Chef Nathan Sez Eat Here, Inc.; Paramount Hudson Inc.; Art Rich Inc. d/b/a Carnival World; and Irving Reingold, an Individual *and* Local 50, American Bakery and Confectionery Workers Union, AFL–CIO. Case 22–CA–3800

January 19, 1973

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN MILLER AND MEMBERS KENNEDY AND PENELLO

On February 16, 1970, the National Labor Relations Board issued a Decision and Order in the above-entitled proceeding[1] finding, *inter alia,* that the Respondent Chef Nathan Sez Eat Here, Inc., herein Chef Nathan, had discriminatorily discharged certain named employees in violation of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, and directing that the Respondent make an offer of immediate and full reinstatement to these discriminatees to their former or substantially equivalent positions and make them whole for any loss of earnings suffered by reason of the discrimination against them. On August 10 and November 10, 1970, the Board's Order was enforced by the United States Court of Appeals for the Third Circuit.[2]

A backpay specification and notice of hearing was thereafter issued by the Regional Director for Region 22 on November 5, 1971, setting forth the total net amount of backpay allegedly due to each of the discriminatees and naming Chef Nathan and, in addition, Paramount Hudson, Inc., hereinafter Paramount; Art Rich, Inc. d/b/a Carnival World, hereinafter Carnival World; and Irving Reingold, an individual, hereinafter Reingold, as Respondents in the backpay proceeding and alleging that these four Respondents were jointly and severally liable for payment of the backpay due. Thereafter, Respondents Chef Nathan, Paramount, and Reingold filed a joint answer and Respondent Carnival World filed an answer. These answers denied certain allegations of the specification while admitting other allegations.

A hearing on the backpay specification was thereafter held on December 7 and 8, 1971, before Administrative Law Judge[3] Laurence A. Knapp for determination of backpay due to the discriminatees, and the Respondents' liability for the backpay. That hearing was adjourned *sine die* by the Administrative Law Judge on December 8, but pursuant to a show-cause order why the hearing should not be resumed, to which there were no responses, a notice of reopened hearing was thereafter issued by the Administrative Law Judge on March 29, 1972, setting the date of the reopened hearing as May 1, 1972. The hearing was thereafter resumed and concluded on that day.

On June 30, 1972, the Administrative Law Judge issued the attached Supplemental Decision in which he found that the discriminatees were entitled to the amounts of backpay set forth in the specification and that Respondents Chef Nathan, Reingold, and Carnival World, but not Respondent Paramount, were jointly and severally liable for the backpay due. Thereafter, counsel for General Counsel filed an exception and supporting brief and counsel for Respondents Chef Nathan, Reingold, and Paramount filed joint exceptions to the Supplemental Decision of the Administrative Law Judge.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Supplemental Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions[4] of the Administrative Law Judge and to adopt his recommended Order to the extent consistent herewith.

We agree with the Administrative Law Judge's finding that Respondent Paramount should not be held liable for the backpay due here but that Respondents Chef Nathan and Carnival World should be held jointly and severally liable for the backpay due in the amount set out by the Administrative Law Judge. However, we do not agree with the Administrative Law Judge that Respondent Irving Reingold should also be held liable on an individual basis and hence we dismiss the backpay specification as it is directed to Reingold in his individual capacity.

The Administrative Law Judge held Reingold individually liable solely because in the Board's original decision Reingold had been found to be president and sole owner of Respondent Chef Nathan.[5] In the circumstances of this case, we do not think that this is a sufficient basis on which a finding of individual liability can attach.[6]

Reingold was not named individually or as an

[1] 181 NLRB 159.

[2] 434 F 2d 126.

[3] The title of "Trial Examiner" was changed to "Administrative Law Judge" effective August 19, 1972.

[4] In the absence of exceptions to the Administrative Law Judge's disposition of the backpay due Estaban Estrada, we adopt that disposition *pro forma*

[5] 181 NLRB 159, 161. We note that in the backpay specification, Reingold was characterized as principal stockholder rather than sole owner. We deem this discrepancy inconsequential in view of our decision here.

