Vanguard Oil and Service, Inc. and Vanco Heating, Plumbing and Welding Co. *and* Local 553, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America *and* Ronald Williams. Cases 29-CA-4754 and 29-CA-4820

October 16, 1979

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS JENKINS AND PENELLO

On August 1, 1979, Administrative Law Judge David L. Evans issued the attached Supplemental Decision[1] in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

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.

The Board has considered the record and the attached Supplemental Decision in light of the exceptions[2] and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.

The Administrative Law Judge recommended that interest on the backpay award be computed as set forth in *Florida Steel Corporation*, 231 NLRB 651 (1977). However, the method of determining the interest rate set forth in that Decision is not applicable in cases in which an earlier Order of the Board providing for a different interest rate has been enforced by a court of appeals. Accordingly, we shall order interest to be paid at the rate of 6 percent, as ordered in our original Decision and enforced by the court of appeals.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Vanguard Oil Service, Inc. and Vanco Heating, Plumbing and Welding Co., Brooklyn, New York, its officers, agents, successors, and assigns, shall pay to Ronald Williams the sum $4,705.80, with interest thereon at the rate of 6 percent per annum as stated in our original Decision, with appropriate deductions for taxes required to be withheld by Respondent under Federal and state laws.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

DAVID L. EVANS, Administrative Law Judge: This supplemental proceeding to determine backpay was heard before me, with General Counsel and Respondent represented, in Brooklyn, New York, on February 28 and March 26, 1979, on the specification of the General Counsel and answer of Vanguard Oil and Service, Inc. and Vanco Heating, Plumbing and Welding Co., herein called the Respondent. Generally, the issue litigated was the amount of backpay due from Respondent to Ronald Williams pursuant to a Board order. The parties were afforded full opportunity to examine and cross-examine witnesses, to introduce evidence, and to present oral argument. A brief was submitted by Respondent, and the General Counsel submitted a letter of statement of position, both of which have been carefully considered. Upon my observation of the witnesses, their testimony, the exhibits, and upon the entire record in the case I make the following findings and conclusions.

I. BACKGROUND AND PLEADINGS

On June 30, 1976,[1] Administrative Law Judge Frank H. Itkin issued his decision (numbered JD-456-76) in which he found, *inter alia*, that Respondent had, on January 14, discharged employee Ronald Williams in violation of Section 8(a)(3) and (1) of the Act. On August 9, by unreported order issued in absence of exceptions, the Board adopted Judge Itkin's recommended order. On June 16, 1977, the Court of Appeals for the Second Circuit entered a judgment enforcing the Board's order.

The specification alleges that Williams' backpay period begins January 14, the date of the discharge, and ends on July 14, the date upon which Williams was reinstated by Respondent. The specification would exempt from the backpay period the dates between January 22 and March 1. On January 22, Williams received a gunshot wound in his left forearm. General Counsel contends that Williams underwent a period of incapacity which lasted only until March 1. Respondent answers that Williams was incapacitated for an unspecified period beyond March 1 and that during the entire backpay period Williams made no reasonable search for work. Respondent acknowledges liability only for the days between the discharge and the injury.

Therefore, there are two basic issues: (1) when did Williams become able to work, and (2) did he engage in a

[1] The original Decision is not reported in volumes of Board Decisions.

[2] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[1] All dates are in 1976 unless otherwise specified.

reasonable search for work during that portion of the back-pay period in which he was not incapacitated?

II. FINDINGS

A. *The Period of Disability*

The issue of the duration of the incapacity turns largely upon credibility resolutions. The case is rendered particularly difficult because critical testimony of both sides contains inconsistencies and logical improbabilities. Moreover, an unquestionably accurate conclusion on the issue would require a *post hoc* medical opinion coupled with a precise knowledge of the nature of Williams' work. No physicians testified and the testimony regarding the physical requirements of Williams' job is essentially nonexistent.

Williams alone testified on behalf of the General Counsel. Testifying on behalf of Respondent were its president, Kenneth Butler, its vice president, Carl Willacy, Gerald Neal, senior medical records librarian from Harlem Hospital Center in New York, and Fred Lewis, legal clerk in the medical records department at The Brookdale Hospital Medical Center in Brooklyn.

Williams testified that "around the 19th or the 21st of January" he was driving an automobile in New York City when he was involved in a traffic accident. When he got out of his car to exchange drivers' licenses with the other party, a sniper shot him in the left forearm with a .22 caliber firearm. Williams was taken to Harlem Hospital where, according to the "Emergency Record" received in evidence, he arrived at 11:10 a.m. on January 22, which date I find to be the date of the injury. Surgery to repair the damage was performed on that date, and on January 29 Williams signed himself out of the hospital. The records of his stay at Harlem Hospital were identified and received in evidence, but there was no opportunity to cross-examine the individuals who were responsible for their compilation; therefore the conclusions which can be safely drawn from them are extremely limited. The "Discharge Summary" recites, *inter alia*, "He was found to have severe median and ulnar nerve deficits with weakness in the extensors. M-G was suggested. However, pt. signed out AMA on 1/29/76." Neal explained that the abbreviation "AMA" was "against medical advice" and "M-G" was a muscle graft[2] which is surgical procedure in addition to that performed on January 22.

