UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA

DESERT AGGREGATES, INC.

and

Cases 32–CA–18653-1
32–CA–18726-1

OPERATING ENGINEERS LOCAL NO. 3, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL–CIO

Gary Connaughton, Oakland, Calif., for the General Counsel.
Paul V. Simpson, of *Simpson, Garrity & Innes,* South San Francisco, Calif., for Respondent.

SUPPLEMENTAL DECISION

Statement of the Case

JAMES M. KENNEDY, Administrative Law Judge: This compliance hearing was tried in Visalia, California on September 15-16, 2004. The underlying Board order (340 NLRB No. 38) was issued on September 23, 2003. That order required Respondent, its successors and assigns, to make whole two employees for losses due to their discriminatory layoff in January 2001. Initially, the order required backpay only until their recall in April 2001, but the Board modified its first order, granting the General Counsel's motion for reconsideration on December 31, 2003. Thereafter, a dispute arose over two issues with respect to discriminatee Mark Gregg. As a result, the Regional Director for Region 32 issued a compliance specification on June 29, 2004. Respondent properly filed an answer to the compliance specification on July 20, 2004. Both the General Counsel and Respondent have filed briefs and they have been carefully considered.

The issues, as presented are twofold: first whether Respondent's recall notice to Gregg dated March 27, 2001 and his response to it tolled backpay and, second, if it did not toll backpay, whether the Regional Director's backpay calculation was correctly calculated, given Respondent's assertion that Gregg had failed properly to mitigate. The first issue is a threshold issue, for if the recall was valid, no backpay would be due, even for the period of the layoff since Gregg was unable to work during that period. The compliance specification seeks a total of $77,963.97, plus accrued interest. The bulk of that money is attributable to a period of time where Gregg had purchased a party rental and small printing business, beginning in March 2003. Earlier backpay quarters had, in large part, been offset by interim earnings. Gregg eventually rejected a second job offer of April 26, 2004, an offer which Respondent made at the behest of the Board's Regional office.

The Board's Findings of Fact and Some Background

In its initial decision of September 23, 2003, the Board reversed the administrative law judge pertaining to the layoffs of Gregg and the second employee (Miller). It found that the administrative law judge had erred in concluding that Respondent had rebutted the General Counsel's prima facie case. Essentially, the Board found that Respondent's reason for selecting Gregg and the other employee for layoff was not persuasive. Respondent had argued that the two were selected for layoff during a planned seasonal shutdown because they did not have plant maintenance skills, while those employees it kept did possess those skills. The Board found Respondent's explanation unpersuasive because in previous years it had kept those two aboard during the seasonal shutdown even though they were not capable in plant maintenance. It concluded that the two had been laid off because of their organizing activity on behalf of the Charging Party, International Union of Operating Engineers, Local 3, AFL–CIO.

In reaching these conclusions, the Board specifically stated: "The Respondent's rock plant is a *seasonal operation*. During the slow months at the beginning of each year the Respondent focuses on maintenance and repair of its equipment . . . Gregg runs the rock plant." 340 NLRB No. 38, sl. op. at 4. Later in the decision, during its discussion of the General Counsel's allegation, which the Board rejected, that a bargaining order was the appropriate remedy, the Board stated: "Here, the Respondent unlawfully solicited and promised to remedy employee grievances and *laid off two leading union supporters [including Gregg] for a 3-month period."* Id., sl. op. at 6. (Italics supplied.)

Therefore, although the Board found Respondent had unlawfully chosen Gregg for the seasonal layoff on January 8, 2001, it nevertheless observed that Respondent had recalled Gregg on March 27, 2001, leading it initially to say the backpay remedy was to cover only the period of the layoff. In response to the General Counsel's motion, arguing that the validity of the recall letter had not been litigated, the Board reconsidered and ordered Respondent, "if it had not already done so," to reinstate Gregg and make him whole for lost earnings "from the date[ ] of [his] unlawful layoff[ ] until the date on which the Respondent makes or has made [a] valid reinstatement offer to [him]." 340 NLRB No. 170 (2003).

The language of the modified order permitted the Board, at the compliance stage, to determine whether the March 27 recall was or was not valid. Even so, nothing in the modification changed its underlying finding of fact that Respondent was a seasonal business and that Gregg had been laid off for the 3-month plant maintenance period.

