

J. C. Boespflug Construction Co. and Fred W. Hagel. *Case No.*
19-CA-1153. July 9, 1957

SUPPLEMENTAL DECISION AND ORDER

On July 27, 1955, the Board issued its Decision and Order in the above-entitled case,¹ finding that the Respondent had unlawfully discharged Fred W. Hagel on June 9, 1954, in violation of Section 8 (a) (3) and (1) of the Act. The Board, as part of its remedy, ordered the Respondent to make Hagel whole for any loss of pay which he may have suffered as a result of the discrimination against him. The Board further directed, however, that the Respondent's financial liability to Hagel should in no event continue beyond the completion date of the Anchorage, Alaska, project² from which Hagel was discriminatorily discharged.

The Respondent's Anchorage project thereafter having been completed, and the parties having failed, through informal negotiations, to agree on the amount of back pay due Hagel, the General Counsel moved the Board on February 24, 1956, for an order directing a back-pay hearing to be held in accordance with the procedure set forth in Sections 102.51a to 102.51h, inclusive, of the Board's Rules and Regulations, Series 6, as amended. On March 13, 1956, the Board issued an order directing the Regional Director for the Nineteenth Region to serve upon the parties a back-pay specification as provided in Sections 102.51a and 102.51b of the Board's Rules and Regulations, and thereafter to proceed in accordance with Sections 102.51c to 102.51h of the Rules and Regulations.

On May 23, 1956, the General Counsel filed back-pay specifications claiming a total of \$5,410.40 to be due Hagel for the period from the date of his discriminatory discharge on June 9, 1954, to the completion date of the Anchorage project on September 25, 1955.³ On June 11, 1956, the Respondent filed an answer disclaiming liability for most of the back pay claimed by the General Counsel. Pursuant to due notice to all parties, a hearing was held on November 15 and 16, 1956, before Trial Examiner Howard Myers. On December 14, 1956, the Respondent filed a brief in which it contended that the maximum amount of back pay due Hagel, if any, was \$923.74. On January 9, 1957, the Trial Examiner issued his Supplemental Intermediate Report attached

¹ 113 NLRB 330.

² This project consisted of the construction of the Elmendorf Air Force Base hospital near Anchorage, Alaska.

³ At the hearing, the General Counsel was permitted to amend the specifications by alleging that the Anchorage project was not completed until November 14, 1955, when the last carpenter on the job was terminated. The General Counsel also adduced evidence at the hearing showing Hagel's intermediate earnings for the period from September 25 to November 14, 1955.

hereto, in which he recommended, in agreement with the Respondent's contention, that Hagel be awarded the sum of \$923.74 for loss of pay by reason of the Respondent's discrimination against him. Thereafter, the General Counsel filed exceptions to the Supplemental Intermediate Report and a brief in support of its exceptions, and the Respondent filed a reply brief.

Pursuant to the provisions of Section 3 (b) of the Act, as amended, the Board has delegated its powers in connection with this proceeding to a three-member panel [Chairman Leedom and Members Rodgers and Bean].

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The Board has considered the Supplemental Intermediate Report,⁴ the exceptions and briefs, and the entire record in the case,⁵ and, except as noted below,⁶ hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

ORDER

Upon the entire record in this case, the National Labor Relations Board hereby orders that the Respondent, J. C. Boespflug Construction Co., its officers, agents, successors, and assigns shall pay to Fred W. Hagel net back pay in the amount of \$923.74.

⁴ The Supplemental Intermediate Report contains inadvertent errors which do not affect our conclusions herein. Thus, the Trial Examiner states that Wayne Edsall was rehired in March 1953 rather than March 1954, concludes that Hagel would not have been retained as a carpenter after October 14, 1954, instead of October 17, 1954.

⁵ We have also considered the General Counsel's motion to strike portion of (Respondent's) reply brief and comment upon case cited therein. We find nothing, however, in said document to affect our determination of the issues presented in this case.

