

**Sopps, Inc. and Industrial Workers of Allied Trade, Local 199, N.F.I.U.** Cases 29-CA-1230 and 29-CA-1230-2

April 15, 1971

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS FANNING, BROWN, AND KENNEDY

On April 10, 1969, the National Labor Relations Board issued its Decision and Order in the above-entitled proceeding,<sup>1</sup> finding, *inter alia*, that Respondent discriminatorily laid off and subsequently discharged Marie Fontana in violation of Section 8(a)(3) of the National Labor Relations Act.

Pursuant to a backpay specification and appropriate notice issued by the Regional Director for Region 29, a hearing was held before Trial Examiner William W. Kapell on September 23, 1970, for the purpose of determining the amount of backpay due Fontana.

On December 3, 1970, the Trial Examiner issued the attached Supplemental Decision in which he awarded backpay to Fontana. Thereafter, the General Counsel and Respondent filed exceptions to the Trial Examiner's Supplemental Decision and supporting briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with these cases to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Supplemental Decision, the exceptions and briefs, and the entire record in these cases, and hereby adopts the findings,<sup>2</sup> conclusions, and recommendations of the Trial Examiner, as modified herein.<sup>3</sup>

The Trial Examiner, while awarding backpay to Fontana for the first 2 days of the unfair labor practice hearing in this case, which she attended under subpoena, denied her backpay for the last 5 days of the hearing on the ground that, by continuing to attend the hearing after being released from the subpoena, she voluntarily made herself unavailable for potential employment on those 5 days. The General Counsel excepts to this finding, contending that time spent at an unfair labor practice hearing by a discriminatee, whether voluntarily or involuntarily, should not be deducted from gross backpay. We find merit in this contention.

It is well settled that an alleged discriminatee is entitled, as a matter of right, to remain in the hearing

room throughout the taking of testimony, since he is regarded as a complainant, whether or not he is the charging party.<sup>4</sup> The alleged discriminatee, whether or not subpoenaed, remains part of the General Counsel's case throughout the hearing; he may be needed to rebut any defense presented by the respondent. If the Board denies him relief, in whole or in part, he will be an "aggrieved person" who can seek review of the Board's order in a United States Court of Appeals.<sup>5</sup> For all these reasons, it is clear that a discriminatee attending an unfair labor practice hearing, although unavailable for remunerative employment, should not be placed in the same position as a discriminatee who is disabled or has voluntarily withdrawn from the labor market. Indeed the Board has held that a discriminatee is justified in declining to accept a job which would make it impossible for him to attend a hearing.<sup>6</sup> Accordingly, we hold that Fontana is entitled to backpay for the entire period of the hearing. The effect of this is to increase the amount of backpay by \$27.20 in the second quarter and \$40 in the third quarter, for a total of \$67.20.

SUPPLEMENTAL ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Sopps, Inc., Brooklyn, New York, its officers, agents, successors, and assigns, shall pay to Marie Fontana the sum of \$1,354.06, plus interest accrued to the date of payment in accordance with the formula set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716, less deductions for applicable taxes.

<sup>1</sup> 175 NLRB No. 49

<sup>2</sup> Footnote 3 of the Trial Examiner's Decision should correctly state that "the General Counsel argues, in effect, that Fontana would have received an immediate increase to \$68 a week," rather than \$66, as inadvertently set forth by the Trial Examiner.

<sup>3</sup> Respondent's request for a rehearing is hereby denied, as the record contains no evidence to support the allegation of fraud and the evidence outside the record relied on by Respondent is clearly insufficient to establish fraud.

<sup>4</sup> *T. I. L. Sportswear Corp.*, 131 NLRB 176, 177, fn. 1, *Trettenero Sand & Gravel Co.*, 129 NLRB 610 *Walsh-Lumpkin Wholesale Drug Co.*, 129 NLRB 294, 295, *Lewis Karlton, d/b/a Consolidated Frame Co.*, 91 NLRB 1295

<sup>5</sup> See *Kovach [Studebaker Corp.] v. NLRB*, 229 F.2d 138 (C.A. 7), *Albrecht [Carnegie-Illinois Steel Corp.] v. NLRB*, 181 F.2d 652 (C.A. 7), *Jacobsen [Protective Motor Service Co.] v. NLRB*, 120 F.2d 96 (C.A. 3)

