

One or two of the statements made by Hicks, or possibly Woosley, border close upon the line beyond which employer officials illegally restrain and coerce employees in violation of Section 8(a)(1). Among these are Hicks' inquiry on whether Sims had visited an employee's home, and on whether an employee thought the Union would achieve a majority. Even in jest, the foreman's statement that he was preparing to harass any possible union steward in his employment is ordinarily improper. Considering this case as a whole, however, and as no other unfair labor practices have been proved against the Respondent, I do not think any useful purpose would be served by issuance of a formal cease and desist order directed against such isolated, and, at best, very minor infractions of the proscription set out in the Act. Accordingly, I shall recommend dismissal of the complaint in its entirety.

#### RECOMMENDED ORDER

Upon the basis of the foregoing findings and conclusions, I recommend that the complaint herein be dismissed in its entirety.

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**United States Air Conditioning Corporation and International Union, United Automobile, Aerospace and Agricultural Implementation Workers of America, UAW (AFL-CIO).** *Case No. 8-CA-1789. April 11, 1963*

#### SUPPLEMENTAL DECISION AND ORDER

On July 19, 1960, the Board issued a Decision and Order in the above-entitled case,<sup>1</sup> finding that the Respondent had discriminated against 22 named employees in violation of Section 8(a)(3) and (1) of the National Labor Relations Act, as amended, and directing, *inter alia*, that the Respondent offer immediate and full reinstatement to 21 of these employees and make them whole, and also make whole the estate of a deceased employee, for any loss of pay suffered by reason of the Respondent's discrimination.

On November 30, 1961, the United States Court of Appeals for the Sixth Circuit entered its decree enforcing in full the Board's Order including the reinstatement and backpay provisions.<sup>2</sup>

On August 10, 1962, the Board's Regional Director for the Eighth Region issued and served upon the parties a backpay specification and notice of hearing, and issued amendments to this specification on August 31 and September 21, 1962; the Respondent filed answers thereto. Pursuant to notice, a hearing was held before Trial Examiner C. W. Whittemore for the purpose of determining the amounts of backpay due. On December 26, 1962, the Trial Examiner issued the attached Supplemental Intermediate Report, finding that the Regional Director's specifications fully met the requirements of the Board's Rules and Regulations, and that the Respondent's answers thereto did not meet the allegations in the specifications; accordingly, the

<sup>1</sup> 128 NLRB 117.

<sup>2</sup> The court entered a consent decree which is unpublished

Trial Examiner awarded specific amounts of backpay to the discriminatees. The Trial Examiner found further that five of the discriminatees had not been properly reinstated to their former or substantially equivalent positions. Thereafter, the Respondent and the Charging Party filed exceptions and supporting briefs, and the General Counsel filed a brief in support of the Supplemental Intermediate Report.

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 Leedom and Brown].

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 and the exceptions and briefs, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner with the following additions and modifications.

1. The Trial Examiner found, and we agree, that the discriminatees are entitled to the amounts of backpay and other benefits listed in the Supplemental Intermediate Report. The General Counsel, in accordance with the Board's Rules and Regulations, issued a backpay specification analyzing the amounts of backpay due each discriminatee under a comprehensive backpay formula, which is set forth in the specification and described in the Supplemental Intermediate Report. The specification showed for each discriminatee the backpay period broken down by calendar quarters, the basis of computation as to gross backpay and interim earnings, the expenses for each quarter, the net backpay due, and other pertinent information. The General Counsel also introduced the Respondent's employment records, which disclosed that, with respect to each discriminatee, employees with less seniority were retained or new employees hired during the backpay periods in the same or substantially similar jobs as those held by the discriminatees prior to their discharge.