What that finding means, is that Gregg had never been discharged from his job, but only subjected to a seasonal, albeit unlawful, layoff. That conclusion is plain because the Board was clearly aware that Gregg had been sent the recall later in late March. In making that observation the Board, for the time being, eliminated the possibility that Respondent had used the term 'layoff' euphemistically in order to conceal a discharge. Gregg, therefore, had not yet been found to be a dischargee. Further inquiry would not be required unless the recall could be determined, on some other basis, to be invalid. Such possibilities might include an excessively short period of time to report back to work, [1] a reasonably perceived continuation of

---

[1] The rule of law on this point is set forth in *Esterline Electronics Corp*., 290 NLRB 834, 835 (1988). There the Board said that if a discriminatee receives an unconditional offer of reinstatement with a report-back date, it will not be found invalid simply because the period seems extremely short. It will be found invalid if the offer is to lapse if the employee's decision is not made by that date. The case requires the employee to respond to such a letter, if only to ask for additional time.

discrimination [2] or unduly onerous work assignments. [3] Any of these might lead the Regional Director to reasonably argue that the recall was not in good faith, that the employer had rejected any obligation to comply with the Act, and that the layoff had proven to be a disguised discharge. The Board's modified order permitted the litigation of such issues. The compliance specification, however, never made such a claim.

It will be recalled that Respondent operates an aggregate quarry and asphalt plant near Ducor, California. Ducor is a small community with fewer than 350 residents, according to a population sign. (The 2000 census lists a population of 504.) It is located in rural Tulare County approximately 15 miles south of Porterville. The area is sparsely populated and employment opportunities are limited, even for able workmen such as Gregg. Gregg is a skilled heavy equipment operator, having about 25 years of experience. While employed by Respondent, not only did Gregg operate heavy equipment such as bulldozers and loaders, he also drove haul trucks, water trucks, operated the excavator and, as the Board said, ran the rock plant. He can also operate road scrapers and blades and no doubt other types of heavy equipment as well. His hourly wage at the plant was a little over $14 per hour, less than half the union construction scale of almost $30 per hour, not including fringe benefits. Gregg lives in Springville, a small town northeast of Porterville. Indeed, to commute to the Ducor plant on Old Stage Road, Gregg had to drive partway into Porterville. His drive, according to Yahoo Maps, is a one-way trip of about 22 miles. (Ducor, itself, is somewhat further.)

On January 2, 2001, shortly before Gregg's layoff on January 8, his attorney, Lawrence T. Musso, signed and shortly thereafter filed, a Workers' Compensation application on his behalf, citing occupational stress as a work-related medical condition requiring a treatment award. Although Respondent received notice of Gregg's claim, is not clear on the record when that occurred; it had become aware of the claim by late March when it came time to recall him from the layoff. That awareness led to a request in the recall letter asking Gregg to provide the medical release required of workers returning from Workers' Comp leave. That request is not challenged as unreasonable.

By letter of March 27, 2001 (a Tuesday), plant manager Bruce Bunting wrote Gregg the following letter referencing 'Recall':

> Dear Mark:
>
> Desert Aggregates is recalling you from layoff on [Tuesday] April 3. Please report to work at 8:00 A.M. Your primary duties will be to drive the water truck, the haul truck and to run the excavator; other duties will be assigned as appropriate. You will receive the same wages that you received when you last worked at Desert Aggregates. Medical Benefits will be available if and when you have worked for Desert Aggregates for another three (3) months.
>
> Please confirm your availability to return to work by [Friday] March 30, 2000 (sic). [4] We will also need a doctor's release for your return to work on April 3.

Upon receiving the recall letter, Gregg decided not to speak directly to Bunting even though he had some questions. His main issue was to clarify his status, given that he was on Workers' Comp and to determine if the reporting date could be moved to accommodate any

---

[2] *Rainbow Coaches*, 280 NLRB 166, 184 (1986), enfd. as mod. 835 F.2d 1436 (9th Cir. 1987), cert. den. 487 U.S. 1235 (1988).

[3] *Eastern Die Co.*, 142 NLRB 601 (1963) (employees Arel, Gagna, Fortier and Polley), enfd. 340 F.2d 607 (1st Cir. 1965); *Research Designing Service*, 141 NLRB 211, 216-217 (1963).

[4] An obvious typographical error. The writer meant 2001.

release for work issues. Yet, he did not call Bunting to resolve those questions. Instead, he consulted his Workers' Comp lawyer Musso and, with Musso's help, wrote a letter saying, inter alia, that such communications should be through the lawyer. Correspondingly, Gregg urged Respondent also to utilize its lawyer. He did say he would attempt to locate the work release documentation.