⁶ The Trial Examiner found, *inter alia*, that Hagel did not make a diligent attempt to obtain employment between November 11, 1954, and May 16, 1955. As this period is subsequent to the date when, as found by the Trial Examiner, Hagel would in any event have been terminated, we find it unnecessary to pass upon, and therefore do not adopt, the Trial Examiner's finding of a lack of diligence in seeking employment.

SUPPLEMENTAL INTERMEDIATE REPORT

On July 27, 1955, the National Labor Relations Board, herein called the Board, issued a Decision and Order¹ in the above-entitled proceeding finding, among other things, that J. C. Boespflug Construction Company, herein called Respondent or Company, had violated Section 8 (a) (3) and (1) of the National Labor Relations Act.

The Board, as part of its remedy, ordered Respondent, to reinstate Fred W. Hagel to his former or substantially equivalent job and make him whole for any loss of pay he may have suffered during the period of the discrimination against him, less his net earnings during that period. It further ordered that the back pay due Hagel was to be computed in accordance with the formula enunciated in *F. W. Woolworth Company*, 90 NLRB 289. The Board, however, limited the back-pay direction by, (1) eliminating any reimbursement to Hagel during the period he would normally have been out of work due to seasonal layoffs; and (2) by restricting Respondent's financial liability to Hagel to the date of the completion of the Anchorage, Alaska, project which Respondent was then performing.

¹ 113 NLRB 330.

The parties having been unable, through informal negotiations, to agree upon the amount of back pay due Hagel,² the General Counsel for the Board moved the Board on February 24, 1956, for an order directing a back-pay hearing to be held in accordance with the procedure set forth in Sections 102.51a through 102.51h of the Board's Rules and Regulations, Series 6, as amended. On March 13, 1956, the Board issued an order directing the Regional Director for the Nineteenth Region to serve upon Respondent back-pay specifications and to proceed thereon.

On May 23, 1956, the aforesaid Regional Director duly served upon Respondent and Hagel back-pay specifications alleging that Respondent was indebted to Hagel in the sum of \$5,410.40 for the period from June 9, 1954, the date when Hagel was discriminatorily discharged, to September 25, 1955, the date when Respondent completed its project at Elmendorf Air Force Base, at Anchorage, Alaska.³

At the instant hearing, which was held pursuant to due notice at Anchorage, Alaska, on November 15 and 16, 1956, Board's counsel contended that, absent discrimination, Hagel would have been continuously employed by Respondent as a carpenter until the project upon which he was employed was completed by Respondent. Respondent contended at the hearing and in its brief⁴ that Hagel, in the normal course of events, would have been laid off on or before the week ending October 17, 1954, when a reduction in the carpenter force reduced the number of carpenters then working to 10; that this group of 10 carpenters was later reduced to 8 on November 3, 1954; and that it was further reduced on January 17, 1955, to 4.

Respondent further contended that since Hagel did not make a reasonable effort during the period of his unemployment, November 11, 1954, to May 16, 1955, to obtain other work, he is not entitled to any back pay during said period.

A. *The pertinent facts*

Hagel testified, and the Trial Examiner finds, that: prior to World War II and until about 1943, he was in the employ of Lockheed Aircraft Corporation, doing "tool liaison work and jig and fixture work all with precision tools"; about in 1943, he entered the carpentry field; he entered Respondent's employ in 1952; he lived in the Anchorage, Alaska, area since March 29, 1952; at the time of his discharge by Respondent on June 9, 1954, he was a journeyman carpenter; he had performed rough as well as finished carpentry work for Respondent; on June 15, he registered for employment with the Alaska Territorial Employment Service, and at the same time requested unemployment compensation, and asked for a job; he reported to the unemployment service on July 2 and 9; on the latter date he informed the unemployment service that he had procured employment; on June 9 and 10 he went to Carpenters Local Union 1281, of which he was a member, seeking work; on or about June 11, he went to Seward, Kenai, and Homer, Alaska, in quest of work but obtained none; on either June 12 or June 14 he went to Valdez, Alaska, seeking a job but was unsuccessful; sometime between June 20 and 25, he made unsuccessful job hunting trips to Big Delta and Fairbanks, Alaska; upon returning from Fairbanks, on or about June 26, he asked Grover Fisher, business agent of Carpenters Union Local 1281, for a job; almost daily thereafter he asked Fisher to find him a job; and on July 6, Fisher secured carpenter employment for him with Morrison-Knudsen Company; he worked for Morrison-Knudsen from July 6, until August 4, 1954; and he worked for Patti-MacDonald & Associates from August 6 to September 30, for L. E. Baldwin from October 4 to October 22, and for J. B. Warwick Co. from November 1 to November 11.