[6] We are mindful that Reingold controlled Chef Nathan's assets, business operations and labor relations policies and participated in the commission of the unfair labor practices earlier found but such does not change our decision as detailed *infra*

employer in the unfair labor practice charge or in the complaint. It is only now at the backpay stage of this proceeding that Reingold has been alleged as a separate Respondent. In the same situation, in *Riley Aeronautics Corporation*,[7] the Board affirmed the Administrative Law Judge's dismissal of a backpay specification directed to an individual, who, like Reingold, was president of the corporation found to have violated the Act in the prior unfair labor practice proceeding, where there was no evidence that the individual had committed some act which would justify piercing the veil of the corporate respondent to reach the individual. We deem the rationale of that case controlling here and, viewed from that perspective, we also find no evidence in this record to justify piercing the veil of Chef Nathan.[8] We therefore conclude that Reingold is not personally liable for the backpay due the employees discriminated against and we shall dismiss the backpay specification insofar as it is addressed to Reingold in an individual capacity.[9]

SUPPLEMENTAL ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent Chef Nathan Sez Eat Here, Inc., and Respondent Art Rich Inc. d/b/a Carnival World, their officers, agents, successors, and assigns, shall pay to each discriminatee as net backpay the amounts set forth by the Administrative Law Judge in his recommended Order.

[7] 178 NLRB 495

[8] As was noted in *Riley* at 178 NLRB 500–501, circumstances where the corporate officer was the disguised continuance of the corporation, or where he dissipated the corporate assets, or where he intermingled personal and corporate affairs, or where he attempted to evade backpay liability might justify a piercing of the veil but here the evidence reveals none of these circumstances, nor any other which would compel our finding Reingold individually liable

[9] We note, however, that Reingold, as Chef Nathan's president, has the responsibility as a corporate officer to take the steps necessary to effectuate the Board's order and that if he refuses to discharge his duty as an officer to satisfy a court enforced order, including disbursing corporate funds to meet the corporate backpay obligation, he risks punishment for contempt *N L R B* v *Hopwood Retinning Co, Inc*, 104 F 2d 302, 304, 305 (C A 2), *West Texas Utilities Co, Inc* v. *N L R B*, 206 F 2d 442, 445 (C.A.D C)

TRIAL EXAMINER'S SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

LAURENCE A. KNAPP, Trial Examiner: This is a supplemental backpay proceeding which I heard at Newark, New Jersey, on December 7 and 8, 1971, and May 1, 1972, in the following background circumstances.

On February 20, 1970, the Board issued its Decision and Order finding that Respondent Chef Nathan Sez Eat Here, Inc. (herein sometimes called Chef Nathan), which then and theretofore operated a restaurant near Hackensack, New Jersey, had discharged five employees in violation of the Act and ordering that Respondent, *inter alia,* to offer reinstatement to those discriminatees and make them whole for their lost earnings. In this decision, the Board found that Irving Reingold was president and sole owner of Chef Nathan. Subsequently in 1970 the United States Court of Appeals for the Third Circuit entered its judgment enforcing the Board's Order in full. On July 2, 1971, Art Rich, Inc. d/b/a as Carnival World (herein sometimes called Carnival World), which was not a party to the previous unfair labor practice proceeding, in which the Board's reinstatement and backpay order had issued, purchased the business of Chef Nathan and leased the corresponding restaurant premises from Paramount Hudson, Inc. (herein sometimes called Paramount) under a lease executed both by Paramount and its principal officer and stockholder, Mr. Irving Reingold. A paragraph (par. 7) of the business purchase agreement (executed by and between Reingold, Chef Nathan, and Carnival World) states that these parties were aware of the previous unfair labor practice proceeding against Chef Nathan, in which at the time the purchase agreement had been executed the Board's Order had been enforced by the court of appeals, as noted above, and that purchaser Carnival World would reinstate the five discriminatees, which it did on July 2, 1971, thus tolling backpay liability under the Board's order as of that date.