Gregg's letter:

> Dear Mr. Bunting:
>
> I received your recall of layoff notice on March 29. Due to short notice and your requirements for my return, I am unable to provide the necessary documentation on by (sic) the date requested. I am requesting a postponement of my return to work date in order to consult with my treating medical professionals. Throughout the next week, I will attempt to secure the proper documentation needed, if it is determined that I am able to return to work. If you have any further questions, please contact:
>
> Lawrence T. Musso, Attorney at Law
> [Address, telephone/fax numbers and e-mail address omitted]
>
> Or, your Attorney.

Gregg's behavior is most peculiar. He knew he was on layoff status and the Company was recalling him as expected; why would he not at least pick up the telephone to call Bunting? Assuming he needed Mr. Musso's advice, what purpose was served by asking Respondent to communicate with him through Musso, much less asking Respondent to use its own lawyer to do it? During the hearing, Respondent's counsel pursued the matter in more depth. Gregg's testimony:

Q BY MR. SIMPSON: Okay. Now, in terms of your relationship, I want to take you back to your March 30, 2001 letter, Respondent's 1, and -- I may be missing something here, but your message to the company was if it had any further questions, it should contact your attorney; correct?
[Objection interposed]
Q BY MR. SIMPSON: -- was that [if] they had any further questions, that they should contact your lawyer. If you'll read that last sentence, please.
A (WITNESS GREGG) Yes.
Q Isn't that the intent of that?
A That's what that says.
Q Okay. And in fact you didn't want to be speaking to any company manager, including Mr. Bunting at Desert Aggregates at that time; isn't that right?
A That's correct.
Q And in fact, sir, isn't it a fact that as far as you were concerned, and you represented this to workers' compensation judge at some point during the point during the case, in 2001, that Mr. Bunting and other managers were causing you so much stress that you did not want them to even be present for your deposition in your workers' comp case. Do you remember that, sir?
A That's correct.
[Objection interposed]
Q BY MR. SIMPSON: Is that correct, sir?
A Correct.
Q And isn't it a fact, sir, that the Judge in the workers' comp case granted you a court order that said that Mr. Bunting could not be present in the same room as you when you gave a deposition in a workers' comp case?
[Objection interposed]

Q BY MR. SIMPSON: Yes, didn't the workers' comp judge issue an order saying that Mr. Bunting could not go in to the deposition?

Actually, that wasn't the question. He answered that one. Isn't it a fact, Mr. Gregg, that you did not want to work in the same environment as Mr. Bunting in 2001 because he was causing you a great deal of stress?

A Correct.

[Objection interposed]

Q BY MR. SIMPSON: Let's try it for the third time. Isn't it a fact, Mr. Gregg, that in 2001 you did not want to be working in the same workplace with Mr. Bunting?

A That's correct.

Q And so when it came time for you to go back to work after you were released by your doctor, you had no interest in going back to work for Mr. Bunting; did you, sir?

A I was advised not to.

Q Okay. My question to you is you had no interest in going back there; isn't that correct?

A That's correct.

Q And when you say you were advised not to go back to work there, who advised you not to go back to work there?

A Dr. Geshuri.

Q And you were following your doctor's advice as far as you were concerned?

A Yes, I was.

As Gregg testified, the next communication to Respondent came from licensed psychologist Yosef Geshuri, Ph.D., of the Center for Health and Behavior in Porterville. On April 6, 2001, Dr. Geshuri sent Respondent a certificate of unfitness for duty stating that Gregg "is unable to perform his duties" from April 1 to May 15, 2001. He commented: "Due to stress and anxiety working around and being severely allergic to honey bees."

The honeybee allergy and stress had not been mentioned in attorney Musso's January Workers' Comp application. That application had cited only 'occupational stress.' [5] It is therefore unlikely that the occupational stress claim of January 2001 and Dr. Geshuri's unfitness report 4 months later are clinically connected. Gregg, as an equipment operator, regularly works outside in all seasons, limited only by foul weather and muddy ground. Harmful insects are an assumed risk in his line of work. Assuming that Gregg is allergic to bee stings (which the record does not directly support), I entertain doubts that the risk of a bee sting is a legitimate ground for a discriminatee to decline a recall. (Besides, if Gregg is allergic to bee stings, he is no doubt sufficiently interested in self-protection to maintain immediate access to a bee sting kit and to wear protective clothing.) Even so, there is no evidence that Respondent was aware of Gregg's vulnerability. Oddly, Dr. Geshuri did not reference any source of stress other than honeybees. Dr. Geshuri's reasons, of course, do not square with the January Workers' Comp claim. Certainly honeybees are an unlikely source of job stress in December and January; it's too cold, even in relatively mild Tulare County.