The credited evidence further discloses that: Hagel reported regularly, and as often as required, to the Alaska Territorial Employment Service between November 11, 1954, and May 16, 1955; he was unable to obtain a job through that agency; during the aforesaid period he weekly spent from 30 to 60 minutes at the union hall inquiring for employment without success and about once or twice a week he spent approximately 2 hours at the union hall when the morning "open calls" for carpenters were made; that Hagel was not gainfully employed from November 11,

² Respondent having prior to February 1956, completed all its Alaskan operations, the only portion of the Board's affirmative order now left to be enforced is the back-pay provision thereof.

³ At the hearing Board's counsel moved to amend the back-pay specifications by alleging that the project was not completed until November 14, 1955, and hence an additional sum was due Hagel. The motion was granted over Respondent's objection.

⁴ Respondent's counsel filed a brief on December 14, 1956, which has been carefully considered.

1954, through May 16, 1955; and Hagel did not seek employment other than through the Alaska Territorial Employment Service, through Carpenters Local Union 1281, and through a few individual carpenter friends.

In his oral argument, heard at the conclusion of the taking of the evidence in the instant proceeding, Board's counsel stated that it was incumbent upon Respondent to show, by substantial credible evidence, that the 10 carpenters retained by Respondent after October 17, 1954, were so retained on a nondiscriminatory basis. In support of this argument, relying mainly on *Underwood Machinery Company*, 95 NLRB 1386, *Sifers Candy Company*, 92 NLRB 1220, and *Kartarik, Inc.*, 111 NLRB 630, Board's counsel points to Hagel's long, continuous employment with Respondent, the various breaks in employment of the 10 carpenters retained, Hagel's good workmanship, the discriminatory manner in which Hagel was fired in June 1954, and that Hagel's status as job steward at the time of said discharge entitled him to the maximum preference of employment retention.

To refute these contentions, Respondent relies mainly, but not solely, upon the testimony of Richard T. Mayer.

Mayer testified that: he is presently Respondent's Alaskan representative; during the period Respondent was performing the Elmendorf Air Force job he was the assistant to the project manager; during the period in question it was Respondent's reduction-in-force policy to retain those carpenters who not only excelled in general ability and compatibility but who (1) had performed similar type of work for the Company, (2) had more or less specialized in the work then being performed, and (3) had previously been a Respondent supervisory employee;⁵ that seniority was not the determining factor when a reduction in force was necessary; and he, Project Manager William C. Miller, and Job Superintendent John A. Fellerhoff decided which carpenters were to be retained after October 17, 1954.

Mayer further testified that in the fall of 1954, the outside construction on the Air Force project had been substantially completed, and the remaining work consisted predominantly of so-called "finishing" and interior work, including installation of hardwood doors, windows, trim, and general completion of the interior, and as this phase of the work approached Fellerhoff, Miller, and he decided that only 10 carpenters would be needed after October 17; 8 after November 3; and 4 after January 17, 1955.

Mayer's testimony⁶ regarding the individuals retained after October 17, 1954, and the reasons therefor, are discussed *seriatim*.

