

tions which are sufficiently different from those of the driver-salesmen and route supervisors to warrant the exclusion of the latter two groups. We also note that no union seeks to represent a combined unit of transport drivers and driver-salesmen. We find, therefore, that the following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All transport (relay) drivers employed by the Employer at its Jacksonville, Florida, plant, excluding all other employees, guards, and supervisors as defined in the Act.

[Text of Direction of Election omitted from publication.]

Loren A. Decker d/b/a Decker Truck Lines and Local Union 650, Teamsters, Chauffeurs, Warehousemen and Helpers of America, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.
Case No. 18-CA-1036. October 12, 1962

SUPPLEMENTAL DECISION AND ORDER

On August 24, 1960, the Board issued a Decision and Order in the above-entitled case¹ finding *inter alia* that the Respondent had discharged Carl Reisner in violation of Section 8(a)(1) and 8(a)(3) of the Act and directing that the Respondent offer Reisner immediate and full reinstatement to his former or substantially equivalent position without prejudice to his seniority or other rights and privileges and make him whole for any loss of pay suffered by reason of its discrimination against him. Thereafter the Board's order was enforced in full by the United States Court of Appeals for the Eighth Circuit and a decree was entered on December 4, 1961.²

On March 22, 1962, the Board's Regional Director for the Eighteenth Region issued a backpay specification and, on April 2, 1962, the Respondent filed an answer thereto. Upon appropriate notice issued by the Regional Director, a hearing was held before Trial Examiner Stanley Gilbert for the purpose of determining the amount of backpay due the claimant. On July 6, 1962, the Trial Examiner issued his Supplemental Intermediate Report, attached hereto, in which he found that Reisner was entitled to payment by the Respondent of \$2,106.58. Thereafter, the Respondent and the General Counsel filed exceptions to the Supplemental Intermediate Report and briefs in support thereof.³

¹ 128 NLRB 858.

² 296 F. 2d 338.

³ The Respondent's request for oral argument is denied inasmuch as the positions of the parties are adequately set forth in the record, exceptions, and briefs.

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

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 entire record in this case, including the Supplemental Intermediate Report, the exceptions and briefs, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner with the modification noted below.

The Board specifically rejects Respondent's arguments that its check sent to the Board's Regional Office in November 1960 constituted an accord and satisfaction for all backpay due employee Reisner, both before and after the date of the check and that the Board is now estopped from raising the backpay issue. The record shows that the compliance officer and Regional Director repeatedly advised the Respondent, both before and after receipt of the check, that the case would not be closed nor would the Board approve a settlement until a bona fide offer of reinstatement had been made to Reisner. We agree with the Trial Examiner that the Respondent did not make Reisner a proper offer of reinstatement. It is thus clear that no settlement was ever concluded. Moreover, at the hearing the Respondent and General Counsel stipulated that the Board was not apprised of the so-called settlement and it is well settled that only formal approval by the Board will make a settlement binding upon the parties. *N.L.R.B. v. Armstrong Tire and Rubber Co.*, 263 F. 2d 680 (C.A. 5); *Bonnar-Vawter Incorporated*, 135 NLRB 1270.

ORDER

On the basis of the foregoing Supplemental Decision and the entire record in this case the National Labor Relations Board hereby orders that the Respondent Decker Truck Lines, Fort Dodge, Iowa, its agents, successors, and assigns shall pay to Carl Reisner net backpay in the amount of \$2,106.58.

SUPPLEMENTAL INTERMEDIATE REPORT AND RECOMMENDED ORDER

STATEMENT OF THE CASE

This is a supplemental proceeding heard before Trial Examiner Stanley Gilbert in Fort Dodge, Iowa, on May 1 and 2, 1962, on the backpay specification issued March 22, 1962, and answer of Respondent thereto.¹

¹ Both the specification and answer were amended during the course of the hearing, but it does not appear necessary for the purpose of this Intermediate Report to set forth the details of said amendments.

On August 24, 1960, the Board issued its Decision and Order (128 NLRB 858) directing the Respondent, *inter alia*, to "offer Carl Reisner immediate and full reinstatement to his former or substantially equivalent position without prejudice to his seniority or other rights and privileges and make him whole . . . for any loss of pay he may have suffered by reason of the Respondent's discrimination." On December 4, 1961, the United States Court of Appeals for the Eighth Circuit entered its decree (296 F. 2d 338) enforcing in full the provisions of the Board's Order herein.