---

[5] Although I declined to receive GC Exh. 7 as being too remote in time to be relevant, it appears Gregg had, 6 months earlier, filed a claim for Workers' Comp benefits on July 11, 2000 for something involving an insect; whether bee or something else, he could not say. His claim said, "While running a loader something bit me in the back." There is no suggestion of an allergic reaction in this incident. It may have been a honeybee or yellow jacket sting, but based on his own description it seems more likely to have been some kind of biting fly such as a horsefly, deerfly or similar. Whatever it was, it had no connection to the 'occupational stress' complaint of January 2001.

Despite Dr. Geshuri's May 15, 2001 proposed fitness date, Gregg did not contact Respondent to advise he could return. There is no showing what his fitness for duty was between May 15 and September 2001. After notifying Bunting of his unavailability in early April, had Gregg remained in contact he would have discovered that Respondent had work available.

Bunting testified that the letter he sent Gregg was a standard letter sent anyone who had been off work for more than 60 days. He also testified that Gregg never objected to any of the terms set forth in the recall letter, including the waiting period for the health plan.

Moreover, Respondent's health plan was of little or no interest to Gregg. It only covered him, not his wife and children. It does not appear that he had ever used it, nor is it entirely clear that he had even signed up for it. The principal health coverage for Gregg and his family came from his wife's long-term employment with the California State Department of Health. The cards from that HMO were on file with the medical providers the family had chosen under that plan. [6]

---

[6] Gregg's wife Shawna principally handles the family's financial matters. Her health plan, the state-connected HMO, was no doubt directly billed for services. The same cannot be said for Respondent's plan, since it does not appear to have been an HMO. Her testimony regarding the use of Respondent's health plan was too vague to be certain the Company plan was even known to their medical providers. She can only "assume" that it was, but clearly does not know:

[WITNESS SHAWNA GREGG]: Generally speaking, we've consistently used my health plan, just simply because it is a better plan. Mark has had insurance when he worked at Desert Aggregate, and I assume that both medical cards were on file. Which one was billed for services, I wouldn't know because the medical provider would bill the insurance directly.
JUDGE KENNEDY: You wouldn't know how that would be handled?
THE WITNESS: No, I would not.

Gregg's rejective attitude toward the health plan of whomever employs him continues to be seen when one focuses on the health plan which came to him in September 2001 through his Calhoun Brothers job, work governed by the Local 3 collective bargaining contract. See his testimony in the footnote. [7]

Plant manager Bunting next acknowledged receipt of Gregg's certificate of unfitness from Dr. Geshuri. He explained Gregg's status at the time he received the certificate:

Q (BY MR. SIMPSON) Now, at the time you received this document, Mr. Gregg had been recalled from lay-off; correct?
A (WITNESS BUNTING) Yes.
Q So he was no longer laid off as such; correct?
A Yes, he was now on workers' comp.
Q So you say he is now on workers' comp. Was he on some form of leave based on this document?
A He was -- he was saying that he couldn't work based on his workers' comp injury.
[Objection interposed]

