

3. Since August 13, 1963, the Union has been the exclusive bargaining representative of the Company's employees in an appropriate unit described as follows: All production and maintenance employees of the Employer at its Selma, California, plant, excluding office clerical employees, professional employees, salesmen, guards, and supervisors as defined in the Act

4. By repudiating an agreement reached on May 25, 1964, and refusing to sign or honor it, the Company has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

5. By initiating wage increases to some employees in the appropriate unit described above without consultation with the Union, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid unfair labor practices the Respondent has interfered with, restrained, and coerced its employees within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommended Order omitted from publication.]

Melrose Processing Company and United Packinghouse, Food and Allied Workers, AFL-CIO. *Case No. 18-CA-1661. March 31, 1965*

SUPPLEMENTAL DECISION AND ORDER

On April 21, 1964, the National Labor Relations Board issued its Decision and Order in the above-entitled proceeding,¹ finding, *inter alia*, that Respondent had discriminated against Celeste M. Thielen in violation of Section 8(a)(3) and (1) of the National Labor Relations Act, as amended, and directing that Respondent make her whole for loss of pay resulting from the discrimination.

On June 25, 1964, the Regional Director for Region 18 of the Board issued a backpay specification, and on July 10, 1964, Respondent filed an answer. Upon appropriate notice issued by the Regional Director, a hearing was held before Trial Examiner David London for the purpose of determining the amount of backpay due. On January 26, 1965, the Trial Examiner issued his attached Supplemental Decision, finding the discriminatee entitled to a payment of \$1,961.11. Thereafter, the Respondent filed exceptions to the Trial Examiner's Supplemental Decision and a brief in support thereof.

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 Fanning and Brown].

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed.

¹ 146 NLRB 979

151 NLRB No. 134.

The rulings are hereby affirmed. The Board has considered the entire record in this case, including the Trial Examiner's Supplemental Decision, the exceptions and brief, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.²

SUPPLEMENTAL ORDER

On the basis of the Supplemental Decision and the entire record in the case, the National Labor Relations Board hereby orders that Respondent, Melrose Processing Company, its officers, agents, successors, and assigns, shall make Celeste M. Thielen whole by payment to her of the amount set forth in the Trial Examiner's Supplemental Decision. Furthermore, since Respondent has not yet complied with the terms of the Board's Order to rehire Thielen, the Regional Director for Region 18 is authorized to conduct, if necessary, additional backpay proceedings to investigate further backpay rights for the period subsequent to May 30, 1964.

²The Respondent argues that during the period in question, Celeste Thielen was, in effect, compensated for her services at the family locker plant by being provided with room and board. This argument is based in part on workmen's compensation awarded her as a result of an injury sustained at the locker. Under the Minnesota Workmen's Compensation Act voluntary, uncompensated workers can be covered by Workmen's Compensation (Minnesota Statutes Annotated, Section 176 011). Accordingly, we reject this contention on this basis as well as for the reasons set forth by the Trial Examiner

TRIAL EXAMINER'S SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

Melrose Processing Company, hereinafter referred to as Respondent, is engaged at Melrose, Minnesota, in the slaughtering and processing of turkeys, on a seasonal basis, and hires its employees anew each year. It operated its plant from September 1961 to June 1962, from August 1962 to mid-December 1962, and reopened in mid-June 1963.

On April 21, 1964, the Board issued its Decision and Order (146 NLRB 979) finding that during the first two periods aforementioned Celeste M. Thielen was employed as a neck slitter in the eviscerating department of Respondent's plant. The Board further found that in violation of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, Respondent had discriminatorily denied Thielen rehire at the opening of the June 1963 season. To remedy that discrimination, Respondent was directed, *inter alia*, to offer her immediate employment (or, if its plant was not then operating, when the plant reopened), at her former position and to make her whole for any loss of earnings suffered by reason of the discrimination against her.

Respondent having failed and refused to comply with the Decision and Order above described, the Board's Regional Director for Region 18, on June 25, 1964, pursuant to Sections 102.52 through 102.59, inclusive, of the Board Rules and Regulations, Series 8, as amended, issued backpay specifications and notice of hearing setting forth in detail the amounts alleged to be due Thielen under the aforesaid Decision and Order for the period commencing June 17, 1963, and continuing to May 30, 1964. On or about July 10, 1964, Respondent served its answer to those specifications admitting that it has not offered Thielen reinstatement but pleading affirmatively that she "is unable to work and is unemployable because of physical disability and incapacity . . . and has been so unemployable in her present physical condition during all or part of the time set forth" in the aforementioned specifications.

After due notice to all parties, the instant proceeding to determine the extent of Respondent's liability to Thielen, if any, was heard by Trial Examiner David London on August 20, 1964, at Melrose, Minnesota. Full opportunity was afforded the parties to adduce relevant evidence and to examine and cross-examine witnesses.

Since the close of that hearing, the General Counsel and Respondent have submitted briefs which have been duly considered by me.

