

American Casting Service, Inc. and International Molders' and Allied Workers' Union of North America, AFL-CIO. Cases 25-CA-1877 and 25-CA-1878

March 6, 1970

SECOND SUPPLEMENTAL DECISION
AND ORDER

BY CHAIRMAN McCULLOCH AND MEMBERS
FANNING AND JENKINS

On February 18, 1965, the National Labor Relations Board issued a Decision, Order, and Direction of Second Elections, finding, *inter alia*, that Respondent had discriminated against Thomas Mason, Jewell Stafford, George W. Bryant, Jr., Joe Jackson, Wayne Johnson, Ralph Nelson, Theron Carter, Isaiah Young, and Joe McGarrah, in violation of Section 8(a)(3) and (1) of the National Labor Relations Act, as amended, and directing Respondent to make whole these individuals for any pay losses they may have suffered thereby.¹ Thereafter, on August 8, 1966, the Board's Order was enforced by the United States Court of Appeals for the Seventh Circuit.² Following a hearing, the Trial Examiner on March 18, 1969, issued his Supplemental Decision in which he found the discriminatees herein to be entitled to backpay in the amounts specified. Thereafter, on May 29, 1969, the Board ordered the record reopened and remanded the case for the limited purpose of introducing into evidence certain documents and testimony from William White d/b/a White Construction Company, concerning the interim earnings of Joseph H. McGarrah. On June 26, 1969, the Board issued a Supplemental Decision and Order³ adopting the findings, conclusions, and recommendations of the Trial Examiner, with respect to all discriminatees except McGarrah. On August 12, 1969, a further hearing was held before Trial Examiner Benjamin B. Lipton who issued his Second Supplemental Decision on October 1, 1969, finding McGarrah entitled to backpay in the amount of \$874.47. Respondent filed exceptions to that Decision and a supporting brief.

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.

The Board has reviewed the rulings made by the Trial Examiner at the second supplemental hearing and finds no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Second Supplemental Decision, the exceptions and brief, and the entire record in this case, and hereby adopts

the findings, conclusion, and recommendation of the Trial Examiner.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the Recommended Order of the Trial Examiner, and hereby orders that Respondent, American Casting Service, Inc., its officers, agents, successors, and assigns, shall pay Joseph H. McGarrah the amount set forth therein.

TRIAL EXAMINER'S SECOND
SUPPLEMENTAL DECISION

BENJAMIN B. LIPTON, Trial Examiner: On March 18, 1969, I issued in the instant backpay proceeding a Supplemental Decision in which it was recommended that specific amounts of backpay be awarded to eight named employees, including Joseph H. McGarrah, theretofore held by the Board and Court to have been discriminatorily discharged by Respondent. On May 29, 1969, the Board ordered the record reopened and remanded the case for the purpose of taking further evidence relating solely to the interim earnings of McGarrah, as described below. On June 26, 1969, the Board issued its Supplemental Decision and Order⁴ adopting the findings, conclusions and recommendations of the Trial Examiner, while reserving decision as to the amount of backpay due McGarrah. On August 12, 1969, pursuant to the remand, further hearing was held before me in Princeton, Indiana. Thereafter, Respondent filed a brief, which has been given due consideration.

On the entire record, and from my observation of the demeanor of the witnesses on the stand, I make the following supplemental findings and conclusions:

At the previous hearing, McGarrah testified that he helped William White, d/b/a White Construction Company, on two projects for which he received no wages but was given salvage materials: (1) In the fourth quarter of 1963, on the Ohio Street bridge job, he received salvage lumber, which White told him was worth \$200. He subsequently sold most of the lumber in small quantities and obtained an estimated total of \$200. (2) Between February 18 and March 18, 1964, on the Gibson County Bank job, he was compensated by White only in the form of salvage, some of which he sold for "a very small amount."² On the social security records in evidence, White had apparently reported that, from November 15, 1963, to June 1, 1964, McGarrah received salvage valued at \$300.

White did not appear at the original hearing, although he had been served by Respondent with a subpoena to testify and produce his payroll records. Respondent's motion for continuance, made to the Trial Examiner at the hearing, for the purpose of allowing Respondent to seek to produce White at a future date, was denied. On the basis of that record, it was found by the Trial Examiner (a) that McGarrah's testimony was "at best

¹151 NLRB 172

²NLRB v American Casting Service, Inc., 365 F 2d 138

³177 NLRB No 5

⁴177 NLRB No 5

²McGarrah also gave testimony, *inter alia*, that he received no remuneration for assisting John Vickers in repairing White's truck, and for helping White level certain farm land owned by Churchman.

vague and less than persuasive" concerning the value of the salvage materials; (b) that the unsold salvage as well as the small quantity McGarrah sold from the Gibson job represented valid interim earnings, despite the absence of an indicated value; and (c) that, in the circumstances, the amount of \$300, reflected in White's social security report, was accepted as deductible interim earnings to effect an accommodation "covering all of the disputed items."