---

[7] Q (By MR. SIMPSON) And isn't it a fact, sir, at the time you first began working at Calhoun, you were not -- you personally were not covered for benefits under the Operating Engineers health and welfare plan?
A (WITNESS GREGG) I have no idea. I was covered under my wife's.
Q Okay. And isn't it a fact, sir, that your first job with a Local 3 Operating Engineer Union company working under a Union contract was your job for Calhoun in September of 2003?
A Correct.
Q And, sir, isn't it also a fact -- and, by the way, when you signed up with Local 3, who was the person from Local 3 that sat down with you and explained to you what union membership was all about, including the benefits and the dues and the information that one would normally expect to have when they joined the Union?
A Nobody.
Q No one. Just went in and did what? How did you become a member?
A They gave you a book. And it explains it all. Whether I choose to read it or not. I was there to get a job and make money.
Q Did you read the book?
A No, I did not.
Q Did you give it to your wife to read?
A It's sitting in the house.
Q Well, that's not my question.
A I didn't hand it to her to read, No.
MR. CONNAUGHTON: Objection, relevance. Whether he --
ADMINISTRATIVE LAW JUDGE KENNEDY: All right. I understand what he said, Yes.
Q BY MR. SIMPSON: Didn't someone explain to you from Local 3 -- anyone from Local 3 explain to you at some point in time that you would need to work a certain number of hours and a certain number of months for a union company before you were covered under the Operating Engineers health plan?
A No.
Q Sir, isn't it a fact that someone from Local 3 talked to you to be sure that you were going to cover -- be covered under your wife's plan because there would be a period of time that you were not covered under the Calhoun Brothers plan?
A Not to my recollection, No.
Q Okay. All right. Is it -- so it's a fair statement to say you don't even know whether you were covered under the Operating Engineers health plan for a period of time that you were working at Calhoun; correct?
ADMINISTRATIVE LAW JUDGE KENNEDY: That's true[?]
THE WITNESS: That's true.

Q BY MR. SIMPSON: What was your understanding of Mr. Gregg's leave status after -- based on the document you received on April 6th?
A Well, he had been on lay-off, and now we were aware that he couldn't come back to work because of his medical condition.
Q Now, as a result of that document, in which you interpret to mean that he could not come back as a result of the medical condition associated with his comp claim, did he have any priority rights to return to work?
A Generally, when somebody is laid off, they're -- they're the first people to be called back. And anybody who would be off for medical reasons, would get first priority to come back to work.

Respondent's procedure in that circumstance is simply to wait until the employee notifies them that they are ready to return. As noted, Bunting said such employees are treated with priority, subject to the commonsense requirement that Respondent had a sufficient workload. He added that Gregg would have been given priority over persons with less time with the Company than he.

When Bunting received Dr. Geshuri's certificate in April, he also realized that Gregg would not be available as soon as he had hoped. Accordingly, Respondent rehired Kenneth McDarmott. McDarmott had worked for Respondent in the past and was a known quantity. Bunting testified that had Gregg notified him in September that he had been cleared for work, Respondent continued to have work available; McDarmott's presence would not have interfered with Gregg's recall. Even if there had been insufficient work to employ two persons in that category, Bunting says Gregg's priority status would have come into play and he would have substituted Gregg for McDarmott. According to Bunting, Gregg's skills were too high to pass up. Bunting pointed out that equipment operators possessing Gregg's various skills are few in that corner of California. [8]

[8] Bunting qualifies as an expert in the field of hiring skilled equipment operators, having performed that task for 24 years, including 8 at the Ducor plant. He is also aware of the needs of nearby aggregate operations and their success rate in acquiring skilled equipment operators.

In September 2001, according to Gregg's somewhat tepid "belief", [9] his doctor released him to return to work. [10] His behavior continued to be unconventional for one seeking his job back. Instead of contacting Respondent and advising that he had been released for work, he notified the Charging Party, Operating Engineers Local 3. The Union, aware of Gregg's high level of skill, treated him as a journeyman, and referred him as heavy equipment operator to a heavy and highway contractor, Calhoun Brothers, near Hollister (San Benito County), more than 200 miles from his Springville home. Calhoun has a collective bargaining contract with Local 3. As a result of his employment there, Gregg joined that Union. Calhoun has been his employer ever since, except for the period when he operated the party rental and printing business he purchased in Porterville. He has worked for Calhoun for two distinct periods, the first being September 21, 2001 through March 2003 when he opened the Porterville business. During the 2001-2003 period he worked for Calhoun in a variety of locations in both the Monterey Bay and San Francisco Bay areas. This decision obligated him to find temporary quarters in those locations, but he would return to his Springville home on weekends and other periods of downtime. His decision to follow the Union's September 2001 lead to construction employment had the consequence of his never learning or, perhaps, choosing not to learn, that Respondent still had his job available for him under the terms of the recall letter. In the spring of 2004 he

---

[9] Although Gregg accepted a September release-for-work date as the premise in a question (see the next footnote), there is no on-the-record explanation concerning why Dr. Geshuri's certificate setting May 15, 2001 for release was not followed. Had he actually been released in mid-May, but chosen to wait for the Union to dispatch him to Calhoun? In part, that evidentiary void is due to the pleadings found in the backpay specification where the Regional Director conceded Gregg was disabled and not entitled to backpay before September 21, 2001. Respondent admitted no backpay was due for that period, but I do not find that admission to be a concession that Respondent ever agreed that a doctor had extended the May 15 return to work date; certainly not by 4 months. Dr. Geshuri's certificate suggested that the springtime honeybee risk would be over by mid-May and Gregg could resume work then. That is all Respondent really knows.