The specification alleges that Respondent has not offered reinstatement to Reisner in accordance with the Board's Order and sets forth a computation of the backpay claimed to be due to said Reisner. The computation runs from the date of his discharge, March 18, 1959, to the end of the calendar year 1961.²

It was found by the Trial Examiner in the prior proceeding herein (which findings were adopted by the Board and enforced by the Court) that Reisner was at the time of his discriminatory discharge on March 18, 1959, a "regular part-time" driver. It appears in the recital of facts in said Trial Examiner's Intermediate Report, that on March 22, 1959, Reisner offered to work "full-time" for the Respondent. The aforesaid computation of the backpay alleged to be due to Reisner is predicated on what he would have earned as a part-time driver from March 18, 1959, to March 22, 1959, and thereafter as a full-time driver to which category he would have advanced on or before March 22, 1959, it is alleged in the specification, but for his discriminatory discharge.

The Issues and Conclusions

The Respondent, by his answer, as amended during the course of the hearing, raises the following issues:

1. By alleging an accord and satisfaction of all backpay due to Reisner for the period from the date of his discharge up to and including the month of October 1960, the issue is raised whether General Counsel is estopped from seeking any additional backpay for said period.

In an attempt to comply with the Board's Order, Respondent paid to Reisner an amount for said period which was predicated on a computation of what he would have earned as a part-time driver (based on gross backpay of 58 percent of the average earnings of the full-time drivers). General Counsel, in his brief, admits that if it be found that Reisner is not entitled to reinstatement as a full-time driver there would be nothing further due for the period covered by the alleged accord and satisfaction. In view of my findings below that Reisner is entitled only to reinstatement as a part-time driver, he has already received the full amount due to him for said period, and, therefore, it appears no practical purpose would be served in passing upon this issue.³

2. Respondent alleges that it did make a proper offer of reinstatement to Reisner by letter dated December 1, 1960, and subsequent calls to work. However, in view of the admission by Respondent that the gross backpay due Reisner as a part-time driver should be computed on the basis of 58 percent of the average earnings of full-time drivers, and, further, in view of the great disparity between such a figure and the amount Reisner would have earned even had he worked every time the Respondent afforded him the opportunity after the aforesaid letter offering reinstatement, it is clear that the offer was never properly implemented. Respondent called him for only about 20 days of work from December 1960 to the end of 1961.⁴ It does not appear that Respondent can seriously contend that there is an issue as to whether or not there had been a proper offer of reinstatement, since the letter proved to be little more than token compliance with the order of reinstatement. Respondent failed to offer him work on a basis which would have enabled him to earn approximately 58 percent of the average earnings of full-time drivers (which

² General Counsel indicated that thereafter and up to the date of the hearing Reisner has earned more than the gross backpay which could be claimed. General Counsel, however, specifically reserved the right to claim backpay in the future in the event Reisner's interim earnings should fall below the level of the appropriate gross backpay.

³ I do not pass upon the principle of estoppel urged by Respondent, although it does not appear to be well founded.

⁴ In view of this, it appears that Reisner's refusal of a few of these calls would not constitute a waiver of his right to reinstatement. Respondent has not argued that there was a waiver.

would have constituted "reinstatement to his former or substantially equivalent position").

3. The sole and controlling issue raised by Respondent's answer, as amended, is whether or not Reisner is entitled under the Board's Order to reinstatement as a part-time or full-time driver. During the course of the hearing Respondent amended his answer by alleging that Reisner's backpay should be computed on a basis of 58 percent of the average earnings of full-time drivers. It is clear from the record and General Counsel concedes that the 58 percent figure is the proper basis for computing the gross backpay, if it should be determined that Reisner is not entitled to reinstatement as a full-time driver.

The Board's Order provided that he be reinstated as a part-time driver, since that was his status at the time of his discharge. However, the General Counsel contends it is appropriate to infer that, had it not been for his discriminatory discharge on March 18, 1959, he would have advanced to the status of a full-time driver by March 22, 1959. General Counsel then argues that the burden of proof is upon Respondent to show that Reisner was not entitled to reinstatement as a full-time driver and further contends that the fact that there was no seniority practice which would have operated to entitle Reisner to advancement to full-time status is of no significance. (It does not appear that General Counsel contends that such a seniority practice existed nor is there any proof of such a practice.)

