November or December 2002, where the
Company offered Kleyn a sum of money if he would waive reinstatement.

35 An oral offer of reinstatement can be valid. *Hoffman Plastic Compounds*, 314 NLRB
683. In this case, however, the Respondent has not persuaded me that it made a valid offer until
June 24, 2003. The Respondent's own witness testified as to what would amount to, at best, a
conditional offer for a job that might come up. Further, I credit Kleyn's testimony that no such
40 offer was made.

45 Kleyn testified that after his termination by the Respondent he contacted Mitch Dakin, a
shop steward for Local 3 who was involved in the organizing campaign. He states that Dakin
told him that work in the industry was slow and that he would have to wait.

According to Kleyn, immediately after October 10, 2002, he undertook a search for work
on his own by responding to ads in the newspapers and by utilizing the web site
www.hotjobs.com. Kleyn testified that he contacted many electrical contractors and supply
50 companies over the next five months but was unable to get an offer until February 5, 2003. And
a few days after he received the offer, he also got word from Local 3 representative that he could
go to work at a shop having a contract with Local 3. Faced with the two offers, Kleyn opted for

the union job and went to work for JDF on February 10, 2003.

The Respondent claims that the Union, with the assent of Kleyn, entered into an agreement whereby Kleyn would remain out of work for three or four months so that the Respondent would be liable for at least that amount of backpay. In this regard, the Respondent points to a recording of a meeting that was held at the Union's office in April 2003 where Vincent McElrean spoke to some of the Respondent's employees. This recording was made by Robert Lopez who is an employee of the Respondent. (I note that Lopez was the shop steward for the rival union, Local 363 United Service Workers, AFL-CIO, and that he openly expressed his support for that Union as opposed to Local 3). In any event, the Respondent introduced into evidence a tape and transcript of a small portion of the meeting where McElrean spoke about Mr. Kleyn. The transcript, to the extent relevant here, reads as follows:

That's the other thing I want to clear up ... that Ilya got fired as you well know back in October. Alright. And we sat and spoke to Ilya about that. We could of put him out to work right away but we felt that Millennium did wrong and under the law.... if he went to work right away then the only thing that Millennium would be liable for is if they were found guilty of violating his rights, would be the difference. So let's say he was making \$500 with Millennium and he was making \$525 Local 3 – he would be entitled to nothing from Millennium. You see. Now, so what was decided was that no, you've got a good case and Millennium ought to have to cough something up in order to make that right. Okay. And what happened here where he's concerned – so we agreed that if he stayed out of work for 3 months, I think it was, or 4 months, alright, but was collecting unemployment during that who period of time, so as long as he's getting unemployment we weren't feeling too guilty about it. We didn't feel great about what we were doing but we wanted Millennium to be in a position to where they owed him something. ¹

According to Lopez, when McElrean made the foregoing statements, all the people at the meeting looked at Kleyn who nodded his head in an affirmative manner.

There is no dispute that McElrean made the statements described above. But he testified that he made them in the context of a much longer presentation where he was trying to show employees that despite claims by the rival union, Local 3 could exercise some real power. He testified that his statements that the Union decided to not get Kleyn another job was a bit of puffery made to demonstrate that if employees were discharged for their union activity, the Employer would be forced to suffer a monetary loss.

¹ The transcript goes on and McElrean describes a different transaction involving an article 20 proceeding at the AFL-CIO in Washington, (where Kleyn was asked to be a witness by Local 3), and after which, there were settlement discussions between the Respondent and the Regional Office in relation to the charge and Kleyn's discharge. McElrean told the employees at the April meeting that although the Employer offered a sizeable amount of money to Kleyn, its lawyers insisted on a waiver of reinstatement that Kleyn, with the gratitude of the Union, refused to waive. McElrean pointed out that Kleyn's decision to insist on reinstatement would mean that he could vote in the election if he won the unfair labor practice case and that "he made a sacrifice is what it comes down to." As the article 20 proceeding took place in late October or early November 2002, the settlement discussions must have taken place at a somewhat later time.

5 McElreon testified that he did not make any agreement with Kleyn that the latter should not look for or accept other employment. He testified that, in fact, an inordinate number of Local 3' s members were out of work in the fall and winter of 2002 as a result of the economic recession that hit New York particularly hard. McElreon testified that he could not have gotten Kleyn a job anyway.

10 Similarly, Kleyn credibly denied that he ever made such an agreement with any representatives of Local 3. He testified that he did in fact diligently look for work after his layoff on October 10, 2003. ²

15 The recording is intriguing. But a close listening of the recording shows that there is nothing that amounts to an explicit admission by McElreon or Kleyn that Kleyn had agreed, back at the time of his layoff, to forego a job search for the purpose of imposing a monetary liability on the Respondent.

20 Once the General Counsel has shown the gross backpay due in the Specification, the Employer has the burden of establishing affirmative defenses which would mitigate its liability, including willful loss of earnings and interim earnings to be deducted from the backpay award. *NLRB v. Brown & Root, Inc., et al.*, 311 F.2d 447, 454 (8th Cir. 1963); see also *Sioux Falls Stock Yards Company*, 236 NLRB 543 (1978). Respondent does not meet its burden of proof by presenting evidence of lack of employee success in obtaining interim employment or of so-called "incredibly low earnings, but must affirmatively demonstrate that the employee did not make reasonable efforts to find interim work. *NLRB v. Miami Coca-Cola Bottling Company*, 360 F.2d 569, 575-76 (5th Cir. 1966).

30 In backpay cases, the discriminatee is required to make a reasonable search for work to mitigate backpay. *Lizdale Knitting Mills*, 232 NLRB 592, 599 (1977). But he or she is only required to make reasonable exertions, not exercise the highest standard of diligence. The Act does not require that a search be successful; only that it be an honest good faith effort. The burden of proof is on the Respondent to show that a claimant has failed to make an effort or that he or she willfully incurred losses of income or was otherwise unavailable for work during the backpay period. *NLRB v. Pugh & Barr, Inc.*, 241 F.2d 588 (4th Cir. 1956). Where there are doubts, they are resolved in favor of the discriminatee and not the Respondent, which is the wrongdoer. *United Aircraft Corp.*, 204 NLRB 1068 (1973). In determining whether a good faith effort was made the Board may consider all his circumstances including the economic climate in which the individual operates his skills and qualifications, his age and his personal limitations. *NLRB v. Madison Courier Inc.*, 472 F.2d 1307 (D.C. Cir 1972),

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50 ² Kleyn testified that he was unaware that there was a union/employer referral service and that he didn't register for employment there.

In view of all the foregoing, I shall recommend the issuance of the following

ORDER

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The Respondent, Millennium Maintenance & Electrical Contracting, Inc. shall pay the following amounts to or on behalf of Ilya Kleyn.

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Net Backpay	\$25,378.00 plus interest.
Dental Expenses	400.00.
Local 363 Annuity Fund	1480.00 plus interest. ³

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Dated

Washington, D.C.

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Raymond P. Green
Administrative Law Judge

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³ Pursuant to *Merriweather Optical Co.*, 240 NLRB 1213 (1979), interest on the payments to the Annuity fund are governed by the interest rates established by the appropriate trust document.