

The parties agreed that truckdrivers should be included in the unit. As indicated above the truckdrivers haul coal from the mines under the various operators. However, they appear to be under the exclusive control of Panther who assigns them to the various mining operations as needs require. Though the drivers appear from time to time on the payrolls of the operators, such payroll practice seems to be merely a device for allocating the cost of the trucking service supplied by Panther. Thus, we find that Panther is the sole employer of the truckdrivers and they shall be included in the Panther-E.T.-Roberts unit.

Accordingly, we find that the following employees of the named employers constitute separate units appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

(1) All underground and outside employees working in and around the mines and tippie employed by Panther Coal Company, Inc., and Lee & Blankenship Coal Co., excluding technical and office employees, guards, and supervisors as defined in the Act.

(2) All underground and outside employees working in and around the mines and tippie employed by Panther Coal Company, Inc., and Lester & Fox Coal Co., excluding technical and office employees, guards, and supervisors as defined in the Act.

(3) All underground and outside employees working in and around the mines and tippie employed by Panther Coal Company, Inc., and Rocky Gap Coal Co., excluding technical and office employees, guards, and supervisors as defined in the Act.

(4) All underground and outside employees working in and around the mines and tippie, including truckdrivers, employed by Panther Coal Company, Inc., at its E.T. Coal Co. and Roberts Coal Co. mining operations, but excluding technical and office employees, guards, and supervisors as defined in the Act.

[Text of Direction of Elections omitted from publication.]

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**Aerosonic Instrument Corp. and Harry V. Miller and Edna Ludington.** *Cases Nos. 9-CA-957 and 9-CA-957-1. August 3, 1960*

### SUPPLEMENTAL DECISION AND ORDER

On November 6, 1956, the National Labor Relations Board issued a Decision and Order in the above-entitled case,<sup>1</sup> which order was enforced by the United States Court of Appeals for the Sixth Circuit by a decree entered on December 17, 1957.<sup>2</sup> Thereafter, pursuant to a

<sup>1</sup> 116 NLRB 1502.

<sup>2</sup> 249 F. 2d 959 (C.A. 6). We hereby correct the date of the court's decision, which is inadvertently set forth in the Intermediate Report as December 17, 1959.

backpay specification and appropriate notice issued by the Regional Director for the Ninth Region, a hearing was held for the purpose of determining the amounts of backpay due to the discharged employees.

On April 18, 1960, Trial Examiner James T. Rasbury issued his Intermediate Report in this supplemental proceeding, a copy of which is attached hereto, in which he recommended that specific amounts of backpay be awarded to the seven claimants. Thereafter, the Respondent filed exceptions to the Intermediate Report.

The Board<sup>3</sup> 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 the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

### ORDER

Upon the basis of this Supplemental Decision the entire record in this case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Aerosonic Instrument Corp., its officers, agents, successors, and assigns, shall pay net backpay in the amounts of \$13.40 to James Barfield; \$433.23 to John Buehler; \$759.27 to Ewell Goodpastor; \$515.04 to Dorothy Hall; \$50.88 to Harry V. Miller; \$118.08 to Violet Rogers; and \$704.94 to Helen Niederhelman.

<sup>3</sup> Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, the Board has delegated its powers in connection with this case to a three-member panel [Chairman Leedom and Members Bean and Jenkins].

### INTERMEDIATE REPORT

On November 6, 1956, the Board issued its Decision and Order, 116 NLRB 1502, directing that the Respondent, Aerosonic Instrument Corp., make whole James Barfield, John Buehler, Ewell Goodpastor, Harry V. Miller, Helen Niederhelman, Violet Rogers, and Dorothy Hall for their losses resulting from the Respondent's unfair labor practices in violation of Section 8(a)(3) of the Labor Management Relations Act, as amended, herein called the Act. On December 17, 1959, the Circuit Court of Appeals for the Sixth Circuit entered its decree enforcing in full the backpay provisions of the Board's Order in said case.

The General Counsel and the Respondent being unable to informally resolve the question of backpay, the Board acting by and through its agent John C. Getreu, Regional Director for the Ninth Regional Office, issued backpay specifications and notice of hearing which were duly served on the Respondent on January 6, 1960. The backpay specification served on the Respondent set forth in clear and precise terms, consistent with the Board's Decision and Order rendered against Respondent in 116 NLRB 1502, the backpay period, the gross backpay, the method of computation, the interim earnings, and the net amount due each employee above-named.

The Respondent by and through its president, H. J. Frank, filed an answer in the form of a letter from Mr. Frank to the Ninth Regional Office of the National Labor Relations Board which was dated January 14, 1960, the contents of said letter having been subscribed and sworn to before a Florida notary public on January 26, 1960, at Clearwater, Florida.

The answer questioned the propriety of including the "bonus" or "incentive" earnings of the employees as a part of the gross backpay, contending that the "bonus" had been eliminated during the backpay period of time and that the employees herein involved would not have received a "bonus" had they continued working for the Respondent during the backpay period. Mr. Frank's answer also raised a question

concerning the failure of the backpay specifications to consider as interim earnings such moneys as the individuals herein involved may have received from the State of Ohio in the form of unemployment benefits in calculating the net amount due each employee.