In its answer to the specification, the Respondent maintains that only 7 of the discriminatees are entitled to backpay,<sup>3</sup> and that the remaining 15 are not entitled to any because employment was not available for them during their backpay periods. In its brief filed after the hearing, the Respondent contends that the Trial Examiner foreclosed it from showing, at the hearing, the unavailability of employment for these 15 discriminatees by excluding the evidence it sought to adduce "pertaining to economic consideration, lack of work, failure to have a job available for claimants, or any other defense set up in

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<sup>3</sup> Dwight Andrews, Robert Nathan Dailey, Edwin D. Gale, Edward Heineman, Charles T. Martin, John Ott, and Daniel Wells.

Respondent's answer." We find no merit in the Respondent's contention that it was foreclosed from presenting any relevant evidence. The Trial Examiner did reject—and properly so—the Respondent's efforts to relitigate the issues previously determined in this case. It is clear from the record, however, that the Respondent was not precluded from adducing any competent evidence regarding layoffs or other economic factors bearing upon the availability of jobs during the backpay periods. Indeed, at one point in the record the Trial Examiner remarked that this was precisely the type of evidence which the Respondent should submit, as distinguished from testimony relating to whether the discriminatees were originally laid off for discriminatory or economic reasons, matters already determined by the Board and court, but which the Respondent persisted in attempting to relitigate.

2. The Respondent also contends that the General Counsel failed to meet the burden of proof required in backpay cases. In this connection, the Respondent, during the hearing, argued that, despite the finding of discriminatory discharges, the burden was nevertheless on the General Counsel to show that a job was available for each discriminatee in "the same line" during the backpay period. We find no merit in this contention. We have heretofore held, with court approval, that in a backpay proceeding the burden is on the General Counsel to show only the gross amounts of backpay due. When that had been done, the burden is upon the respondent to establish facts which would negative the existence of liability to a given employee or which would mitigate that liability.<sup>4</sup> In the instant case, as indicated above, the General Counsel not only met with the burden of proof required in such cases, but went further and introduced into the record evidence which disclosed that jobs were available for all the discriminatees during their backpay periods. On the other hand, the Respondent failed to establish any facts which would negative or mitigate its liability to any of the discriminatees.

3. The Trial Examiner found, and we agree, that the Respondent has not satisfied the Board's order with respect to the reinstatement of Daniel Wells, Cathie Parker, Gary Bell, Jessie Randall Berry, and Bernard Scribner. However, the Trial Examiner made no recommendation with respect to the Respondent's reinstatement of these five employees. In these circumstances, we find that Respondent's backpay liability as to these employees was not tolled by its token reinstatement of them on August 1, 1960, but continues to accrue until the Respondent offers them reinstatement to their former or substan-

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<sup>4</sup> *NLRB v. Brown and Root Inc.*, 311 F. 2d 447 (CA 8); *Phelps Dodge Corp. v. NLRB*, 313 U.S. at 198-200, *NLRB v. Cambria Clay Products Company*, 215 F. 2d 48, 56 (CA 6); *NLRB v. J. G. Boswell Co.*, 136 F. 2d 585, 597 (CA 9).

tially equivalent positions. Accordingly, the Regional Director is instructed to take such steps as may be necessary to insure proper reinstatement of these discriminatees, and to determine the amounts of additional backpay if any which may be due them. Payment of backpay herein determined to be due shall not, however, await such further action.

### 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, United States Air Conditioning Corporation, Delaware, Ohio, its officers, agents, successors, and assigns, shall pay to the employees involved in this proceeding, as net backpay herein determined to be due, the amounts set forth opposite their names in the conclusions and recommendations of the Trial Examiner.

### SUPPLEMENTAL INTERMEDIATE REPORT

#### STATEMENT OF THE CASE

This proceeding stems from a dispute as to the amount of backpay due 22 employees found by the Board to have been unlawfully discharged by the Respondent.

On July 19, 1960, the Board issued its Decision and Order (128 NLRB 117) requiring that the Respondent offer immediate and full reinstatement to 21 of these employees (one in the interim having died) and that the Respondent make them whole (or in the case of the deceased employee his estate) for the loss of pay suffered by reason of the unlawful discrimination.

