JD(SF)–18–07
Overland Park, KS

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

HIGH-TECH INTERIORS, INC

and Case 17-CA-22916

UNITED BROTHERHOOD OF CARPENTERS
AND JOINERS OF AMERICA, DISTRICT COUNCIL
OF KANSAS CITY & VICINITY, AFL-CIO

Michael Werner, Esq., Overland Park, KS,
for the General Counsel.

Stewart L. Entz, Esq., of *Entz, Entz & Laskowski, LLC,*
Topeka, KS, for the Respondent.

Rebecca Proctor, Esq., of *Blake and Uhlig, P.A.,*
Kansas City, KS, for the Union.

SUPPEMENTAL DECISION

Statement of the Case

Gerald A. Wacknov, Administrative Law Judge: Pursuant to notice a hearing issued by the Regional Director on February 22, 2007, this matter was held before me in Junction City, Kansas, on April 10, 2007. This is a supplemental proceeding for the purpose of determining the amount of backpay due two employees found by the Board to have been unlawfully denied employment by the Respondent. The Board's Decision and Order in this case is found at 348 NLRB No. 18 (September 28, 2006).

The compliance specification herein was issued by the Regional Director of Region 17 of the Board on February 22, 2007. Thereafter, the Respondent filed an answer and amended answer to the compliance specification essentially denying that the discriminatees are entitled to backpay, and specifically objecting to the selection of certain individuals utilized as comparable employees by the Regional Director for the determination of backpay.

The parties were afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from Counsel for the General Counsel (General Counsel), counsel for the Respondent, and counsel for the Union. Upon the entire record, and based upon my observation of the witnesses and consideration of the briefs submitted, I make the following:

Findings of Fact, Analysis and Conclusions of Law

The Board found that the Respondent unlawfully refused to hire William Rogers and Bruce Hildebrandt because their employment applications indicated their intent to organize employees on behalf of the Union. On October 19, 2006, following the issuance of the Board's Decision and Order, the Respondent offered Rogers and Hildebrandt conditional instatement. Both individuals declined the Respondent's offer.

The Respondent presents three principal objections to the backpay specification. First, the Respondent maintains that the discriminatees are owed no backpay whatsoever because the Board specifically stated that, as with all new employees, Rogers and Hildebrandt must pass mandatory drug screening and physical capacity tests administered by the Respondent as a condition of instatement. Further, specifically with regard to the issue of backpay, the Board also stated:

> Consequently, upon showing of a test failure, the burden should shift to the General Counsel to go forward with evidence that the discriminatee would have passed the test if administered at the time of the Respondent's unlawful conduct. The ultimate burden of persuasion remains with the wrongdoing Respondent.

The Respondent, in its brief, asserts that, "The first assumption that can be made from the language of the Board is that, if Rogers and Hildebrandt failed to take the tests or failed the tests, they would not be entitled to any backpay whatsoever [unless] the General Counsel offer[ed] affirmative evidence that they would have passed the pre-employment tests at the time of the application…" This "assumption" regarding the Board's intent is clearly unfounded. Rather, the Board explicitly enunciated the process by which the discriminatees' entitlement to backpay, as distinguished from instatement, was to be resolved if they took but failed to pass the pre-instatement tests. The Board's language was not equivocal and, contrary to the Respondent's contention, the Board was silent regarding the process for determining backpay in the event the employees refused the offers of instatement and, as a result, no pre-instatement test was administered. Further, the Respondent, relying solely on its foregoing assumption, proffered no evidence to show that either Rogers or Hildebrandt would have failed such tests at any time during the backpay period. Accordingly, I find no merit in the Respondent's argument.

Secondly, the Respondent maintains that backpay should have been tolled on January 19, 2005, when the Union placed pickets on certain jobs, as both Rogers and Hildebrandt testified during the hearing herein that as union members they would have refused to work behind any picket line placed on the job by the Union.