At the hearing held in Cincinnati, Ohio, on March 15 and 16, 1960, Respondent's counsel offered no evidence in the form of authenticated corporation minutes, books, and records kept in the normal course of business by Respondent Corporation or the sworn testimony of any witnesses that might have enlightened the Trial Examiner as to the exact pay received by other employees working for the Respondent during the appropriate backpay periods herein involved or any evidence of a similar nature which might have tended to prove a change in the Respondent's pay policies which would have been of a nondiscriminatory nature insofar as the employees herein are involved. Respondent's counsel stated that replacements hired by Respondent for the employees involved herein did not receive "bonuses" during a portion of the backpay period herein involved. During the course of the hearing the Trial Examiner repeatedly urged Respondent's counsel to come forward with some evidence of an acceptable nature which would have some probative value in proving a nondiscriminatory change in the pay practices of the Respondent. Respondent's counsel replied by saying that other than his own hearsay remarks he had no proof to present.

In the course of the hearing Respondent's counsel took the position before the Trial Examiner that the Respondent did not question the accuracy of the figures contained in the aforementioned backpay specification; that the Respondent did not contest the "bonus" payments utilized in the backpay specifications for employees Dorothy Hall and Violet Rogers inasmuch as they were not employed in the machine shop which apparently was the only portion of Respondent's business wherein a change concerning the "bonus" payments occurred; and that the Respondent no longer desired to question the failure of the backpay specifications to include the moneys, if any, that the employees herein involved may have received as unemployment compensation from the State of Ohio.<sup>1</sup>

#### Findings

Based on the entire record before the Trial Examiner, including the pleadings, the position taken by Respondent's counsel on the record, the failure of Respondent to come forward with any evidence, and the entire record herein, the Trial Examiner is compelled to accept as proven the amounts of backpay to which the employees herein are entitled as that set forth in the aforementioned specifications.<sup>2</sup> This is true and the only finding available to this Trial Examiner for two reasons. First the complete lack of any acceptable evidence of probative value tending to prove a lawful and nondiscriminatory change in pay policies as it concerned the "bonus" payments to the employees herein affected during the backpay periods involved. Second, the Board in its Decision and Order rendered against this Respondent accepted and adopted the Trial Examiner's Intermediate Report concerning the initial violations of the Act by the Respondent as to the discriminatory discharges of the employees herein involved. In the aforementioned Intermediate Report which is a part of the official record herein the Trial Examiner stated the following: "True it is that the discontinuance of the incentive system in the machine shop stemmed from the unlawful conduct in discharging the crew, renders any probable bonus earnings thereunder a legitimate item in the computation of the backpay"; (see p. 1528). [Emphasis supplied.] This finding may very well have been binding on the Trial Examiner, and was so urged by the counsel for the General Counsel, even if the Respondent had come forth with some probative evidence tending to prove a permissible nondiscriminatory change in pay policies during the backpay period herein involved. However, in view of the record in this case, a determination of the precise question as to the extent to which the earlier findings might have been binding on the Trial Examiner is not reached. In the absence of some probative evidence supporting Respondent's answer this Trial Examiner feels entire justified in utilizing the earlier determination as an added reason for the holding herein, because it as apparent that the matter was litigated and carefully considered by the Trial Examiner in the initial determination herein.

<sup>1</sup> See *Gullett Gin Company, Inc v NLRB*, 340 US 361, in which the Supreme Court stated that the Board need not use unemployment compensation moneys received as "earnings" to be offset against gross compensation.

<sup>2</sup> See Section 102.54 through 102.59 of the Board's Rules and Regulations, Series 8, for a statement of Board procedure and pleadings in backpay proceedings.

## Conclusions and Recommendations

Upon the basis of the foregoing findings of fact, and upon the entire record in this proceeding, including the more detailed computations as set forth in the Appendix attached hereto, I recommend that the Board adopt the findings of fact made herein and issue such decision or order as may be appropriate, requiring and directing Aerosonic Instrument Corp., its officers, agents, successors, and assigns to pay Jame Barfield the sum of \$13.40; John Buehler the sum of \$433.23; Ewell Goodpastor the sum of \$759.27; Dorothy Hall the sum of \$515.04; Harry V. Miller the sum of \$50.88; Violet Rogers the sum of \$118.08; and Helen Niederhelman the sum of \$704.94. The moneys to be paid each named individual shall, of course, be subject to the usual withholding taxes and payments required by law.

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**Schott Metal Products Company and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Milk & Ice Cream Drivers & Dairy Employees Union, Local 497.** *Case No. 8-CA-1970. August 3, 1960*

## DECISION AND ORDER

On March 16, 1960, Trial Examiner Albert P. Wheatley issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging 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. Thereafter, the Respondent filed exceptions to the Intermediate Report and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, the Board has delegated its powers in connection with this case to a three-member panel [Chairman Leedom and Members Rodgers and Jenkins].

The Board has reviewed the rulings made by the Trial Examiner at the hearing 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<sup>1</sup> in the case, and hereby adopts the Trial Examiner's findings, conclusions, and recommendations, with the following additions.<sup>2</sup>

The Respondent excepts, *inter alia*, to the Trial Examiner's failure to find that certain employees engaged in such strike misconduct as to justify denying them reinstatement. In its brief to the Board in support of its exceptions, the Respondent alludes to three incidents involving two employees, Speck and Muzzy. The incidents concern

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<sup>1</sup> After the Intermediate Report had issued, Respondent moved to reopen the record for the purpose of taking additional evidence relating to the date of the Union's organizational campaign. As the Respondent has not made any showing as to why the additional evidence could not have been offered at the hearing by the exercise of due diligence, we do not believe that a reopening is warranted. *Missouri Transit Company, et al*, 116 NLRB 587, 589-590. The motion is denied.

<sup>2</sup> The Respondent's request for oral argument is also denied as the record, exceptions, and brief adequately present the issues and positions of the parties.