On November 30, 1961, the United States Court of Appeals for the Sixth Circuit entered its decree enforcing in full the reinstatement and backpay provisions of the Board Order.

On August 10, 1962, the Regional Director for the Eighth Region issued and served a backpay specification and notice of hearing. Amendments to this specification were issued on August 31 and September 21, 1962. The Respondent filed answers. Pursuant to notice, hearing was held in Delaware, Ohio, on September 24, 25, 26, and October 16, 1962, before Trial Examiner C. W. Whittemore.

At the hearing all parties were represented and were afforded full opportunity to present evidence pertinent to the issues. Briefs have been received from General Counsel and the Respondent.

Upon the record thus made, and from his observation of the witnesses, the Trial Examiner makes the following findings and conclusions:

#### I THE SPECIFICATIONS AND RELEVANT MOTIONS

As noted above, before the hearing the Regional Director issued and served upon the Respondent original and amended specifications. In the opinion of the Trial Examiner not only were such specifications comprehensive and detailed, but they fully meet the requirements of Section 102.53 of the Board's Rules and Regulations since they show, for all employees involved, "the backpay periods broken down by calendar quarters, the specific figures and basis of computation as to gross backpay and interim earnings, the expenses for each quarter, the net backpay due" and other pertinent information.

Also, as noted above, the Respondent filed "answers" to such specifications. None of such answers, in the opinion of the Trial Examiner and as urged by counsel for the General Counsel both at the opening of the hearing and in his brief, comply with the requirements set out by the Board in Section 102.54(b) of said Rules and Regulations. They fail fairly to meet the substance of the allegations of the specifications. They do not "specifically state the basis" for disagreement nor set forth "in detail" the Respondent's position as to the applicable premises nor furnish appropriate supporting figures.

In substance and effect, as to most of the employees involved, the Respondent's answers merely attempt to resurrect issues already litigated and determined by the Board and the court—questions relating to the original discharges and layoffs. At the opening of the hearing the Trial Examiner granted the motion of counsel for the Regional Director to strike all such impertinent allegations of the answers, but reserved ruling upon the accompanying motion to render judgment on the specifications as to 14 discriminatees without the taking of further evidence. These 14 individuals are:

Gary Lee Bell	Burl Coffee	Vollie H. Maggard
Jessie Randall Berry	Lloyd Huddlestun	Bernard Scribner
Russell Hickson	Bozo Petrovich	Warren Thomas
John Ott	Ronald Charles Bell	Roger Shoaf
Lowell Irvin Bell	James J. Gentry	

Thereafter evidence was received as to all claimants. The Respondent, however, failed to amend its answers, even during the hearing, to meet the requirements of the aforesaid Rules and Regulations. Furthermore, in the opinion of the Trial Examiner upon review of the testimony adduced by the Respondent, much of such evidence as was brought forward was vague and immaterial. For these reasons the Trial Examiner now grants the motion to "make findings of fact as to the 14 claimants based upon the allegations appearing in the specifications, as amended."

## II. OTHER ISSUES

In compiling the specifications counsel for the General Counsel includes as appropriate factors for inclusion in backpay due the loss of vacation pay, Christmas bonus, and profit-sharing and retirement benefits. In its answer the Respondent merely denies "all allegations" with respect to these elements.

As to vacation pay, facts adduced at the hearing and both Board and court decisions fully support the contention of counsel for General Counsel. For a considerable period of years the employees of the Respondent have received vacation pay in accordance with a set formula based upon length of service with the Company. And as counsel states succinctly in his brief:

It has long been established that wages, as construed under the National Labor Relations Act, include emoluments of value arising out of the employment relationship over and above the actual hourly or piece work rate. There is no question here but that the added compensation represented by the vacation pay derived directly from the employment relationship. Accordingly, it is properly includable in the computation of gross backpay. *Kartarik Inc.*, 111 NLRB 630, 634-635, enf'd 227 F.2d 190 (C.A. 8); *Mastro Plastics Corporation, etc.*, 136 NLRB 1342.