Just why Williams checked out of Harlem Hospital was disputed. The hospital records recite one specific reason which William denied. If true, the reason recited would tend to sully Williams' good name and character and, absent firsthand testimony on the issue on the part of the individual who made the accusation, I decline to repeat the substance thereof here. It suffices to say that Williams was obviously still in need of treatment when he left Harlem Hospital on January 29, for he reported to Brookdale Hospital on the next day.

At 9:30 a.m. on January 30, Williams reported to Brookdale hospital. The record of that visit states that he was not suffering acute distress. The sutures of the Harlem Hospital surgery were taken out, he was given Tylenol to take "P.R.N." (*pro re nata*, or, as needed) for pain, and he was referred to the "hand clinic," for postoperative rehabilitation consultation. Williams visited the Brookdale Hospital Outpatient Clinic on February 11, but the record of that visit is illegible. He visited the Brookdale outpatient clinic again on March 3, but the physician's handwritten notes of that visit were indecipherable by Lewis. The March 3 clinic notes have checked, adjacent to a line bearing the question "employable," the box designated "No." According to Lewis, this would have been completed by the physician who saw Williams on March 3. The Brookdale records also include a copy of a questionnaire from The New York Crime Compensation Board entitled "Request for Verification of Information of the claim of" and thereafter is inserted the name of Ronald Williams as "Name of Claimant of Victim." One of the questions on the form is: "How long was or will patient be constantly totally disabled (unable to work)?" In response there is written in the respective blanks "From *2/3/76* through *undetermined*." The document is signed: "Rita M. Scheler, R.N. [Registered Nurse] Ass't. Direction Ambulatory Care (Clinic)." Finally, there is a document upon which are handwritten only the word "Hand" and the date "3/17/76." As Lewis testified, that document meant that Williams had an appointment at the outpatient clinic for that date for which he did not appear. Williams acknowledged that he did not appear for the appointment on March 17.

Williams first testified that, after recuperating, he began looking for work by going to Respondent's place of business "[i]n February, early March." He stated that he approached Willacy and asked for his job back, but that Willacy replied that he could not have it because Respondent thought it would win the then pending Board case. Williams testified that, although he is right handed and usually carries his toolbox in his right hand, he appeared at Respondent's carrying in his left hand the toolbox which weighed from 15 to 20 pounds. On cross-examination, Williams denied that during this meeting with Willacy he was squeezing a black rubber exercise ball; he testified "I don't think we even talked about an injury."

Willacy places the conversation at "sometime in April . . . . It was around Easter time. Because the work had just wound down. And we had had a strike in February. And most of the workers had returned to work. And we were about to cut the number of workers during the summertime." (Easter fell on April 18, 1976; there was testimony that the demand for heating oil slacked off in April of each year.) Willacy denied that Williams carried a toolbox with him during the visit and he stated three times on direct examination that he could not recall Williams asking for his job back or other "small talk," although he stated flatly on cross-examination that no such request was made. He stated that there was nothing unusual about Williams being at the facility because other employees returned when they were not working. Willacy testified that Williams "had the habit of coming in the office not only to see me, but to see other people. So I didn't ask him why, because it was a natural thing" even though he acknowledged that Williams

[2] The transcript, p. 115, l. 4, is hereby corrected to change "musclegraph" to "muscle graft."

had not been to the office since his discharge and that he did not know who Williams was supposed to be visiting on that day. Willacy testified that throughout the conversation Williams squeezed a black rubber exercise ball. According to Willacy, he remarked to Williams that he had heard about the shooting and asked what the ball was for and Williams replied, "I'm squeezing it so I can get some strength back in my hand." Willacy did not claim to have offered Williams a job on this visit and he did not deny telling Williams that he thought Respondent would win the Board case.

Kenneth Butler, Respondent's president, testified that Williams appeared at Respondent's facility "sometime, in I'd say, late April, May, around in there." He did not remember who if anyone else was present, but he stated, "most of the employees were about when he was in there." Butler stated that Williams was there to see him, that Williams stated "he was willing to work at that particular time. But he also admitted that he couldn't work with one hand .... He wanted to make sure that I didn't take on another service mechanic or service company to totally replace him .... He couldn't do anything. He couldn't handle any work with his left arm. It was impossible for Ronnie to do any work with his left hand." When asked what he responded to Williams' request, Butler replied, "I told Ronnie I'd take him back. I had no problems with taking him back. Ronnie simply couldn't work, he simply could not do any work. To do any kind of service work, you have to have use of both hands." Butler stated that he could remember no rubber ball such as that described by Willacy in Williams' prior visit, but did state, "I seem to remember him with a sling." Butler quickly retreated from the reference to the sling stating that he remembered Williams holding his left hand with his right, palm to palm, so as to support the left arm.