<sup>6</sup> *Alaska Steamship Co.*, 114 NLRB 1264, 1267, *West Texas Utilities Co.*, 109 NLRB 936, 946

TRIAL EXAMINER'S SUPPLEMENTAL DECISION

WILLIAM W. KAPPELL, Trial Examiner: This is a supplemental proceeding instituted for the sole purpose of determining the amount of backpay due Marie Fontana under the terms of the Board's Order (175 NLRB No. 49). On September 23, 1970, a hearing was held before me in Brooklyn, New York. All parties participated and were

afforded full opportunity to present relevant evidence. Upon consideration of the entire record, including briefs filed by the General Counsel and Respondent, I make the following findings and conclusions:

#### I. THE REMEDIAL ORDER RELATING TO BACKPAY

Respondent was found to have violated, *inter alia*, Section 8(a)(3) of the Act by discriminatorily laying off employee Marie Fontana on Tuesday, February 6, 1968,<sup>1</sup> and discharging her on Friday, February 16. Respondent was ordered to make Fontana whole for any loss of pay suffered as the result of the discrimination practiced against her.

#### II. THE PAYBACK SPECIFICATION

Controversy having arisen over the amount of backpay due to Fontana, the Regional Director issued a Backpay Specification, as amended at the hearing, setting forth the following:

##### A. The Backpay Period

The backpay period began on February 7 and terminated on October 21.<sup>2</sup>

##### For first quarter (2/7/68--3/31/68)

Gross backpay: 6-2/5 weeks <u>4/</u> at \$68 week	\$435.20
Interim Earnings: none	-0-
Net Backpay	<u>\$435.20</u>

##### For second quarter (4/1/68--6/30/68)

Gross Backpay: 13 weeks at \$68 per week	\$884.00
Interim Earnings: Tru-Pac, Inc., 80 Richard St., Brooklyn, N.Y.	\$605.12
Net Backpay	<u>\$278.88</u>

##### For third quarter (7/1/68--9/30/68)

Gross Backpay: 13 weeks at \$68 per week		
Interim earnings: Tru-Pac, Inc.,	\$114.07	
Bridge Binding Inc., 360 Furman Street, Brooklyn, N.Y.	\$220.50	\$334.57
Net Backpay		<u>\$549.43</u>

##### For fourth quarter (10/1/68--10/21/68)

Gross Backpay: 3 weeks at \$68 per week	\$204.00
Interim Earnings: Tru-Pac, Inc.	<u>\$153.45</u>
Net Backpay	\$ 50.55

#### B. The Wage Rates of Respondent's Employees

1. At the time of her discharge, Fontana, the highest paid nonsupervisory female and most senior worker, was receiving a weekly wage of \$64 a week.

2. During the week in which Fontana was laid off, employee Mary Lancaster received a wage increase from \$64 to \$68 a week during the backpay period.

3. Absent the discrimination against her, Fontana would have received a wage increase from \$64 to \$68 a week during the backpay period.

4. Effective the week ending February 9, female employees (other than Lancaster) were granted a wage increase of 10 cents an hour, thereby increasing their weekly wage from \$60 to \$64 a week, and that thereafter within 60 to 120 days these employees received a further increase from \$64 to \$66 a week.<sup>3</sup>

#### C. The Backpay Computations

The net backpay due to Fontana<sup>4</sup> during the backpay period is based upon the following computations:

and given \$68 a week.

<sup>4</sup> Fontana was permitted to work on Tuesday and Wednesday, February 13, and 14, and was off due to illness on February 15. For administrative convenience the General Counsel treats the 5 days on which she was permitted to and did work during the period February 7 through 16 as 1 week in the first quarter making a total of 6-2/5 weeks. According to my calendar calculations the gross backpay during this quarter should be computed on the basis of 7 weeks not 6-2/5 weeks, thereby increasing the gross backpay to \$476.

<sup>1</sup> All dates hereafter refer to the year 1968 unless otherwise noted.

<sup>2</sup> Although Respondent in its answer denied that allegation, it was conceded at the hearing.