That annual Christmas gifts, as bonuses, constitute a part of an employee's remuneration is a Board determination approved by the court in *N.L.R.B. v. Niles-Bement-Bond Company*, 199 F.2d 713 (C.A. 2). That the factor is properly included in backpay computations was established in *Moss Planing Mill Co.*, 110 NLRB 933, 935.

Since it does not appear that the Respondent followed a specific formula in awarding such bonuses, counsel properly, in the opinion of the Trial Examiner, determined the amounts due the discriminatees by applying bonus payments received by reasonably comparable employees. As to this principle the Respondent offered no alternative, simply maintaining that no bonuses, however arrived at, should be awarded. Therefore the Trial Examiner will adopt the allegations of the specifications on this point.

As to the issue of profit-sharing plan benefits and as General Counsel urges, *W. C. Nabors d/b/a W. C. Nabors Company* (134 NLRB 1078) supports his contention that to make the discriminatees whole certain credits properly must be included in the backpay due them. Credits, and not outright payments, are included in the specifications, since the Respondent's plan (which requires participation) provides for actual payments only when employment terminates. Terminations here not having been voluntary, but unlawful, it is reasonable to require an upward adjustment of such credits to a monetary level which would have been attained absent the discrimination.

The foregoing principles having been approved by the Board and the Trial Examiner having spot-checked for accuracy the detailed and exhaustive compilations upon which the specifications are based, said specifications are hereby adopted.<sup>1</sup>

In addition to the factors above disposed of, there exists a dispute as to whether or not five discriminatees (Daniel Wells, Jessie Randall Berry, Cathie Parker, Gary Bell, and Bernard Scribner) were in fact ever reinstated as the Board and court ordered to their "former or substantially equivalent positions."<sup>2</sup> The case of each is discussed below.

*Daniel Wells:* Pursuant to the Board's Order, Wells was offered reinstatement as were others involved, on August 1, 1960. For about 10 days he was permitted to work at his former job as welder and assembler. At this point, although others of less seniority continued at similar work, Wells was told there was no more work for him on the line and was transferred to construction welding elsewhere in the plant. On this job, which paid about 75 cents an hour less than his regular position, he was permitted to remain a few weeks. He was then assigned as a helper to the electrical maintenance foreman, at the same reduced pay. On January 20, 1961, he was laid off, being told there was no more work for him. He finally obtained steady work with Clark Industries. About noon on Saturday, March 31, 1962, Wells was informed by Superintendent Ross, at the Respondent's plant, that he could return to his former position on the line but must report by 7 o'clock the following Monday morning, the next workday. Since Wells had resigned from a steady interim job to accept the reinstatement offer in 1960, he reasonably asked Ross for time to give appropriate notice to his then employer, Clark Industries. Ross was adamant, and insisted that he must report on Monday. Although Wells made an effort to reach someone at Clark Industries who would accept an appropriate notice, he was informed that the individual who could approve it would not be available until April 15, 2 weeks later. He promptly wired Ross that he could not report until April 16. On Monday, April 2, the Respondent sent Wells a letter in which, in effect, it was considered that by his failure to report that day he had declined the offer. No appropriate offer of reinstatement since then has been made to this employee.

As to the offer of reinstatement in 1962 it is plain that the Respondent held it open for an unreasonably brief time. (*White Sulphur Springs Company*, 136 NLRB 375.) The Respondent's conduct in this respect adds support to the conclusion, here made, that the transfers, demotions, and layoff shortly after his original recall to work failed measurably to comply with the Board Order. It is found that this employee was not reinstated to his former or substantially equivalent position. Consequently the Trial Examiner adopts the amended specifications as to this employee.