In its Order of May 29, 1969, the Board in essence (a) described certain exceptions filed by Respondent which challenged the credibility of McGarrah and which contended that the motion for continuance for the purpose of examining White and his records should have been granted; (b) concluded that, "since White failed to answer the subpoena, the record is insufficient to determine McGarrah's backpay;" and (c) remanded the proceeding "for the limited purpose" of adducing testimony from White concerning the interim earnings of McGarrah and receiving documentary evidence relating thereto.

At the reopened hearing, White appeared pursuant to subpoena and testified for Respondent. As the only documents he possessed, White produced eleven cancelled checks which he had issued to McGarrah during the backpay period from November 11, 1963, to November 20, 1964. He explained that his payroll records for this period and at least one additional check were lost, describing the circumstances. White testified with respect to each of the eleven checks, in evidence, and in general to the work done for him by McGarrah and remuneration therefor during the pertinent period. A wide latitude (e.g., in leading questions) was allowed Respondent in its examination of White. McGarrah also testified briefly on rebuttal.

In its brief, Respondent states the position that neither White nor McGarrah can be credited, and that the finding should be made that McGarrah worked for White full time during the fourth quarter of 1963 and the first quarter of 1964, and the amounts for these two quarters be deducted from McGarrah's gross backpay. This argument is rejected as without supporting evidence. Alternatively, if White is credited, Respondent contends that the following items, representing interim earnings of McGarrah, should be deducted: (1) \$300 for salvage material; (2) \$60 paid to McGarrah for cutting trees at the Gibson job; (3) \$35 for two days' work on the Ohio Street job; (4) \$15 realized by McGarrah for trees taken from the Churchman land-leveling job; and (5) \$250 in loans which were canceled when McGarrah performed work on White's home furnace.

In the Trial Examiner's Supplemental Decision, affirmed by the Board, *supra*, the applicable law in a backpay proceeding is set forth at some length, with citations. In brief, as pertinent hereto, Respondent has the burden of proving facts which would negative or mitigate its liability to a given employee who was discriminated against, after General Counsel has shown the gross amounts of backpay due. It is insufficient for Respondent to rely upon vague or indeterminate evidence, or upon testimony concerning interim earnings which it asserts as lacking in credibility. As it is in the nature of an affirmative defense, positive evidence, or such that clear and reasonable inferences can be drawn, on the performance and value of interim work needs to be adduced by Respondent, absent which allegations for deductions from gross backpay must fail.

A *Value of the Salvage*

As noted, the Trial Examiner had recommended that \$300, shown by White in the social security report, be deducted as covering all disputed items involving McGarrah. This was found in the Board's Order as lacking support in the record without further opportunity afforded for White to answer the subpoena. White has now given the following testimony: At the Ohio Street job, McGarrah requested and was given some plywood forms which White had used for shoring purposes. White's cost for all such lumber, when new, was about \$300. However, he "would not know" its value as salvage. At the Gibson job, he had no knowledge of the amount of salvage material taken out by McGarrah, and had no idea of its value. All the salvage given to McGarrah was not worth anything to White. The figure of \$300, which was submitted to the Social Security Agency,³ covering the Ohio Street and Gibson salvage was "just a rough estimate;" it "could have been way more, it could have been way less." He was not questioned concerning McGarrah's testimony that he was told by White that the salvage he received was worth \$200.

McGarrah testified that he used some of the Ohio Street salvage plywood to shore up a barn where he then lived as a tenant, although the landlord wanted to have the barn torn down. Additionally, he gave Adolph Partenheimer, who helped him, some of the salvage from the Gibson job.

Finding as to the value of the salvage can be based on the more complete remand record, albeit the evidence is still not entirely clear and specific on the issue. Among other things, White was not even aware of the amount of salvage taken by McGarrah. Therefore, he could not fairly estimate its value nor, more especially, the money for which McGarrah could sell the salvage. In light of the new evidence, the \$300 valuation in the social security report appears unfounded.⁴ Consequently, I am led to conclude that McGarrah received, as he testified, \$200 for the lumber which he sold from the Ohio Street job.⁵ There remains the "very small amount" which he realized from the Gibson job, plus the salvage which was unsold in the five years which have elapsed. Bearing in mind that the burden of evidence rests with Respondent, I assign such additional salvage the value of \$25, which I believe is reasonable in the context of this record — thus arriving at the sum total of \$225 to be deducted.

B *Additional Compensation*

Of the eleven checks he produced, White identified two checks as wages paid to McGarrah for cutting trees behind the Cozy Cafe in connection with the Gibson wrecking job — one for \$20 on March 6, 1964, and one for \$40 on March 18, 1964. White also testified that he knows he paid McGarrah \$35 on the Ohio Street job in November 1963, for about two days' work in building forms and pouring concrete at \$2 an hour, but that the

³White testified that the handwriting on the social security report was not his.