In support of this argument the Respondent relies upon the testimony of Paul Garrett, an organizer for the Union. Garrett testified he was in charge of establishing a picket line at a job site in Topeka, Kansas, where the Respondent was working. The picket sign stated: Hi-Tech Interior Has Committed Unfair Labor Practices against Carpenters District Council of Kansas City and Vicinity. Garrett was not in charge of establishing picket lines at two other job sites in Manhattan, Kansas, where similar picketing was simultaneously conducted with identically-worded picket signs. The extent of Garrett's brief testimony is as follows:

> Q. (By General Counsel): Why did you direct individuals to carry picket signs at the St. Francis' jobsite in Topeka?
>
> A. To get Woody Hall, which was our salt off the project.

Q. What was—what was the purpose of the picketing or the picket signs?

A. It was Unfair Labor Practice picket to –which we do, generally, to inform the public.

Q. Do you recall what the Unfair Labor Practice was?

A. It was a refusal to hire.

Q. Which individuals?

A. Bruce Hildebrandt and Will Rogers.[1]

Respondent's Field Superintendent, Martin Baumgard, testified that on January 19, 2005, when picketing began at the St. Francis cite, employee Woody Hall, a member of the Union who had been hired in October, 2005 and was employed as a carpenter at that cite, approached him and quit, stating that he was not going to cross a banner.

The Respondent presented evidence showing that prior to and following the Respondents failure to hire Rogers and Hildebrandt the Union conducted a campaign to unionize the Respondent, employing various means in pursuit of this objective, including direct appeals to Respondent's customers, handbills, and even large billboard advertising. However, no picketing of the Respondent's jobsites occurred until January 19, 2005, causing Hall to quit work. The Respondent maintains that the picketing option was, in effect a tactic seized upon as a "last resort" when all other organizational attempts had failed, and that this picketing would have been conducted by the Union even if Rogers and Hildebrandt had been hired and were working. Accordingly, the Respondent contends that union members Rogers and Hildebrandt would have quit on that day had they been employed, as they too, like Hall, would have refused to work behind the Union's picket line. The Respondent contends in its brief that this conclusion is compelled by "common sense and the practical realities" of the record evidence.

The only direct evidence regarding the Union's purpose in picketing the Respondent's jobsites consists of the wording on the signs and the abbreviated testimony of Union Organizer Garrett. The signs protest the Respondent's unfair labor practices, and Garrett testified that the picketing at the St. Francis jobsite was to cause Hall to quit his employment as well as to protest the Respondent's failure to hire Rogers and Hildebrandt, who, it was later determined by the Board, were in fact unlawfully refused employment. Garrett was not cross-examined by Respondent on this issue, and did not testify that the picketing would have occurred even if Rogers and Hildebrandt were working at the time. Contrary to the Respondent's apparent contention, Garrett's testimony is not inherently inconsistent, as it makes sense that the Union simply may not have wanted one of its members, Hall, to continue working for an employer that discriminates against other union members. On the basis of this record, I find the Respondent has not sustained its burden of proof, and has failed to establish that even if it had hired Rogers and Hildebrandt the Union would nevertheless have commenced to picket the Respondent's jobsites on January 19, 2005 or thereafter. Accordingly, I find no merit to the Respondent's contention that backpay should be tolled as of January 19, 2005.

[1] It appears from the testimony of Garrett that the picketing at the St. Francis cite continued for at least several days. Thus, Garrett testified regarding the photograph of a picket at the St. Francis job site that, "I don't know if I was present this day [apparently January 19, 2005] but I was present one day for sure." As noted, Hall quit on the first day of picketing. Thus, it may be concluded that the Union continued picketing after Hall was no longer working. Moreover, identical picketing took place at other jobsites.

Lastly, the Respondent maintains that certain employees utilized by the Regional Director as "comparable employees" for the determination of backpay were paid higher wages because of their unique position and/or abilities, and in fact their wages were not comparable to what the discriminatees would have earned during the backpay period.

In this regard, the Region's Compliance Officer, Robert Fetch, detailed the methodology by which backpay is customarily calculated in construction industry refusal to hire situations. Thus, the wages of the next-hired employee in the discriminatee's job classification are assigned to the discriminatee, and when that particular exemplar no longer remains on the payroll, the employee next hired after the exemplar's departure is then used as a subsequent exemplar; this process is repeated until such time as the backpay period ends. Accordingly, in this manner, the backpay specification provides that backpay for Rogers is $31,335.67, and backpay for Hildebrandt is $32,464.75.