*Cathie Parker:* Except for the Christmas bonus and vacation pay factor, the Respondent concedes the accuracy of the specifications as to this employee, up to August 1, 1960, but with this proviso: "if he had been able to work." A letter from Parker's physician was placed in evidence with a stipulation that its contents would have been the substance of his testimony had he been called as a witness. The letter states that Parker was physically able to perform his regular duties as a crane operator, or in a comparable position, from the time of his unlawful termination until October 1, 1961. The amended specifications make no claim for backpay after the latter date, when Parker was no longer in the labor market. The Respondent offered no credible evidence to rebut the doctor's affidavit. Counsel's calculations of backpay due as of August 1, 1960, are therefore adopted forthwith.

As to the issue of reinstatement, credible evidence supports the contention that he was not given the same or substantially equivalent position on or after August 1, 1960, although the position and its duties continued in existence and such tasks were performed by employee Bohanna, who had many years less seniority. Parker's pay was reduced more than 40 cents an hour upon his recall.

<sup>1</sup> The Trial Examiner does not presume to be an accountant, nor does he suspect that each Board member will himself check every item and calculation in these specifications. It would appear to be an extravagant waste of public funds were both the Trial Examiner and the Board to submit such accounting matters to the same staff experts. And as previously noted, the Respondent has pointed out no errors of compilation.

<sup>2</sup> The Trial Examiner's initial ruling that such questions more appropriately should be submitted for disposal by the circuit court of appeals was reversed by the Board, and evidence was thereafter received.

Counsel properly, in the opinion of the Trial Examiner, measures the amount of backpay due Parker by the actual earnings of Bohanna, who through the material period filled the job to which Parker should have been reinstated. Therefore the Trial Examiner will adopt the backpay specifications as to this employee, in full.

No backpay for Parker is claimed after October 1, 1961, when he was again injured at the plant and not thereafter available.

*Gary Bell:* As noted in section I, above, and for the reasons there stated, the Trial Examiner adopts the specifications, as amended, relative to this employee.

Competent evidence establishes that Bell was not reinstated on August 1, 1960, or at any other date, to the same or substantially equivalent position as a stockroom assistant in the truck body department. He was promptly assigned upon recall to construction work, and on the third day was required to work in a water-filled ditch, without boots. Upon protesting, he was told to see President Way, who ordered the employee out of his office. The employee reasonably declined to work under such conditions and left the plant. Foreman Slater, as a witness, admitted having given him this assignment. Slater's other testimony, to the effect that Bell had done similar work for him before his unlawful termination in 1958, is not only refuted by company records but is also deprived of weight by the fact that, as a witness, he admitted that at the earlier hearing he had conceded having told the truth only about half the time.

The Trial Examiner concludes and finds that Gary Bell at no time has been accorded full reinstatement to his former or substantially equivalent position, and that Slater's requirement that he dig in the water-filled ditch without protective footwear was, in effect, a constructive discharge.

*Jessie Randall Berry:* Also as noted in section I, above, and for the reasons there stated, the amended specifications relative to this employee are adopted and found.

Substantial and credible evidence supports General Counsel's contention that this employee was not, except for a brief period of 2 weeks, reinstated to his regular job as assembler-welder in the crane department. The Respondent adduced no credible reason for his transfer to the construction crew, where his long and expert service as a welder was utilized only occasionally and where his earnings were considerably reduced. It is here concluded and found, as General Counsel urges, that the "Respondent's brief token reinstatement of Berry to his former position fell far short of constituting the good faith action contemplated in, and required by, the Board's order."

General Counsel properly used the actual earnings of Farnum Smith to calculate the backpay due Berry.

*Bernard Scribner:* For the reasons there stated, the Trial Examiner in section I, above, granted the motion to adopt the specifications as to this individual.

There remains the question as to whether he was actually reinstated in compliance with the Board's Order. Competent evidence supports General Counsel's contention that he was not.