On cross-examination, Butler stated that he had not seen Williams when he came in to talk to Willacy, and he did not recall Willacy telling him of Williams' visit after it occurred. Butler was given the opportunity on cross-examination to reconcile the reference to the sling with his insistence that Williams supported his left arm with his right hand, but he could not do so. He insisted on cross-examination that Williams admitted during the conversation that he had no use of his left hand, but that "the man wanted to work with one hand." Butler testified that he responded, "And I wanted to know how, how he could do it, when it's hard enough trying to work with two hands." Butler conceded that he did not give Williams the opportunity to try to work with one hand or two. Butler denied that Williams had his toolbox with him during their conversation.

On rebuttal, Williams acknowledged that there was a second visit with Butler, as well as the earlier visit with Willacy. He places the visit with Butler at the "end of March, early April." Again Williams asserted that he had his tools with him. He denied having his arm in a sling, stating that he only used a sling while in the hospital, and stated that holding his hands, palm to palm, was a usual mannerism of his. Williams testified that he asked Butler for a job then, not in the future, and denied admitting being unable to work. Williams concluded on direct that he was physically ready to work when he talked to Butler as well as Willacy.

In rebuttal, Williams was asked by General Counsel why he did not show up for the March 17 appointment at the Brookdale Clinic.

> Q. (By General Counsel) Now, did you have an appointment at Brookdale that you canceled or did you not show up for?
>
> A. Yes.
>
> Q. Do you recall about when that was?
>
> A. I believe it had to be in the middle of March. That was my last—early March was my last visit. It must have been in the middle of March.
>
> Q. Was there any particular reason why you didn't show up for that appointment?
>
> A. Because I felt that I didn't need what they was telling me, all these—I felt that my arm was acting up different—to work on my own.
>
> Q. At the time of the canceled appointment, had you already been to see—do you recall whether you had gone to Vanguard or not prior to the date of that canceled appointment?
>
> A. I could have been before. It's around the middle of March I went back. It could have been before.

Williams was a difficult witness, and his references to carrying his 20-pound toolbox (or carrying it in his left hand although he is right-handed and his custom was to carry it in his right) appear to be exaggeration. However, I felt him to be a basically honest witness, and I specifically find that he was testifying truthfully and accurately in his last quoted passage in which he places his visit with Willacy at "the middle of March."

I do not believe Willacy's testimony that he did not recall Williams asking for his job back; and I do not credit Willacy's statements that there was nothing unusual in Williams coming to Respondent's facility, as Williams was then a discharged employee whose right to reinstatement was being contested by Respondent—a most unusual circumstance. Accordingly, I do credit Williams' testimony that he did ask Willacy for reinstatement, whether he was then carrying a toolbox or not.

I do not credit Butler's statement that he had "no problems" with reinstating Williams; Respondent obviously had "problems" with reinstating Williams since it did not do so until after the June 30 decision by Judge Itkin. I do not credit Butler's testimony that Williams appeared with his arm in a sling; whether he supported his hand out of habit or debility I am unable to determine, but, as discussed herein, the question could have been resolved by Butler's taking Williams up on his request for employment, for work with one hand or two, when, even according to Butler, it was made by Williams.

As the General Counsel argued in his closing statement, the testimony of Willacy and Butler seemingly advances the proposition that Williams' arm atrophied between the Willacy and Butler visits and the discriminatee presented himself at Respondent's facility for no purpose other than to exhibit his incapacity for work. I do not believe this. I find and conclude that Williams presented himself to Willacy and Butler for the purpose of securing employment, and that there is insufficient evidence to conclude that he was unable to work when he did so. Moreover, for purposes of

this decision, I place the date of his first appearance, and the date to resume the running of Respondent's backpay obligation, at March 15.

Respondent's position is to the effect that after proof of the injury was adduced, the burden was on Williams to demonstrate by physician's certification when he was able to work and/or that the burden was on the General Counsel to prove precisely when the period of incapacity ended. Failing such demonstration or presentation, Respondent argues, no liability can be assessed against it for the period from January 22 to July 14. I disagree.

Williams did not have a duty even to ask Respondent for his job back, much less a duty to present certification of ability to perform it. Moreover, a physician's certificate of fitness or "employability," without reference to the particular job involved, would have been meaningless. The way to ascertain if and when Williams was able to perform his job was to have Respondent comply with its lawful obligation to offer Williams reinstatement or take him up on his request for reinstatement when he presented himself at Respondent's facility. Then the line would have been drawn: Williams would have had to perform or be left with indisputable evidence of his alleged inability manifested.