Grady Ward and James P. Thommasson were retained until November 3, because (a) Ward was not only an excellent carpenter with considerable service with Respondent, but he was the last Negro carpenter employed on the project, and it was Respondent's policy to keep at least one Negro carpenter as long as possible in order to avoid possible charges of racial discrimination, (b) Thommasson had been working with Andrew Clemmeson installing stairs, and Respondent did not want to separate this team until the work had been completed.

Charles Olson was originally hired by Respondent on January 29, 1951, over a year prior to Hagel's employment, and worked continuously until November 15, 1952; Olson was rehired for finishing work on the Alaska Native Service Hospital, another 1954-55 Respondent project and herein called ANS, where he had worked under Foreman Augustine; Respondent considered Olson a specialist at hanging doors; the finishing work on the Air Force project was identical to the ANS finishing work; the carpenters under Augustine's supervision on the ANS job were favored to be retained on the Air Force job; Hagel had never worked under Augustine and had never worked on "hardwood finishing" for Respondent, although he had done some good "softwood interior" work on industrial type buildings, such as on the laundry and maintenance sheds.⁷

William Rauscher had worked for Fellerhoff for many years, had gone to Alaska from Montana at the special request of Fellerhoff with the understanding that he would be given work until the project was completed; Respondent considered

⁵ Mayer testified, and the Trial Examiner finds, that it was Respondent's policy to retain carpenter foremen, or persons who had been such, in preference to nonsupervisory carpenters so that it would have "a group of people who we [could] use as a nucleus for future crews on new work."

⁶ The stipulation [Board's Exhibit No. 2] entered into by Board's counsel and counsel for Respondent also has been taken into consideration.

⁷ The credited evidence discloses that Hagel was rated "good" by Fellerhoff and rated "excellent" by Jack Boyd, the foreman who discharged him in June 1954; each of the eight carpenters retained after November 3 had been rated "excellent" on Respondent's records at one time or another.

Rauscher one of its very best carpenters and he had been a Respondent foreman in 1953. Although Rauscher started work after Hagel, Rauscher's long association with Fellerhoff, his good workmanship, and his former foreman job enabled him to continue work through the winter of 1954-55.

C. C. Call was first employed in 1951, a year prior to Hagel; worked under Augustine on the ANS job as a finishing carpenter; and served as carpenter foreman during the summer of 1952.⁸

Andrew Clemmeson was first hired in 1950, and had the longest continuous employment of any Respondent carpenter, having worked from July 5, 1950, until December 11, 1953. Clemmeson was a Respondent carpenter for 3 years on the ANS project where he worked as a finishing carpenter under Augustine's supervision.

Wayne Edsall started his Alaskan employment with Respondent in June 1952⁹ and worked continuously until December 1953. He was rehired in March 1953 and worked until January 28, 1955. He worked on the ANS and Air Force jobs and was in charge of saw yard during most of his employment on the latter job.¹⁰

Raymond Kays was first hired by Respondent in February 1951; was terminated in September 1951; rehired February 1952, terminated May 1952; hired again in April 1953, terminated in November 1953; rehired in March 1954, terminated January 17, 1955; last hiring was from March 8, 1955, to September 22, 1955.

Olie Edsall was not only an excellent carpenter, but was a 20-year employee of Respondent; worked in Alaska as project manager and as superintendent from 1949 until ill health caused him to resign in August 1953. Edsall returned to the Air Force job in 1954 as part of his recovery therapy.

Paul Breeding was first hired in 1951. During his employment he worked as a finishing carpenter on ANS job under Augustine and Respondent considered him a specialist on jobs requiring mechanical ability.¹¹

Upon the entire record in the case, the Trial Examiner finds Mayer's testimony, as epitomized above, to be substantially in accord with the facts. Mayer impressed the Trial Examiner as a straightforward, honest witness and to be a person who is meticulous in not enlarging his testimony beyond his actual memory of what occurred. In addition, Mayer's testimony is, in the main, corroborated by Respondent's books and records, the accuracy of which has not been challenged.