September 21, 2001, the date chosen as the start date for backpay, was actually the day Gregg began went to work for Calhoun Brothers in Hollister. One can be certain that that arrangement did not coincide with any work release. Time must have passed. Neither the date Gregg was released to return to work nor, if no written release was forthcoming, the date he actually became physically capable of returning, was ever litigated.

Gregg agreed that he was looking for a job where he could make the most money. He well knew if he could work under the Local 3 collective bargaining contract, his hourly wage would be more than twice as much as Respondent paid, and he thought he would be ahead financially no matter what the travel costs and inconveniences might turn out to be.

[10]The testimony on which the General Counsel relies for proof that the Worker's Comp declaration of unfitness had been extended is set forth below. It is singularly unimpressive as proof. Why wasn't another doctor's certificate presented? Was one ever issued?

Q (By MR. SIMPSON) And in fact you continued out on your workers' compensation work-related injury for a number of months; correct?

A (WITNESS GREGG) I believe so.

Q Isn't it a fact that you were not released to return to work until some time in September of 2001?

A I believe that might be the month, Yes.

Q And, your Honor, if I might address your attention to the back pay specification, and you don't need to look at it now, but General Counsel specifically notes the back pay period following the lay-off begins to accrue in terms of actual losses in or about September of, I think, 21, 2001.

turned over the daily operation of the party rental/printing business to an employee and returned to Calhoun Brothers in July. He was still working for Calhoun at the time of the hearing. About that time he had turned down Respondent's second reinstatement offer dated April 26, 2004. See p. 1, supra.

Analysis and Conclusions

Counsel for the General Counsel contends that Respondent's March 27, 2001 recall letter is invalid on its face. As will be seen below, I disagree. In particular, the General Counsel believes the reference to the 90-day waiting period for eligibility for the Company's health insurance plan renders the recall letter defective. Respondent counters by asserting that the health insurance issue was of negligible importance to Gregg, citing the record evidence described above in which Gregg had eschewed the Company plan in the past, had declined Local 3's plan when he was hired by Calhoun Brothers, and that the Greggs long ago had made a family decision to rely solely on the health plan provided Mrs. Gregg through her employment with the California Department of Health. In addition to Respondent's observation, I note that the letter's language pertaining to the Company health plan can reasonably be read as informational only. Significantly, there is no proof whatsoever that the language constituted a continuation of the discrimination, or that Gregg perceived that it did; in fact he did not so perceive it, because it the company plan had no value for him. Objectively, it can be seen as just an incidental benefit which any employee could choose if they wanted.

The General Counsel points to standard board law to the effect that if an employer wishes to toll backpay for a discriminatee, it must make an offer of reinstatement that is 'firm, clear, specific and unconditional.' The legal proposition, of course, is unremarkable. However, invariably the cases which apply that rule, and there are many, deal with discharges, not a discriminatory selection for a seasonal layoff and the expected routine recall upon the season's resumption. A seasonal layoff may easily be contrasted to a discharge. In the latter case, the employee expects to be recalled; in the former employee has moved on with his or her life and may well have obtained new employment. Such an employee needs a greater amount of specificity in order fairly to assess the risks of making a life-altering decision as he responds to a reinstatement offer. The Board does not want a discriminatee to quit an interim job only to find the job to which he is being reinstated has vanished. But with a seasonal layoff, the employee knows to a relative certainty that his job will resume upon the recommencement of business operations. Therefore, the policies behind the 'firm, clear, specific and unconditional' reinstatement offer do not really apply. All the seasonally laid-off employee needs to hear is a reporting date.

Indeed, it appears to me that the Board understood that was the extant situation at the time it issued its amended order. It knew Gregg had been seasonally laid off and recalled, notwithstanding that the layoff was discriminatory. It recognized, however, that there was still the possibility that the recall could be determined to be in bad faith. See the circumstances set forth in footnotes 1, 2, and 3. If any of those events had occurred, a compliance procedure would certainly have been appropriate, including a determination that the layoff had been a sham and that there had been no compliance with the law's requirements or the Board's subsequent order. However, the instant compliance specification has not claimed that the recall letter was made in bad faith; instead, the Director concluded that it was technically defective. Even so, assuming arguendo that the reference to the company health plan was inappropriate, it seems anomalous for that mistake, so inconsequential to the discriminatee, to cost nearly $80,000. That is a case of preferring form over substance or permitting the tail to wag the dog. In fact, the specification does not even include a claim for unpaid medical expenses for the entire 3-year period it seeks backpay.

