

Wonder Markets, Inc. and Retail Employees Union Local 1445, United Food and Commercial Workers International Union, AFL-CIO.¹ Case 1-CA-13132

May 5, 1980

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS
PENELLO AND TRUESDALE

On June 8, 1978, the National Labor Relations Board issued a Decision and Order in the instant case² in which it affirmed the rulings, findings, and conclusions of the Administrative Law Judge that Respondent had engaged in, and was engaging in, certain unfair labor practices in violation of Section 8(a)(3) and (1) of the National Labor Relations Act, as amended, and adopted his recommended Order. The Board's Order required, *inter alia*, that Respondent offer Robert Whitney reinstatement to his former job or, if such job no longer exists, to a substantially equivalent position, and make him whole for any losses he may have suffered by reason of Respondent's unlawful actions against him. This Decision and Order was enforced by the United States Court of Appeals for the First Circuit on May 14, 1979.³

On August 21, 1979, the Regional Director for Region I issued a backpay specification and notice of hearing alleging the amount of backpay due. On November 13, 1979, Respondent filed directly with the Board a Motion for Partial Summary Judgment and a memorandum in support thereof, seeking a determination that as a matter of law Robert Whitney (1) has failed to satisfy his obligation to mitigate backpay, and (2) by virtue of his post-discharge misconduct has forfeited his right to reinstatement. On November 21, 1979, Respondent filed a supplemental memorandum. Subsequently, on November 28, 1979, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why Respondent's Motion for Partial Summary Judgment should not be granted. By document dated December 6, 1979, counsel for the General Counsel opposed Respondent's motion, and made a cross motion to strike that portion of Respondent's answer to the backpay specification which alleges that Whitney has failed

to mitigate lost wages by his refusal of a different job with Respondent. On December 26, 1979, Respondent filed a memorandum in opposition to counsel for the General Counsel's response and cross-motion.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following rulings:

Mitigation of Lost Wages

Respondent argues, both in its answer to the backpay specification and in its Motion for Partial Summary Judgment, that Whitney failed to mitigate lost wages by his refusal of Respondent's offer of a position as a meat manager trainee, and that as a result Respondent's backpay obligation should be either tolled as of the date of that offer, or reduced by offsetting the amount Whitney would have earned in that position from the gross backpay owed him.⁴ Respondent's argument is premised on its contention that Whitney was obligated to accept this position in order to mitigate lost wages, even though the offer was found by the Board not to have satisfied Respondent's obligation to reinstate Whitney. Apart from the fact that Respondent appears to be attempting to relitigate in another guise the validity of its reinstatement offer to Whitney, we find no merit in Respondent's argument. The Board specifically found, in its Decision and Order in the unfair labor practice stage of this proceeding, that Respondent's offer to Whitney of the trainee position, a position other than the one which Whitney held before his discriminatory discharge, did not satisfy Respondent's obligation to reinstate Whitney to his former position, which still existed, and that in addition the trainee position did not appear to be a substantially equivalent one. (236 NLRB at 787). These findings were affirmed by the court of appeals. (598 F.2d at 676.) It is well established that where a discriminatee's former position is in existence as of the date of our order, the restoration of the status quo requires that the employer reinstate him to that position.⁵ Respondent in its motion has not offered any explanation for its failure to do so in Whitney's case. It would be anomalous indeed for this Board to hold, as Respondent would have us do, that an employer must offer a discriminatee his former job where it still exists, in order to comply with its reinstatement ob-

¹ The name of the Charging Party, formerly Local 1445, Retail Clerks International Association, AFL-CIO, C.I.C., has been amended to reflect the change resulting from the merger of Retail Clerks International Association and Amalgamated Meatcutters and Butcher Workmen of North America on June 7, 1979.

² 236 NLRB 787.

³ *Sub nom. N.L.R.B. v. Eastern Smelting and Refining Corporation*, 598 F.2d 666.

⁴ It is not quite clear which of these alternative consequences Respondent would have us accept. We find it unnecessary to resolve this ambiguity since we find, in light of our findings herein, no merit to either contention.