The credited evidence of Grover C. Fisher, business agent for Carpenter's Local Union 1281 from July 1953 to July 1955, and Vernon Ingram, said Union's business agent since July 1955, clearly discloses that Local 1281, at least since July 1953, has continuously maintained a system of rotation of employment opportunities through a "list" or "call" system, which works as follows: When a carpenter member of Local 1281 is out of work, he requests said Union to place his name on the bottom of the list and his name works up as other carpenters above him on the list are dispatched to jobs; that when employers call the Union to supply carpenters, without designating a particular carpenter by name, it is termed an "open call." Each day, at about 10 a. m. and 2 p. m. the person in charge of the open calls proceeds to call out the available jobs and those jobs are assigned to the carpenters present at the "call" in the order their names appear on the list.¹²

Hagel testified, and the Trial Examiner finds, that he never requested to have his name placed on the above-described unemployment list; that he did not regularly appear at "call time" to obtain whatever employment was available; and that he only presented himself about once or twice a week at the morning calls.

B. Concluding findings

Upon the record as a whole, including the record of the original hearing,¹³ the Trial Examiner finds that (1) Hagel would not have been retained as a carpenter

⁸ Just prior to being fired in June 1954, Hagel was removed as job steward by his fellow carpenters and replaced by Call. Hence, Board counsel's contention that Hagel's status as job steward entitled him to maximum employment preference is without merit.

⁹ Edsall had worked for Respondent in the summer of 1944, and in the summer of 1947, on some Montana jobs.

¹⁰ This employment was from March 3 to December 23, 1953, and from March 8, 1954, to January 28, 1955.

¹¹ From June 27, 1953, to October 30, 1953, Breeding was on loan to Electric Smith Company.

¹² Fisher testified without contradiction, and the Trial Examiner finds, that on one occasion in the winter of 1955, he called approximately 75 names before he was able to fill a request for 10 carpenters.

¹³ At the specific request of counsel, the Trial Examiner has carefully read the entire record of the original hearing, including the stenographic transcript thereof.

on the Air Force job after October 14, 1954, and (2) Hagel did not make a diligent attempt to obtain employment between November 11, 1954, and May 16, 1955. Accordingly, the Trial Examiner finds that the gross back pay due Hagel amounts to \$923.74 which sum is arrived at in the following manner:

Gross back-pay due from Respondent from 6-10-54 to 10-17-54-----	\$3,487.07
Interim Gross Earnings ¹⁴ -----	2,563.33
Total back pay due-----	923.74

¹⁴ From Morrison-Knudsen \$843.16; from Patti-MacDonald & Associates \$1,404.05; from L. E. Baldwin \$316.12.

[Recommendations omitted from publication.]

Joslin Dry Goods Company and International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, Local No. 452, AFL-CIO. Case No. 30-CA-419. July 9, 1957

DECISION AND ORDER

On April 9, 1956, Trial Examiner Henry Sahm issued his Intermediate Report in the above-entitled proceeding finding that the Respondent, Joslin Dry Goods Company, had engaged in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action as set forth in the copy of the Intermediate Report attached hereto. The Trial Examiner found further that the Respondent had not engaged in certain unfair labor practices alleged in the complaint, and recommended dismissal of these allegations of the complaint. Thereafter, the Respondent and the Charging Party, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, Local No. 452, AFL-CIO, hereinafter referred to as the Union, filed exceptions to the Intermediate Report and supporting briefs.

The Board has reviewed the rulings made by the Trial Examiner and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions, and briefs, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner with the following additions, modifications, and exceptions:

1. Respondent is a retail department store with main and branch stores located in Denver, Colorado, and environs. On June 29, 1954, the Respondent received a letter from the Union in which the Union claimed to represent a majority of the employees who work at the Respondent's warehouse as truckdrivers, truck helpers, warehousemen, appliance servicemen and installers, and television service repairmen, and requested the Company to bargain with it for these employees. Upon receipt of the Union's demand for recognition, Store Superintendent Jordan, telephoned the Respondent's New York