Nevertheless, the General Counsel insists that the reference in the recall letter to the 90-day waiting period for the medical insurance constituted an impermissible condition upon Gregg's return. It should first be observed that the waiting period did not require Gregg to abandon any statutory right under the Act. The offer to him can easily be distinguished from the cases where reinstatement offers are conditioned upon a restriction against engaging in protected conduct; e.g., *Consolidated Freightways*, 290 NLRB 771, 772-773 (1988), enfd. as modified 892 F.2d 1052 (D.C. Cir. 1989), cert. den. 498 U.S. 817 (1990) (reinstatement offer required discriminatee to accept a warning arising from protected conduct); *All Pro Painting Co.*, 339 NLRB No. 157 (2003) (reinstatement conditioned upon agreeing not to organize union). Respondent's offer did not limit Gregg's behavior in any way. Therefore, to describe the 90-day wait as a condition seems to be an overstatement.

Not having immediate access to the company health plan might be a delay in accessing a desirable employment option, but that is not the type of condition to which the Board refers in assessing the validity of a reinstatement offer. The Board is only concerned about protecting the employee's unfettered right to continue his §7 activity under the Act. All the Board requires is that the discriminatee be given his job back under the terms that he left it. In this case Respondent offered that. Gregg got everything that he had had when he was laid off. To the extent that he had access to the health plan during his previous tenure, if he had it at all, he regarded it as of no value. Had he wanted it, he could have mentioned it in his March 30 letter or he could have called about it. His failure to do so simply punctuates the fact that he never cared about it. He and his family already had a better plan that they were happier with.

Indeed, whatever backpay might be deemed due Gregg now seems to be based upon Gregg's having manipulated the system to some extent. That he was manipulating it is fairly clear. Instead of telephoning in response to the seasonal recall letter, Gregg spoke to his Workers' Compensation attorney and then wrote Respondent a letter which stated he didn't know if he was able to return, but would check with his care provider; if the provider thought he was ready, he would submit the clearance. That portion of the letter was reasonable. Yet Gregg concluded by insisting that further questions be directed to his lawyer and suggested Respondent's lawyer speak for Respondent. That procedure was not reasonable. All Respondent wanted was to recall him to work. What was Gregg trying to accomplish by this ploy? He had three basic choices: accept the recall, decline it, or ask for additional time. His letter did ask for additional time; but what role was the lawyer going to play? As I view it, the only part he could play was to be a fly in the ointment; whatever advice Musso had given is doubtless found in the letter. Gregg did not need additional advice with regard to answering the seasonal recall letter. So why route inquiries to the lawyer thereafter? This behavior seems more like antagonism than good faith.

Despite Gregg's provocation, Respondent simply chose to wait. That wait permitted Dr. Geshuri to respond with his certificate of unfitness. The certificate, of course, was truly strange. Instead of referring to the 'occupational stress' disorder, Dr. Geshuri inexplicably leapt to a brand-new diagnosis — stress-connected honeybee allergy. I find this to be an astonishing non sequitur. Despite that unexpected turn, it is nevertheless clear that a honeybee allergy cannot be a valid reason for Gregg to refuse to return to work, at least where the claim had never before been seen and bore no relation to the operable Workers' Comp claim, the one made in January.

Frankly, this scenario smells of artifice. It is a deflection effort. The only thing that made sense in Dr. Geshuri's certificate was the period of unfitness. And, in point of fact, that interval only amounted to a 6 week delay. Remarkably, as with the lawyer requirement, Respondent chose to accept it and await his Gregg's return. Respondent wanted Gregg back for he was a valuable asset. The 6 weeks passed, yet Gregg chose not to contact Bunting, not even to tell him of any extension.

Finally, at the hearing, Gregg explained his refusal to contact Respondent on the ground that he did not want to be working in the same workplace as Bunting. Without a reasonable claim that Bunting intended to visit further discrimination upon him, Gregg's explanation is unacceptable.