In view of the clear mandate of the Board, the burden of proof is first upon General Counsel to establish as appropriate the inference that Reisner was entitled to reinstatement as a full-time driver. It is well established that the burden of proof is on General Counsel to show the gross backpay to which a discriminatee is entitled. I consider that reinstatement to a status higher than that ordered by the Board, if sought by General Counsel, is part of the element of gross backpay for which he must bear the burden of proof.

General Counsel contends that the employment practice of Respondent with respect to other drivers would not be applicable to Reisner, that he "enjoyed an employment status peculiar to him alone." It is then argued that, in view of the progress he had made in the employ of Respondent (increase in the amount of work given him) and his offer to work full time which facts were indicated in the Intermediate Report and of the evidence elicited before me of the availability of full-time positions and the hiring of a few full-time drivers from the ranks of "extras," it is reasonable to infer that he would have become a full-time driver.⁵

Even if I were to accept General Counsel's contention of Reisner's novel employment status and of the inapplicability of Respondent's employment practices to Reisner's situation, I find no basis for drawing an inference as to how Respondent would have reacted to Reisner's offer to work full time, had he not been discriminatorily discharged. There was nothing introduced at the hearing before me which would afford me a basis for anything more than mere speculation, if the employment practices of the Respondent are not to be considered. On the other hand, assuming that Respondent's employment practices are of some significance, the absence of a seniority practice would indicate the inappropriateness of the inference sought by General Counsel.

Thus, I am led to conclude that General Counsel has failed to sustain the burden of proof (which I have found was upon him) that Reisner was entitled to reinstatement to the position of a full-time driver rather than that of a part-time driver as provided in the Board's Order.

General Counsel and Respondent are in accord that, as a part-time driver Reisner would be entitled to backpay based upon a gross backpay of 58 percent of the average earnings of full-time drivers, less 58 percent of his interim earnings for the periods involved. General Counsel, in an appendix to his brief, set forth a computation of the backpay which would be due Reisner predicated upon this accord. The basis for this computation appears to be appropriate and the figures seem correct. Therefore, I accept, and incorporate in this report as "Appendix A" hereof, said compu-

⁵ It is not contended, nor was such a contention litigated before me, that Respondent's failure to accept Reisner's offer to work full time was illegally motivated, disregarding the question of the applicability of the statutory limitation imposed in Section 10(b) of the Act. It does not appear that the question of whether Respondent's failure to accept Reisner's offer to work full time was illegally motivated constituted an issue in the original proceeding.

tation. Accordingly, I find that there is due to Reisner the total net backpay of \$2,106.58.

[Recommendations omitted from publication.]

APPENDIX A

1960 QUARTER IV

A	Total of the average earnings of regular full-time drivers during the last five of the seven pay periods in the quarter (covering November and December).....	\$1,526 49	
B	58% of A.....		\$885 36
C	Net interim earnings received during these five pay periods are as follows		
	Iowa Steel & Const Co.....	\$23 25	
	Pan-O-Gold Bakery.....	261 00	
	Total.....	284 25	
	[Earnings in October from P I E not included (General Counsel's Exhibit No 2b), as this amount was considered in the sum previously paid by Respondent]		
D	58% of C.....		164 86
E.	Net backpay A-D.....		\$720 50

1961 QUARTER I

A.	Total of the average earnings of regular full-time drivers during the quarter.....	\$1,605 38	
B	58% of A.....		\$931 12
C.	Net interim earnings.....	400 59	
D	58% of C.....		232 34
E.	Net backpay A-D.....		698 75

1961 QUARTER II

A	Total of the average earnings of regular full-time drivers during the quarter.....	\$1,691 45	
B	58% of A.....		\$981 04
C	Net interim earnings.....	1,107 08	
D	58% of C.....		642 10
E.	Net backpay A-D.....		338 94

1961 QUARTER III

A.	Total of the average earnings of regular full-time drivers during the quarter.....	\$1,940 39	
B	58% of A.....		\$1,125 42
C	Net interim earnings.....	1,350 89	
D	58% of C.....		783 51
E	Net backpay A-D.....		341 91

1961 QUARTER IV

A.	Total of the average earnings of regular full-time drivers during the quarter.....	\$2,019.13	
B.	58% of A.....		\$1,171 09
C.	Net interim earnings.....	2,008.01	
D.	58% of C.....		1,164.64
E.	Net backpay A-D.....		6 45
	Total net backpay.....		2,106 58