

Abilene Area Sheet Metal Contractors Association and Abilene Sheet Metal, Inc. and Thomas F. Walker

Area Association of the Journeymen and Apprentices of the Sheet Metal Workers in Central West Texas and Thomas F. Walker. Cases 16-CA-7007 and 16-CB-1221

January 24, 1979

ORDER CLARIFYING DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS JENKINS AND MURPHY

On July 18, 1978, the Board issued a Decision and Order¹ in the above-entitled proceeding in which it found, *inter alia*, that Respondent Abilene Sheet Metal, Inc., hereinafter also called the Company, had violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, by discharging employee Thomas Walker.

Thereafter, on August 31, 1978, the General Counsel filed a motion entitled "Motion for Clarification of the Board Order in Cases Nos. 16-CA-7007 and 16-CB-1221." On September 14, 1978, Respondent Abilene Sheet Metal, Inc., filed a brief entitled "Brief in Response to General Counsel's Motion for Clarification of the Board Decision."

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.

In order to remedy the unfair labor practice regarding the unlawful discharge of employee Walker, the Board's Decision and Order required in paragraph 2(a) that the Company take the following affirmative action:

Offer Thomas Walker immediate and full reinstatement to his former job or, if his job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of pay and other benefits in the manner set forth in the Remedy section.

In his motion, the General Counsel requests the Board to clarify its Order to require the Company to offer Walker reinstatement at a journeyman's position and to make him whole for his loss of pay at a journeyman's rate of pay. In requesting such clarification the General Counsel relies on a finding of the Administrative Law Judge that employee Walker

¹ 236 NLRB 1652.

would have received the journeyman rate of pay if the Respondent Union² had fairly and impartially represented Walker in his grievance on this matter.³

Respondent Abilene Sheet Metal, Inc., also requests the Board to clarify its Order, but it seeks to have the Board indicate that Walker is entitled to reinstatement only to the job he held at the time of his discharge.⁴ The Company contends that it should not be obligated to reinstate Walker to a better position than that which he held during his employment with it.

In this case, the Administrative Law Judge found, in effect, that the Respondent Union unlawfully prevented a determination as to the merits of Walker's claim for the journeyman rate of pay. As heretofore noted, the Administrative Law Judge presumed, only for the purpose of fashioning a remedy for the Respondent Union's unlawful refusal to process a grievance, that Walker's grievance would have been found to be meritorious. Significantly, the Administrative Law Judge made no finding that the Company unlawfully refused to promote Walker or paid him a lesser wage for discriminatory reasons.⁵ Further, on the record before us, we are unable to conclude that Walker, absent the discrimination against him, would have become classified as a "journeyman" sheet metal worker.⁶ Thus, it follows that the Company's obligation is to restore Walker to the position he held at the time of discharge.⁷

Accordingly, based on the foregoing, we grant the clarification of our Order sought by Respondent Abilene Sheet Metal, Inc.

ORDER

It is hereby ordered that the Board's Decision and Order in this matter be, and it hereby is, clarified to provide in a footnote (to be designated footnote 5 and the subsequent footnotes renumbered accordingly) to paragraph 2(a) of the Order as follows:

"⁵ In ordering that the discriminatee be rein-

² Area Association of the Journeymen and Apprentices of the Sheet Metal Workers in Central West Texas.

³ We note that the Administrative Law Judge did not specifically find that Walker's grievance was meritorious or that he would have received the higher wage rate had the Respondent Union fairly and properly represented him. Rather, for the purposes of fashioning a remedy for the Respondent Union's unlawful refusal to process Walker's grievance, the Administrative Law Judge properly "presume[d]" that Walker's grievance, if fairly and impartially processed, would have been found meritorious and would have resulted in his receiving the contractual journeyman rate of pay.

⁴ When discharged, Walker had been considered an "apprentice" sheet metal worker by the Company and was paid accordingly.

⁵ Cf. *California School of Professional Psychology*, 227 NLRB 1657 (1977); *Community Hospital of Roanoke Valley, Inc.*, 220 NLRB 217 (1975).

⁶ Cf. *Golden State Bottling Company, Inc., d/b/a Pepsi-Cola Bottling Company of Sacramento*, 187 NLRB 1017 (1971), *enfd.* 467 F.2d 164 (9th Cir. 1972).

⁷ Walker is, of course, entitled to receive any interim raises and benefits he would normally have received had he not been unlawfully discharged. See *F. M. Broadcasting Corporation*, 233 NLRB 326 (1977).

stated to "his former job or, if that job no longer exists, to a substantially equivalent position," we have indicated that Respondent Abilene Sheet Metal, Inc., must restore Walker to the position

he held at the time of his discharge (i.e., an "apprentice" position), with any interim raises and benefits he would normally have received absent the discrimination against him."