⁵ *Valmac Industries, Inc.*, 229 NLRB 310, fn. 5 (1977).

ligation, while finding that the discriminatee nevertheless must accept an offer of another job which is not even substantially equivalent in order to mitigate lost wages—the ultimate penalty for such failure being, Respondent argues, forfeiture or substantial diminution, if not elimination, of further backpay.

Clearly, if a discriminatee is under no obligation to take a different job from the same employer because the offer thereof does not constitute a valid offer of reinstatement, he is certainly not required to take that job in order to mitigate lost wages and thereby reduce the employer's backpay obligation.⁶ Thus, Respondent's backpay obligation was not tolled or lessened by Robert Whitney's refusal of its job offer, an offer which Whitney was not legally required to accept. Accordingly, we deny that portion of Respondent's motion which relies upon this argument, and grant counsel for the General Counsel's cross-motion to strike this portion of Respondent's answer to the backpay specification.

Reinstatement

In the remaining portion of its Motion for Partial Summary Judgment, Respondent argues that it is entitled to a determination that Robert Whitney has disqualified himself for reinstatement by misconduct subsequent to his May 14, 1977, discharge. Respondent bases its argument on the findings in another recent case⁷ (hereinafter the Cooney case) involving the same employer and union. In that case, James Cooney, Jr., another of Respondent's employees at the same store as Whitney, was discharged. The Board held that the discharge was not unlawful, finding that Respondent had discharged Cooney because of several confrontations in which he was involved, including one which took place on Brown Road on January 11, 1978. Robert Whitney was also involved in the Brown Road incident. Respondent now argues that the findings in the Cooney case establish that Whitney engaged in misconduct on Brown Road which disqualifies him from reinstatement and that, according to principles of *res judicata* and collateral estoppel, Respondent is entitled to such a determination as a matter of law.

We find no merit to Respondent's argument that the findings of fact as to Whitney's conduct in the

Cooney case bar relitigation of this issue in the instant backpay proceeding under the theories of *res judicata* and collateral estoppel. Respondent's argument that *res judicata* applies in this case is incorrect, since the Cooney case and the instant case are two different causes of action. As to Respondent's argument that principles of collateral estoppel apply, collateral estoppel generally requires that where a question of fact essential to the judgment is actually litigated and determined by a valid and final judgment, the determination is conclusive between the parties in a subsequent action on a different cause of action. Restatement of Judgment, §68 (1942). In the two cases in question, although the parties are technically the same (i.e., the General Counsel, Local 1445, and Wonder Markets), the real parties in interest, Cooney and Whitney, are different, since the Union was only acting in a representative capacity. Although a nonparty can be bound by a previous decision if he was in privity with a party, Whitney was not such a beneficiary in the Cooney case. Although Whitney testified in that case, he had no control over, or any interest in, that litigation. Furthermore, the issues in the two cases are different. In the Cooney case, the issue was whether the Brown Road incident was used by Respondent as a pretext in order to discharge Cooney for his union activities, whereas the issue in the instant case is whether Whitney's conduct was such that Respondent should be relieved of the obligation to reinstate him. The paucity of findings about Whitney in the Cooney case demonstrate that the issue of Whitney's participation was incidental to the main thrust of that case. Thus, as a matter of due process, Whitney is entitled to an opportunity to litigate this issue at the compliance hearing, should it be raised. We therefore shall deny this portion of Respondent's Motion for Partial Summary Judgment.

ORDER

It is hereby ordered that the Respondent's Motion for Partial Summary Judgment be, and it hereby is, denied.

IT IS FURTHER ORDERED that counsel for the General Counsel's cross-motion to strike part of Respondent's answer be, and it hereby is, granted.

IT IS FURTHER ORDERED that the above-entitled proceeding be, and it hereby is, remanded to the Regional Director for Region 1 for further appropriate action.

⁶ Obviously, Respondent itself could have limited its obligation at any time by fulfilling its duty to offer Whitney reinstatement to his former position.

⁷ *Wonder Markets, Inc.*, 246 NLRB No. 56 (1979).