However, the backpay due the discriminatees was not paid to them, with the result that on November 5, 1971, the authorized Regional Director issued a "Backpay Specification and Notice of Hearing" by which this supplemental proceeding was initiated, setting forth the total net amount of backpay allegedly due to each of the discriminatees, naming Chef Nathan, Paramount, Irving Reingold, and Carnival World as Respondents in the backpay proceeding and alleging that these four Respondents are jointly and severally liable for payment of the backpay due. Thereafter, on November 22, Respondents Chef Nathan, Paramount, and Irving Reingold filed their joint answer, and on December 1, Respondent Carnival World filed its answer to the specification. These answers deny certain allegations of the specification, principally those having to do with the proper measure of earnings, assert that certain of the dischargees removed themselves from the employment market, and in these and other respects contend that the net amounts due the respective dischargees are substantially less than as alleged in the specification. In all these respects the two answers are identical. They vary only in that the answer of Respondents Chef Nathan *et al.* contends that under paragraph 7 of the purchase agreement Respondent Carnival World agreed to assume all liabilities of Chef Nathan, including the backpay obligation arising under the Board's Order, whereas Respondent Carnival World contends that under that same provision it assumed only the obligation of reinstatement and that Respondents Chef Nathan *et al.* should be adjudged the primary obligors respecting backpay.

The matter came on for hearing on December 7 and on the second day of the hearing, December 8, counsel for both sets of Respondents and for the Charging Union

entered into a stipulation in open court in settlement of the case, in which the two sets of Respondents assumed a joint and several liability in the amount of $15,000 in full settlement of the backpay obligation,[1] subject to approval of the settlement by the General Counsel, which counsel for the Regional Director, for his part, agreed to recommend.[2] Subsequently the General Counsel approved the settlement and thereafter the Regional Director, by a communication dated January 10, 1972, so notified all parties and informed them of the amounts to be paid to each of the discriminatees and notified them to forward corresponding checks for distribution to the discriminatees, following which he would withdraw the specification in final disposition of the matter. Although given an extension of time by the Regional Director, the checks were never submitted to the Regional Director by any of the Respondents. By virtue of this default, the Regional Director withdrew approval of the settlement agreement and filed with me a motion, dated February 11, 1972, to resume the hearing. On February 25, 1972, I issued an order directing the Respondents to show cause by March 10 why the hearing should not be resumed. There being no response by any of the Respondents to this order, on March 29, I issued an order granting the motion of counsel for the Regional Director and directing that the hearing be resumed on May 1, 1972. Shortly before May 1, prior counsel for Respondents Chef Nathan *et al.,* Paul M. Hanlon, Esq. (of Messrs. Schumann, Hession, Kennelly and Doroment of Jersey City, New Jersey) notified me of their withdrawal as counsel for these Respondents. At the May 1 hearing new counsel appeared in place of Messrs. Dreyer & Traub, former counsel for Carnival World, and by that time Albert Gross, Esq., of Hackensack, New Jersey, had entered an appearance for the Chef Nathan *et al.* Respondents.[3]

The hearing was reopened and closed on May 1, following which briefs were submitted by counsel for the General Counsel and for Respondent Carnival World.

The sole contention advanced in the brief for Carnival World is that since it was a *bona fide* purchaser of Chef Nathan's business and was not a party to the commission of the unfair labor practices, it is not liable for backpay, even though it is a successor employer and even though it had notice of the unfair labor practice proceeding and the backpay obligation arising thereunder. I have considered the various decisions cited by counsel as bearing upon this question and have concluded that those most directly in point are *Perma Vinyl,* 164 NLRB 968, and *Golden State Bottling Company, Inc.,* 147 NLRB 410. Applying the principles laid down in these decisions to the facts of these cases, I conclude that the successor Carnival World is jointly and severally liable with the remaining Respondents[4] for the backpay due.

The original counsel for the Respondents contended in their answers and at the hearing that the appropriate measure for determining gross backpay is the average weekly earnings of all the restaurant employees similarly situated rather than the actual past weekly earnings of the five individual employees prior to their discharge, the method employed by the General Counsel in the backpay specification. Obviously, the formula employed in the specification is the most fair, suitable, and equitable formula to employ, and should not be departed from in the absence of special circumstances not present here. The salaries for the various restaurant employees were not uniform, but varied from one employee to another as decided upon by Reingold in the exercise of his judgment as to the respective values or abilities of the varying employees. In these circumstances, their respective earnings are the only reliable measure for backpay purposes.

The original counsel for Respondent also contended that the amounts of gross backpay should be reduced in the cases of Hector and William Melendez on the theory that they could have had interim earnings after their discharges in excess of their actual interim earnings as set forth in the specification. But an analysis of the evidence shows that each abandoned interim employment in an honest search for more rewarding or less onerous jobs and there is no evidence that in doing so they removed themselves from the labor market or resorted to idleness with a view to living during such periods on Respondents' backpay obligation as some form of "welfare" provision.