<sup>3</sup> In support of his contention that Fontana's weekly pay loss during the backpay period should be fixed at \$68 a week, the General Counsel argues, in effect, that, in view of the increases granted to the lower paid employees from \$60 to \$64 a week during the week of February 9, Fontana would have received an immediate increase to \$66 a week, and with greater likelihood an increase to \$70 a week, if Lancaster was worth

### III. RESPONDENT'S CONTENTIONS

Respondent, in substance, contends (1) that, absent the discrimination, Fontana would not have received a wage increase to \$68 a week, and (2) that Fontana is not entitled to backpay because she did not diligently seek employment during the backpay period, thereby incurring a willful loss of earnings. Respondent also claims that its backpay obligation cannot exceed \$650. This contention is based on the testimony of its president, Julius Jacobs, asserting that on October 1 he overheard a telephone conversation from his lawyer to Board Attorney Beatrice Kornbluh in which she agreed with his attorney that her records also indicated Fontana's backpay amounted to approximately \$650. Even if that testimony were credited, the Board would not be estopped from proving the correct amount of the backpay. See *N.L.R.B. v Baltimore Transit Co.*, 140 F.2d 51, 54-55 (C.A. 4). Furthermore, if the aforesaid conversation constituted an attempt to settle the matter, it would be inadmissible.

### IV. THE EVIDENCE CONCERNING RESPONDENT'S CONTENTIONS

In support of its contention that Fontana would not have merited or been granted the wage increase to \$68 a week given to Lancaster, Respondent claims that Lancaster was granted the increase because she undertook new duties previously performed by employees Sullivan and Shogrin following their discharge during the week of February 9. Furthermore, Fontana would not have been considered for the increase because she smoked on the job in violation of a company safety rule and also had a bad record of absenteeism. Fontana credibly testified on rebuttal that there was no such company rule, that the employees smoked without company objection or interference, and that she was never reprimanded for smoking. She also testified that upon returning to work on February 13 and 14 she noted that Lancaster's duties had not changed, and that she continued to work on the bagging machine and coasters as she had previously done. As for the comparable work records of Fontana and Lancaster, it appears, and I find, that Fontana had been employed by Respondent for about a year and a half compared to Lancaster's 6 to 8 months of service, that Fontana was the last employee laid off in December 1967 and the first reemployed during January 1968, that she received the largest Christmas bonus (\$20) in 1967 whereas Lancaster received none, and that at the time of her discharge her wage was \$64 compared to \$60 for

Lancaster. As for Fontana's absenteeism, company records demonstrated that, during the last quarter of 1967 and the early part of 1968, her working record was at least equal to if not better than Lancaster's.<sup>5</sup>

With respect to Fontana's diligence in seeking employment during the backpay period, it appears that upon her layoff she immediately registered at the State Employment Service, and that she unsuccessfully sought employment at various firms, including five which she identified after having her recollection refreshed from a statement she had supplied to the Board in 1968. She, however, was unable to recall any of the details concerning the places where she sought employment either upon referral from the State Employment Service or on her own, pleading that the passage of time had blurred her memory. Information elicited by mail by the Board from Tru-Pac, Inc., indicates that she was employed by that firm from April 18 to September 10 when she quit, and that she was rehired on September 25 until beyond October 21, the cutoff date for backpay when she declined an offer of unconditional reinstatement. Her earnings at Tru-Pac were \$605.12, \$114.07, and \$664.95 for the second, third, and fourth quarters, respectively, of 1968, as set forth in the Backpay Specification. While employed at Tru-Pac, she took a week off in an unsuccessful attempt to obtain a better paying job, and, upon applying at Tru-Pac for reemployment, the Company deferred rehiring her for another week. During layoffs at Tru-Pac, she obtained employment at Bridge Binding Co., earning \$220 during the third quarter of 1968. She also testified that she attended the hearing of the related unfair labor practice case on June 25 through July 3 and testified on behalf of the General Counsel.<sup>6</sup>

### V. CONCLUSIONS

I find that the comparative work records of Fontana and Lancaster establish that Fontana, a more experienced and longer tenured employee, was regarded and treated as the more valuable employee as is indicated by their respective wage rates, layoff and reemployment records, and bonus payments. I find further that Respondent failed to prove either that Fontana's absentee record was worse than Lancaster's or that there was a company no-smoking rule which she disregarded. I, therefore, conclude that, but for her layoff and discharge, Fontana would have been given the wage increase of \$68 a week given to Lancaster during the week ending February 9.<sup>7</sup> I conclude that the method used in determining Fontana's gross backpay is a fair and reasonable one in the circumstances herein.