⁴Although hearsay, such social security data in backpay proceedings are ordinarily entitled to weight, particularly when they reflect actual salary payments reported by the employer. Here, however, the report merely purported to estimate the highly uncertain value of salvage given as compensation to an employee, and any inference as to its accuracy is overcome by countervailing evidence.

⁵No effort was made to ascertain expenses, e.g., transportation and storage, if any, in selling the salvage.

canceled check therefor had been lost. McGarrah had no memory of any of these payments, although he recalled that he performed tree-cutting for White behind the Cozy Cafe. I find that these wages of \$60 and \$35 were paid, as testified by White, and are properly deductible

At the Churchman farm, White gave McGarrah a cottonwood tree, and told him he could cut it and haul it off. White thought "it only brought maybe ten or fifteen dollars, something." He indicated that such information was related to him by McGarrah, who said he couldn't make any money that way and did not want any more of the trees. McGarrah testified that such wood at the time was unsaleable, that he could not sell the tree, and that he received no money for it. Particularly as White had no direct knowledge and was frankly uncertain of the amount, if any, that McGarrah received, I am disposed to accept McGarrah's testimony

C. The Loans

White testified that nine of the eleven checks he produced at the hearing were personal loans made to McGarrah. These checks are in small amounts and bear dates from December 9, 1963, to January 12, 1964. White stated that the Ohio Street job was finished in mid-November 1963, that these checks were drawn at a time when he was not engaged on any job, and that they were given in response to McGarrah's requests, as he was "having a lot of difficulties," and were not in payment for any work done. The nine checks totaled \$250; there were a few other loans in cash. White related that, "right after" he had completed the Ohio Street job, McGarrah came to him seeking work and also asked to borrow money for groceries, upon which White let him have \$30. At about this time, McGarrah helped White repair a stoker on the furnace at White's home. White was uncertain whether he canceled a loan when the work was performed on his furnace. He testified: "It seemed to me like I asked him what I owed him, and he said nothing . . . I believe I said — well, I don't know, it was probably a little amount

that he owed me, I said, 'Well, just forget that, too, then.' . . . I'm almost sure it was that way, but I might have been wrong on it." Thereafter, White made further loans to McGarrah, and he was repaid in cash. McGarrah's account was that he repaired White's furnace on two occasions, and did this work entirely as a gratuity. While he stated that there were no loans which were canceled "to his knowledge," on cross-examination he admitted that "it could have happened," that White could have deducted some of the indebtedness without telling him. About December 1963, he reset the old stoker, which entailed about three hours' work. At a much later date, some time before June 1964, he installed a new stoker, which took about 4 1/2 hours of work. After he obtained regular employment with Tobe A. Field & Co., in June 1964, he started repaying the loans in cash and has paid them back in full.

It is not reasonable or conceivable to me that, for the amount of work done on his furnace, White canceled loans in the amount of \$250, as contended by Respondent. The evidence is unclear as to the dates such work was initially done. White more specifically indicated a time after mid-November, and McGarrah fixed the date in December. The first check, in evidence, was written on December 9 for \$45. And White testified that a loan of \$30 was made shortly before McGarrah commenced work on the furnace. I accept McGarrah's version that he performed such furnace work on two different dates widely separated in time, and relate the conversation described by White to the first occasion, in November or early December. Since it appears that the loan forgiveness was directly connected with the work on the furnace by McGarrah, it may be considered as interim earnings. Absent evidence of specific borrowings prior to the \$30 loan, and attaching some limitation of reasonability on the value of such work, I find that the sum of \$30 should be deducted from McGarrah's gross backpay.

Consistent with the foregoing, the revised backpay computations affecting McGarrah are as follows:

Calendar Quarters	Backpay	Employed By	Net Interim Earnings	Net Backpay
1963-IV	\$289.41	White Construction Co. White Construction Co.	\$200.00 (salvage) 35.00 (wages) 30.00 (loan canceled)	\$ 24.41
1964-I	\$571.86	White Construction Co. White Construction Co.	\$ 25.00 (salvage) 60.00 (wages)	\$486.86
1964- II	\$717.93	Tobe A. Field & Co.	\$354.73	\$363.20
1964-III	\$688.12	Tobe A. Field & Co.	\$823.87	None
1964- IV	\$426.48	Tobe A. Field & Co.	\$645.84	None
Total Net Backpay				\$874.47

CONCLUSION AND RECOMMENDATION

Upon the basis of the above findings, and the entire record in the cases, I conclude that Joseph H. McGarrah is entitled to backpay in the amount of \$874.47, with interest at 6 percent per annum on each of the quarterly sums found due herein from the end of each calendar

quarter,⁷ less the tax withholding required by Federal and State laws. I recommend that the Board adopt these findings and conclusions, and order that the Respondent, its officers, agents, successors, and assigns, pay the sum indicated.

⁷McGarrah was not questioned on rebuttal concerning this loan. *Isis Plumbing & Heating Co.*, 138 NLRB 716