But I do not accept the General Counsel's designation of March 1 as the date upon which the period of liability for backpay resumes. There are two records in evidence which were made by the Brookdale Clinic on March 3. One is signed by a physician which describes Williams as not employable. The other is signed by the assistant director of the ambulatory clinic which recites that his period of disability is "undetermined." Since the people who are responsible for these entries were not made available for cross-examination, I have, of course, a great hesitancy in using the documents for any purpose. However, I feel that it is improbable that the entries were made utterly without factual foundation, and I conclude that, at minimum, there existed a substantial question as to Williams' employability as of March 3. This question would necessarily have existed in Williams' mind also, and I find he did not attempt to resolve the question until he presented himself to Willacy "in the middle of March."

In *The Dayton Tire & Rubber Company, a Division of the Firestone Tire & Rubber Company*, 227 NLRB 873 (1977), a similar case, Administrative Law Judge Melvin J. Welles invoked a sense of "rough justice" to designate when, for purposes of calculating backpay, a period of physical disability of a discriminatee ended. That case, as this one must, turned on the particular facts, but the Board affirmed Judge Welles' decisional basis.

My sense of "rough justice" is impelled to designate the date of March 15 as the date of Williams' recovery by two factors: (1) I believe Williams' testimony that he appeared at Respondent's facility "in the middle of March," and I believe he would have at least tried to go to work if Respondent had given him an opportunity to do so; (2) Williams' failure to appear for the March 17 outpatient clinic appointment is consistent with a belief that he was no longer in need of the clinic's services at some time before that date.

Any error in this determination could have been avoided by Respondent's offering Williams a chance to prove his ability, or inability, to work by offering him reinstatement which, after all, was Respondent's legal obligation at all times in dispute. Or, as stated by the Fifth Circuit in *N.L.R.B. v. Miami Coca-Cola Bottling Company*, 360 F.2d 569, 572 573 (1966), "the Board has, as a matter of policy one that seems reasonable consistently taken the view that when an employer's unlawful discrimination makes it impossible to determine whether a discharged employee would have earned backpay in the absence of discrimination, the uncertainty should be resolved against the employer."

In summary, I conclude that Williams went looking for work as soon as he was able to do so, the first place he went was to Respondent, and that he did so in mid-March; and "rough justice" impels me to place the precise date at March 15, 1976.

B. *Williams' Search for Work*

Williams testified that when he was physically able to work, he went to five different New York oil distributors in an attempt to secure work, but there was none to be had. He further testified that he regularly read newspapers in an attempt to locate jobs and he further relied upon friends for job referrals. He also applied at the New York State Employment Agency, although he acknowledged that it may have been in the latter part of April that he did so.

Respondent placed in evidence a question and answer on a form contained in the Regional Office's backpay file for Williams. The question asks if as part of his search for work Williams referred to newspapers, and the reply is "no." Williams credibly repudiated the reply as representing a misunderstanding between him and the person who completed the form on his behalf, and I credit Williams' testimony that he applied for work at the five different oil distributors, as well as requesting reinstatement from Respondent twice. Respondent seeks to discredit Williams because he relied upon references from friends; however, as stated in *Sioux Falls Stock Yards Company*, 236 NLRB 543, 556 (1978), "It is not an unusual practice for individuals looking for employment to seek assistance from friends and acquaintances in helping them to find work." Nor is it evidence that a reasonable search had not been made.

Williams' testimony of his search for interim employment is unrebutted, and I find it credible. Moreover there is no evidence that he declined any work that was made available to him. Therefore I find that Respondent has not proved that Williams did not make a reasonable search for work and that he is entitled to receive backpay for the periods from January 14-22 and March 15 through July 13, 1976.

CONCLUSIONS

Having found that the backpay period is from January 14 through July 13, 1976, exclusive of the period from January 23 through March 14, 1976, and it not being in dispute that but for the discrimination against him, Williams would have earned a salary of $253 during that period, and there having been no interim earnings by Williams, it is hereby

found that Ronald Williams is entitled to payment by Respondent of the sum of $4,705.80, plus interest[3] accrued to the date of such payment,[4] less tax withholdings required by state and Federal laws.

[3] See *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962); *Florida Steel Corporation*, 231 NLRB 651 (1977).

[4] In its brief, Respondent contends that the period of interest should be suspended for the period from June 21, 1978, until the date this case was heard. As the basis for its request, Respondent contends that the trial was postponed that entire period because Williams was unavailable. There is no factual support for this assertion, and no legal authority for the contention. The request is therefore denied.

ORDER[5]

It is recommended that the Board adopt the foregoing findings and conclusions.

[5] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.