<sup>5</sup> Jacobs admitted that, after admonishing Fontana in the fall of 1967 about her absenteeism, there was a marked improvement in her record and thereafter he had no cause to reprimand her about it.

<sup>6</sup> Administrative notice is taken of the Board's official records stating

that she was subpoenaed to testify at that hearing and was paid for 2 days attendance on June 25 and 26.

<sup>7</sup> It is significant to note that Respondent failed to show what wage rate Fontana would have gotten had she not been discriminated against.

In determining whether or not there was a willful loss of earnings, applicable law holds that it is an affirmative defense and the burden of proving it is on the employer. *N.L.R.B. v. Mooney Aircraft, Inc.*, 366 F.2d 809 (C.A. 5). Thus, once the General Counsel has shown the gross amount of backpay, as found herein, the burden is on the employer to negate or mitigate liability to an employee. *N.L.R.B. v. Brown & Root, Inc.*, 311 F.2d 447 (C.A. 8). Finally, "any uncertainty is resolved against the wrongdoer whose conduct made certainty impossible." *N.L.R.B. v. Miami Coca-Cola Bottling Co.*, 360 F.2d 569 (C.A. 5).

Respondent contends that Fontana's unemployment during much of the backpay period gives rise to a presumption that she failed to seek work or that she willfully incurred loss of earnings. I find no merit to such a presumption. Success in finding employment is not equated with a good-faith effort in seeking work. *Mastro Plastics Corp.*, 136 NLRB 1342, enf. 354 F.2d 170 (C.A. 2), cert. denied 384 U.S. 972. Nor do I find any merit in Respondent's contention that it be accorded special consideration in proving its defense because it was unable to locate the employers to whom Fontana allegedly applied for employment, or to obtain records from the State Employment Service because they were not kept for more than a year, or to obtain records of her interim employment because no longer kept by those employers. Respondent alone was responsible for creating the situation in which it finds itself.

Fontana's loss of work for 2 weeks as the result of obtaining a leave of absence from her job while at Tru-Pac to seek more remunerative employment elsewhere would, if successful, have further reduced Respondent's liability. Her commendable attempt should not react to her detriment because it failed to materialize. Nor can it be asserted that she thereby willfully incurred a loss of earnings. Furthermore, it was not proven by Respondent that the loss of her earnings for the second week resulted from causes other than a lack of work.

I find that Fontana's presence for the entire duration of the unfair labor practice hearing made her unavailable for remunerative employment. As indicated by Board records she was subpoenaed for only 2 days which, presumably, were only required by the General Counsel in proving his case. She, however, voluntarily made herself unavailable for potential employment on June 27 and 28 and on July 1, 2, and 3. I, accordingly, find that she is not entitled to backpay for a period of 2 days in the second quarter amounting to \$27.20 and 3 days in the third quarter amounting to \$40. Except as found above, I conclude that Respondent did not prove by the preponderance of the evidence that Fontana failed to exercise reasonable efforts to obtain employment or willfully incurred loss of earnings during the backpay period.

I, therefore, find and conclude that the following amounts constitute the backpay computations for the respective quarters of 1968.

<u>Quarter</u>	<u>Gross Backpay</u>	<u>Interim Earnings</u>	<u>Net Backpay</u>
First quarter	\$476.00 (7 weeks at \$68)	None	\$476.00
Second "	\$856.00 (12-3/5 weeks at \$68)	\$605.12	\$251.68
Third "	\$843.80 (12-2/5 weeks at \$68)	\$334.57	\$508.63
Fourth "	\$204.00 (3 weeks at \$68)	\$153.45	\$ 50.55
			<u>\$1,286.86</u>

On the basis of the foregoing, I hereby issue the following recommended:

ORDER

Sopps, Inc., its officers, agents, successors, and assigns,

shall pay to Marie Fontana the sum of \$1,286.86 plus interest accrued to the date of payment in accordance with the formulas set forth in *F. W. Woolworth Company*, 90 NLRB 289, and *Isis Plumbing & Heating Co.*, 138 NLRB 716, less deductions for applicable taxes.