Finally, Respondents moved to dismiss Estrada's backpay claim in its entirety because he was not present at the hearing. But Respondents had the burden of proving any reductions to be made in the amounts due Estrada as set forth in the specification and, upon learning at the hearing that Estrada was not present, could have sought a subpena requiring him to be present. But no such request was made. Had there been such a request, arrangements could have been made to protect Respondents' right to examine him, either by postponement of his examination until he appeared in response to the subpena, or had he not been able to be served promptly, by withholding consideration

[1] The portions of the $15,000 to be paid to the respective five discriminatees apparently were arrived at in the settlement negotiations but, at the request of counsel for the Regional Director (who participated in the settlement negotiations), these specific amounts were not made of record

[2] In entering into the settlement stipulation, counsel for the two sets of Respondents put on record their private agreement that each group of Respondents would, as between themselves, contribute half of the $15,000 total, with the understanding, however, that this private arrangement did not condition in any way the joint and several obligation each was assuming in the settlement agreement to pay full $15,000.

[3] On the afternoon of Friday, April 28, Mr. Gross sent me a telegram entering his appearance and requesting a 2-day postponement of the hearing This telegram did not reach the Board's office until the morning of May 1, the morning of the hearing in Newark, New Jersey, and did not come to my attention until I returned to Washington the following day. Neither Mr. Gross or any representative of his appeared at the hearing to move for a postponement or communicated with me while at the hearing site. In the circumstances, I proceeded with the hearing on May 1, and on May 3 notified Mr Gross that I had done so because no timely motion for a postponement had come before me for disposition.

[4] I exclude from the "remaining Respondents" Paramount Hudson, Inc., the owner of the premises occupied under successive leases by the restaurant operations. As owner of the premises, Paramount Hudson, Inc., was not involved in the operation of the restaurant business as an employer of the restaurant employees, and this circumstance is not altered by the fact that Reingold was a principal officer and stockholder of the Paramount landowner. Whether or not liability might attach to Paramount Hudson, as the owner of the premises, if Reingold were its sole stockholder (as he was of Respondent Chef Nathan), that is not the fact on the record before me, and since I must assume there were other stockholders of Paramount Hudson, I see no basis for saddling them with backpay liability merely because the principal stockholder in the landowning company, in which they held stock ownership, was the sole owner of the restaurant business occupying the leased premises

of his case for an appropriate period and subject to eventual dismissal of his claim in case he could not be brought in for examination during such an extended appropriate period. Respondents sought no recourse or protection along such lines but relied solely on his nonpresence at the December 7 and 8 hearings, as though the General Counsel had an absolute obligation to have him present on those dates. However, there is no such absolute obligation resting on the General Counsel and, not having made or sought to initiate any efforts, with or without the cooperation of the General Counsel, to cause Estrada to appear on those or any subsequent dates, Respondents' motion lacks merit and is hereby denied.

It is accordingly found that each of the discriminatees is entitled to the amounts of backpay claimed for him in the backpay specification and that all the Respondents except Paramount Hudson, Inc., are jointly and severally liable for the payment thereof.

Upon the above findings of fact and the entire record in the case, and pursuant to Section 10(c) of the Act, there is issued the following recommended: [5]

ORDER

Respondents Chef Nathan Sez Eat Here, Inc., Irving Reingold, Art Rich, Inc., and their officers, agents, successors, and assigns, shall:

(a) Jointly and severally make the employees involved herein whole by paying to them the amounts specified below, less any withholding required by law, plus interest thereon at the rate of 6 percent per annum:

1.	To John Fabbiani	$ 4,466.36
2.	To Luis Leon	$ 9,188.83
3.	To Hector Melendez	$13,122.58
4.	To William Melendez	$ 4,870.93
5.	To Estaban Estrada	$ 6,392.30

(b) Notify the Regional Director for Region 22, in writing, within 20 days from the date of this Order, what steps Respondents have taken to comply herewith.[6]

[5] In the event no exceptions are filed as provided by Sec 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes

[6] In the event that this recommended Order is adopted by the Board after exceptions have been filed, this provision shall be modified to read "Notify the Regional Director for Region 22, in writing, within 20 days from the date of this Order, what steps the Respondents have taken to comply herewith."