Clearly a discriminatee is obligated to deal in good faith with his situation. The law obligates him or her to mitigate damages by seeking interim employment, to keep good records of any interim earnings, of efforts to obtain work and of periods of unavailability for employment. [11] In many situations the discriminatee also has a duty to respond to his employer's fair-minded entreaties to return. Cf. *Esterline Electronics*, supra. For example, in *Centac Corp*., 179 NLRB 313, 322 (1969); Trial Examiner George Turitz, affirmed by the Board, said:

> The General Counsel contends that Centac's letters to Shatz and Hattem asking them to " ... report for work as soon as possible" were inadequate as offers of reinstatement because they failed to specify that the work offered was the same as their previous employment or that they would not have to join Local 806. Enzensperger had indicated that he discharged Shatz and Hattem unwillingly and only because of Local 806's insistence. In view of these facts, and as neither the letters nor the circumstances stated or implied any conditions or qualifications, [footnote omitted] the most reasonable interpretation of the letters was that Enzensperger was simply reversing his past position, so that (a) membership in Local 806 would not be required of Shatz or Hattem; and (b) they were to go back to work at their old jobs. *If the men had doubt, they could have inquired*. For these reasons it is not recommended that Centac be required to make any further offer of reinstatement to Shatz or Hattem. (Italics supplied.)

Similarly, the Board affirmed Administrative Law Judge Maurice Alexandre when he held in *American Enterprises,* 179 NLRB 313, 314 (1972):

> Admittedly, [the respondent's] offer to hold "the" jobs for the dischargees was not the most felicitous choice of language; and unquestionably, an offer to the dischargees to hold "your" jobs open would have been preferable. But as stated in *Centac Corp*., [supra], *"If the men had doubt, they could have inquired."* (Italics supplied.)

I think it can be said that Gregg's March 30 letter qualified as a *Centac/American Enterprises/Esterline* communication. But rather than clearing up the issues, he slyly pushed the train to his job off the tracks. Gregg could be pretty certain that Respondent would not contact him further if it had to go through his lawyer and that it would not spend money having its own lawyer contact Musso. He could then point the finger at Respondent, arguing that it was Respondent's duty to do more, such as contact him again and its failure to do so would result in a greater period of backpay. I will not accept that scheme.

Centac and *American Enterprises*, of course, dealt with patent ambiguities in the reinstatement offers themselves. The instant case differs in that the ambiguity is latent and not found in the language of the recall letter. As required, the letter's language was 'firm, clear, specific and unconditional.' The ambiguity came from Gregg's chosen status as an employee on Workers' Comp leave. Since he created the uncertainty, it was he who needed to clarify it. Indeed, his March 30 letter could have been written in such a fashion as to eliminate it altogether. Instead, he let the ambiguity stand. Dr. Geshuri's follow-up only worsened the situation, although perhaps making Gregg's evasion evident, once enough time had passed to

---

[11] Here, Gregg kept no, or at least presented no, records (worker's comp unfitness extensions) proving his unavailability during the summer of 2001.

see the entire fact pattern. Gregg's silence which followed after May 15 is, in my view, indefensible. Certainly if Gregg did not want to be working with Bunting, he was entitled to his belief. What he was not entitled to do was let his status as a recalled seasonal layoff continue unresolved or to evade dealing with it. Certainly, he is not entitled to profit from his inaction. Respondent had done its duty. Nothing more was required. If Gregg wanted his job back, he should have kept in touch after May 15.

As a last observation, I note that Respondent's request that Gregg provide a medical release from his Workers' Comp leave was reasonable, since it needed to know if he was able to work. Nevertheless, despite his statement in the letter that he would comply with the request, Gregg never did. Therefore, he never demonstrated that he was fit to return. That remains true to this day, despite his taking employment from Calhoun in September 2001. From Respondent's point of view, Gregg never complied with the request and never carried out his implied promise to do so (nor did he explain his failure to obtain the release). This failure is Gregg's responsibility, and that nonperformance does not require Respondent to bear any financial burden flowing from it.

I therefore find that Respondent properly recalled Gregg from his unlawful seasonal layoff. I further find that Gregg failed to respond to the recall request and that his subsequent explanations for refusing to do so are not legally cognizable. He is therefore not entitled to any backpay.

I therefore issue the following recommended [12]

ORDER

The compliance specification is dismissed.

James M. Kennedy
Administrative Law Judge

Dated: November 2, 2004

[12] If no exceptions are filed as provided by §102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in §102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.