Upon recall on August 1, 1960, Scribner was not put on his former job on the milk-body line, where for nearly a year before his unlawful termination in 1958 he had averaged more than \$2 an hour. For a week he was put on another job at an hourly rate of \$1.15. For the next 2 weeks he was permitted to do work on the assembly line at his old rate, and was then transferred to the construction crew welding at a reduced rate. Scribner remained welding at this reduced rate on the construction crew for about 2 months, and was again demoted to outside construction work, his pay being further reduced to \$1.45 an hour. He continued on this job until January 15, 1961, when he quit. The evidence warrants the inference that he quit when all reasonable hope had been lost that he could expect reinstatement in full as the Board and the court had ordered.

In summary, it is concluded and found that the Respondent has not complied with the Board Order with respect to the reinstatement of Daniel Wells, Cathie Parker, Gary Bell, Jessie Randall Berry, and Bernard Scribner. Since it is the Board's Order which has been thus flouted by the Respondent, it would appear presumptuous for the Trial Examiner to recommend what further action the Board should take.

### III. CONCLUSIONS AND RECOMMENDATIONS

Upon all the foregoing findings and conclusions, including the Trial Examiner's adoption of the specifications as amended, it is concluded that the obligations of the Respondent as of March 1, 1962, to make whole the employees herein involved

will be discharged by its payment to employees named below, and to the estate of Edward Heineman, and/or to the profit-sharing plan account of employees indicated, the amount set opposite their names, less the tax withholding required by Federal and State laws.

	Net backpay	Amount due to profit-sharing account as of 11/1/61	Liquidated amount due from profit-sharing account
Dwight Andrews.....	\$6,953	\$1,432.92	-----
Gary Lee Bell.....	4,903	-----	-----
Lowell Irvin Bell.....	3,707	-----	\$202.93
Ronald Charles Bell.....	2,705	-----	167.70
Jessie Randall Berry.....	5,794	1,230.57	-----
Burl Coffee.....	3,247	-----	389.40
Robert Dalley.....	5,232	-----	162.85
Edwin Gale.....	2,983	-----	179.60
James J. Gentry.....	1,880	-----	-----
Est. of Edw. Heineman.....	1,932	-----	-----
Russell Hickson.....	3,731	-----	198.10
Lloyd Huddleston.....	4,427	-----	-----
Alpheus Jordan.....	8,634	1,252.24	-----
Vollie H. Maggard.....	3,886	-----	140.28
Charles T. Martin.....	6,226	2,967.26	-----
John Ott.....	3,447	469.87	-----
Cathie Parker.....	10,517	1,034.81	-----
Bozo Petrovich.....	3,318	-----	-----
Bernard Scribner.....	13,986	1,460.17	-----
Roger Shoaf.....	958	-----	-----
Warren Thomas.....	3,998	-----	-----
Daniel Wells.....	11,001	2,662.43	-----
Total.....	113,515	12,519.27	1,441.16

**Local 45, International Association of Bridge, Structural and Ornamental Iron Workers and Machinery Movers, AFL-CIO and Kaiser-Nelson Steel & Salvage Corporation. Case No. 22-CD-79. April 11, 1963**

**DECISION AND DETERMINATION OF DISPUTE**

This is a proceeding under Section 10(k) of the Act following a charge filed by Kaiser-Nelson Steel & Salvage Corporation, herein called Kaiser, against Local 45, International Association of Bridge, Structural and Ornamental Iron Workers and Machinery Movers, AFL-CIO, herein called Ironworkers, alleging that Ironworkers illegally coerced Kaiser to change work assignments from one class of employees to another. A duly scheduled hearing was held before Charles Sandberg, hearing officer, on various dates from November 7 through November 14, 1962. Kaiser, Ironworkers, and Local 734, International Hod Carriers, Building and Common Laborers Union of America, AFL-CIO, herein called Hod Carriers, appeared at the hearing and were afforded full opportunity to be heard, to examine and