Upon the entire record in the case,¹ including my observation of the witnesses, I make the following:

Findings and Conclusions

The backpay specification served on Respondent specifies, and Respondent in its answer in this proceeding admits, that the "backpay period begins on June 17, 1963." Those specifications further itemize (a) the hours, rate of pay, and gross earnings of employees in Respondent's eviscerating department for each 3-month period from June 17, 1963, to May 30, 1964, (b) Thielen's interim earnings, and (c) the amount of net backpay allegedly due her for that entire period.

Respondent, neither by its answer, nor its brief, interposed any challenge to the accuracy of the gross earnings specified as Thielen's gross earnings if she had been rehired by Respondent on and after the beginning of the June 1963 season. Its defense to the specifications is twofold: (a) She was physically incapacitated and unable to perform her work; and (b) the specifications failed to consider and deduct from gross backpay (1) compensation in the form of room and board provided to Thielen "by her employer, the family's locker plant, during the period from June 1963 to the time of August 20, 1964, hearing" herein, (2) the period from January 21 to February 17, 1964, during which she sustained an injury to her fingers while employed at the family locker plant and by reason of which she was unable "to perform the functions formerly assigned to her," and (3) workmen's compensation of \$16 for 4 days of work lost and \$345 for partial loss of fingers which amounts she received by reason of the injury last aforementioned.

Broadly speaking, an employee who has been discriminatorily discharged, or denied rehiring, is entitled to receive what he would have earned during the period of discrimination less backpay for periods during which he was voluntarily idle or unable to work, and less his interim earnings. Here, there is no claim that Thielen was voluntarily idle at any time since June 1963, the inception date of Respondent's discrimination. Indeed, the evidence abundantly and conclusively establishes that she made a continuous and sincere effort thereafter to find gainful full-time employment. My only task, therefore, is (1) to determine whether Thielen, during the entire period set forth in the specifications, was physically able to perform the task in which she was engaged by Respondent in 1961 and 1962, and (2) whether she had greater interim earnings than are reported in the specifications.

A. *The alleged physical disability*

Prior to and since September 1961, when Thielen was first employed by Respondent, she also worked on a part-time basis in a locker plant owned by her father, and lately managed by her brother. She had no regular or required hours at that plant but worked there on weekends and when not engaged at Respondent's plant where her hours also were irregular. She received no compensation for that employment until March 1, 1964, when she began to receive \$100 per month for the approximately 25 hours per week she devoted to that employment.

On January 21, 1964, while engaged at her father's plant, she caught the tips of two fingers of her right hand in a grinder she was operating. She went to the hospital that evening, had her two fingers stitched, and remained there until noon of January 23. Though she worked at her father's plant on January 27, she did not have full use of her hand for cutting purposes until about February 21, 1964. Thereafter, she was able to bone meat which she considered "harder than to slit necks."

My visual examination of the hand disclosed the loss of one-eighth to one-fourth inch of the extreme tips of two fingers, and a small portion of the nail. Thielen testified, without contradiction, that she had no loss of feeling in the fingers, no pain, and demonstrated before me that she has full flexibility of the fingers on her right hand and able to tightly hold a slitting knife in that hand. Respondent offered no evidence, medical or otherwise, to establish that Thielen was physically incapacitated on and

¹ On October 6, 1964, counsel for Respondent submitted a written stipulation entered into with the General Counsel, dated September 24, 1964, stipulating that a letter from the Travelers' Insurance Company dated September 3, 1964, and a "Notice of Proposed Discontinuance of Compensation Payments" issued by the Industrial Commission of Minnesota, dated July 29, 1964, copies of which were attached to said stipulation, be received in evidence and considered by me and the Board in the disposition of this proceeding. The stipulation is hereby approved and it, together with the attached exhibits, identified as Respondent's Exhibit No. 2, are hereby made a part of the record herein.

after February 21, 1964, by the incident under consideration. On the entire record, I find that at all times relevant herein, except for the period January 21 to February 21, 1964, Thielen was physically able to perform the tasks she performed during her prior employment by Respondent.

B. Interim earnings

Except for the year 1959, when she lived in another community, Thielen who at the time of the hearing was 36 years old, has *always* lived with her father and mother who *always* provided her with room and board without charge. While being so provided for, she helped her mother, who was ill, with the housework and performed "all the heavy duties around the house." It is Respondent's contention that there should be added to the amounts already noted and allowed in the specifications as interim earnings the sum of \$120 per month from and after June 1963 for the room and board she received from her parents as "remuneration" for her services at her father's plant. There is no merit to this contention.

The testimony is undisputed that Thielen was provided with room and board by her parents without charge during practically her entire lifetime, both before and after she began working at her father's plant and there is no probative evidence that she worked appreciably more hours at that plant after June 1963 until March 1964 than she worked there before June 1963. In that state of the record, it seems reasonable to assume that the practice of providing her with free room and board would have been adhered to whether she helped out at her father's plant or not.

Though "in some cases an arrangement to perform services in return for another's services may result in intervening earnings even though neither party receives cash for the work he renders, . . . such an arrangement must be convincingly established and shown to amount to a firm mutual agreement. I find that no such firm arrangements or agreement exists here; rather, I find that [Thielen] occasionally, [and when convenient to her], lent a hand to [her father] without hope or expectation of recompense. I further find that such gratuitous services do not rise to the stature of earnings." *Belle Steel Company, Inc.*, 135 NLRB 1378, 1381.