The Respondent maintains that in the case of Rogers, employee Kelley Berillium should not have been used as an exemplar because, although Berillium was classified as a carpenter,[2] he was hired to perform dry-wall finishing work, a more highly skilled job which paid considerably higher wages.[3] In this regard, the Respondent's payroll records reflect that Berillium was in fact hired at a wage rate greater than most long-tenured employees.[4] Further, according to the testimony of Jesse Smith, Respondent's accountant, whom I credit, coupled with corroborating payroll-record information, Berillium was in fact primarily assigned to perform dry-wall finishing work. There is no contrary evidence. The General Counsel and Union maintain that Rogers was qualified to perform such work. However, upon being advised of the Respondent's position, and without conceding its original position, the Region prepared an "alternative" backpay specification for Rogers, using the same methodology as noted above, resulting in backpay for Rogers in the amount of $26, 948.17.

Similarly, the Respondent maintains that in the case of Hildebrandt, employee William Burnett should not have been used as an exemplar because, although he sometimes did perform work similar to other employees, he was in fact hired as a salaried project superintendent at a significantly higher rate of pay than other employees.[5] Smith testified that Burnett was a "Project Superintendent with the ability to run more than one project at a time, overseeing multiple people on those projects and he is, also, a former employee…" Further, Smith testified that although the payroll records reflect an hourly rate of pay, Burnett was in fact salaried and his salary was simply reflected as an hourly rate. As noted, the records reflect that Burnett, upon being hired, was indeed paid considerably more than other employees and that he received the identical amount each pay period, thus indicating salaried status. There is no contrary evidence. The General Counsel and Union maintain that Hildebrandt was qualified to perform the duties of a project superintendent. However, upon being advised of the Respondent's position, and without conceding its original position, the Region prepared an "alternative" backpay specification for Hildebrandt, using the same methodology as noted above, resulting in backpay for Hildebrandt in the amount of $23,092.66.

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[2] Indeed, according to Respondent's payroll records, all employees, including Respondent's Field Superintendent Martin Baumgard, are so classified.

[3] For example, Berillium was hired at a rate of $18 per hour, while Hall was being paid $15.25 per hour; both however, were classified as carpenters.

[4] Only employees having lengthy tenures with the Respondent received comparable wages, and newer employees did not.

[5] Respondent's payroll records reflect that Burnett was hired at $19 per hour.

I conclude that the foregoing alternative backpay amounts for each individual more accurately reflect what they would have earned during the backpay period. While it may be correct that Rogers and Hildebrandt could have eventually been elevated to the more highly paid positions occupied by Berillium and Burnett, these latter two individuals were in fact initially hired to perform such work and did so from the outset of their employment. Further, as no other employees already on the payroll were elevated to these positions; there is no reason to presume that either Rogers or Hildebrandt would have been selected for either position over other employees with longer tenure.

Accordingly, from the foregoing, I conclude that the backpay amount for William Rogers is $26,948.17 and the backpay amount for Bruce Hildebrandt is $23,092.66. [6]

Order[7]

The Respondent, High-Tech Interiors, Inc., its officers, agents, successors, and assigns, shall pay backpay as follows, with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), and less taxes required by law to be withheld:

William Rogers	$26,948.17
Bruce Hildebrandt	$23,092.66

Dated: Washington, D.C., June 13, 2007.

Gerald A. Wacknov
Administrative Law Judge

[6] While the Respondent concedes the accuracy of these alternative calculations, it nevertheless contends that backpay should be further adjusted to reflect that on the "average" the Respondent's employees earn approximately $15 per hour; therefore the backpay of Rogers and Hildebrandt should be reduced to reflect this hourly average and they should not have been matched with any particular employees. In effect, the Respondent is suggesting that the methodology used by Compliance Officer Fetch is inappropriate. I credit the testimony of Compliance Officer Fetch that the methodology utilized by the Region constitutes the standard and customary method of calculating backpay in such situations. The Respondent has presented no contrary evidence. Nor has the Respondent demonstrated that its averaging method more accurately reflects the amounts Rogers and Hildebrandt would have earned. Accordingly, I find no merit to this contention of the Respondent.

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