In any event, "in a back pay proceeding, the burden is on the General Counsel to show *only* the gross amounts of back pay due. When that has 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." *United States Air Conditioning Corporation*, 141 NLRB 1278; *N.L.R.B. v. Brown & Root, Inc.*, 311 F. 2d 447, 454-455 (C.A. 8); *New England Tank Industries, Inc.*, 147 NLRB 598. Here, the state of the record is inadequate to permit an accurate evaluation of the services performed by Thielen for her father prior to March 1964, nor does it contain any competent evidence of the reasonable value of the room and board provided by her parents. By reason of all the foregoing, I find that Thielen had no interim earnings resulting from employment at her father's plant prior to March 1964. From and after that date, as has heretofore been found, she was paid \$100 per month, which amounts have been credited in the specifications as interim earnings.

During the entire period of her employment by Respondent, as well as all times thereafter, Thielen supplemented her earnings by working at Mullen's Tavern, on a part-time basis, in the evenings, on weekends, and at other times when not employed at Respondent's plant. According to Respondent's Exhibit No. 1, the highest number of hours Thielen worked at that tavern during any 3-month period prior to June 30, 1963, was 70 hours. Thereafter, when Respondent failed to rehire her, the highest number of hours she was so employed during any 3-month period was 85 hours. Because there is no substantial difference in the hours she was so employed at the tavern before and after she was denied rehire by Respondent in June 1963, I find no occasion to give these supplemental earnings any consideration in determining her interim earnings.

C. Workmen's compensation

Respondent further contends that the interim earnings reported in the Regional Director's specifications for the first quarter of 1964 should be increased by the sum of \$361, the amount Thielen received from the Travelers Insurance Company for the injury she sustained on January 21, 1964. I also reject that contention. "The workmen's compensation award received by [Thielen] was the product of a [Minnesota] statute in furtherance of the public welfare. Such an award, like the unemployment compensation of the *Gullett Gin* case [*Gullett Gin Company, Inc. v. N.L.R.B.*, 340 U.S. 361], is the very type of collateral benefit which the Supreme Court has established is not deductible from back pay In finding that collateral benefits are not deductible from back pay, the Supreme Court stated, "To decline to deduct state

unemployment compensation benefits in computing back pay in not to make the employees more than whole In framing an order to reimburse employees for their lost earnings, manifestly no consideration need be given to *collateral benefits* which employees may have received.” *Moss Planing Mill Co.*, 110 NLRB 933.²

CONCLUDING FINDINGS

Respondent, in its brief, admits, and I find, that the specifications correctly specify “the back pay period and the method of computation of the quarterly gross back pay due Thielen.” That aggregate gross backpay for the period June 15, 1963, to May 30, 1964, amounts to \$2,383.62. The specifications properly report, and credit against that amount, Thielen’s interim earnings of \$300 for work at her father’s plant in March, April, and May, 1964. In addition, it has previously been found that Thielen was physically incapacitated during the period January 21 to February 21, 1964, during which period her gross earnings were specified in the sum of \$122.51, which amount should also be deducted from the principal sum due her. Based on the foregoing computation, I find and conclude that there is presently due Thielen the principal sum of \$1,961.11, with interest thereon as hereafter recommended.

RECOMMENDED ORDER

On the entire record, it is recommended that the Board adopt the foregoing findings and conclusions, and that Respondent be required and ordered to pay Celeste M. Thielen the sum of \$1,961.11, with interest thereon at the rate of 6 percent per annum on each of the quarterly sums found due her from the end of each calendar quarter as set forth in the backpay specifications (*Isis Plumbing & Heating Co.*, 138 NLRB 716), less tax withholding as required by law.

Respondent not yet having complied with the terms of the Board’s order to rehire Thielen, it is further recommended that the Board’s order in this supplementary proceeding include a reservation of her further backpay rights accruing after May 30, 1964, and that the Regional Director for Region 18 be authorized to conduct, if necessary, additional backpay proceedings for the period subsequent to May 30, 1964.

² The Board’s ruling in *Moss Planing Mill Co.*, *supra*, was reversed by the Circuit Court of Appeals for the Fourth Circuit as reported in 224 F. 2d 702. With all due respect for the views of that court, “it is not for a Trial Examiner to speculate as to what course the Board should follow where a circuit court has expressed disagreement with its views. On the contrary, it remains the Trial Examiner’s duty to apply established Board precedent which the Board or the Supreme Court has not reversed.” *Insurance Agents’ International Union, AFL-CIO (The Prudential Insurance Company of America)*, 119 NLRB 768; *Iowa Beef Packers, Inc.*, 144 NLRB 615.

Sears, Roebuck and Co.¹ and General Drivers Union, Local 332, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Ind.,² Petitioner. *Case No. 7-RC-6054. March 31, 1965*

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before Hearing Officer Joseph Bixler. The Hearing Officer’s rulings made at the hearing are free from prejudicial error and are hereby affirmed.

¹ The name of the Employer appears as amended at the hearing.

² The name of the Petitioner appears as amended at the hearing.