

**Coletti Color Prints, Inc. (formerly Coletti Associates)
and Local 1, Amalgamated Lithographers of America.** Case 29-CA-341

June 29, 1973

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN MILLER AND MEMBERS KENNEDY
AND PENELLO

On June 27, 1966, the National Labor Relations Board issued its Decision and Order in the above-entitled proceeding, finding, *inter alia*, that Respondent had violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended, by refusing to sign a collective-bargaining agreement that its representatives had agreed upon with the Charging Union.¹ The Board's Order directed, among other things, that Respondent, upon request, execute the collective-bargaining contract submitted to it by the Union in February 1965 with an effective termination date of April 30, 1968. The Order further directed Respondent to make whole its employees for any losses suffered by reason of Respondent's unlawful refusal to sign the contract. The Order stipulated that such losses were to be computed on the basis of calendar quarters with interest at the rate of 6 percent per annum.² On December 28, 1967, the Court of Appeals for the Second Circuit entered a decree enforcing the Board's Order in full.³

Thereafter, on February 29, 1972, the Regional Director for Region 29 issued and served on the parties a Backpay Specification and Notice of Hearing. Respondent filed an Answer dated March 18, 1972. On May 2 and 3, 1972, a hearing was held before Administrative Law Judge Melvin Pollack for the purpose of determining the issues and the amounts of money due under the General Counsel's Backpay Specification.

On September 21, 1972, Administrative Law Judge Pollack issued the attached Supplemental Decision in this proceeding. Thereafter, the General Counsel and Respondent filed exceptions and supporting briefs. Respondent also filed an answering brief. The Charging Union filed a letter in which it said that it joined in the exceptions filed by the General Counsel.

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, the exceptions and briefs, and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order, except as herein modified.

1. We adopt the Administrative Law Judge's findings that employees Gary Matz, William Lewis, Lloyd Isom, William Smith, and Ruth Luna were properly included in the bargaining unit and therefore were entitled to backpay as set out in the Backpay Specification.⁴

2. We do not adopt the finding that employee Joan Murphy was properly included in the unit. The Administrative Law Judge found that Murphy was a unit employee because she spent a substantial amount of her time arranging and designing materials in connection with Respondent's lithographic process. Respondent contends that Murphy's work was not covered by the collective-bargaining agreement which the Board Order required it to execute. We find merit in this contention.

Murphy's testimony, on which the Administrative Law Judge relied, shows that this employee was hired in the spring of 1966 and worked as an artist. Murphy testified that she prepared drawings to show customers how the final product would appear and, at times, utilized a camera in connection with this work. While she spent some time inspecting and packing prints, Murphy testified that, during the last year of her employment, she spent from 30 to 40 percent of her time contacting customers. This included talking to customers on the telephone or in person. Respondent's president testified that Murphy was hired as a commercial artist and customer sales service employee, whose work was to talk to customers about jobs, prepare preproduction designs, and do sales work outside the office.

The unit description in the collective-bargaining agreement that the Union submitted to Respondent in 1965 covered "lithographic production employees." The quoted term was further defined as "those employees engaged in the manufacture of lithographic jobs" but excluded, among designated classifications, "sales" employees.⁵ We conclude from the record that

¹ *Coletti Color Prints, Inc.*, 159 NLRB 1593

The Board also found that Respondent had violated Sec 8(a)(1) of the Act by discharging a named-union member in order to undermine the Union's majority status. The General Counsel did not seek reinstatement or back pay for this employee and there is no issue respecting backpay for that employee in this supplemental proceeding.

² The Board's Decision and Order based the method of computation on calendar quarters as prescribed in *F. W. Woolworth Company*, 90 NLRB 289

³ Decree unpublished. Opinion, issued December 1, 1967, 387 F 2d 298

⁴ In the absence of exceptions we also adopt, *pro forma*, the findings that employees Kenneth Sheridan and Jack Raskin are included in the bargaining unit

⁵ The collective-bargaining agreement read in pertinent part, "The Employer recognizes" the Union "as the exclusive collective bargaining agent for all of the lithographic production employees. The term 'lithographic production employees' shall mean those employees engaged in the manufacture of lithographic jobs but shall exclude the following classification of

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Murphy's work fell within the category of "sales" employees excluded from the contract unit of lithographic production employees. Accordingly, we will delete from the Administrative Law Judge's recommended Order the sum of \$1,724.64, which we find is not owed to Murphy.

3. We adopt the Administrative Law Judge's finding that Respondent does not owe any payments to the Union's sickness and accident fund and lithography school fund because the General Counsel has shown no losses suffered by employees during the contract period on account of Respondent's nonpayment. He found that, as the Board's Order provided only for making the employees whole, no payments are owed. The General Counsel excepts on the ground that the collective-bargaining contract, which Respondent failed to execute, establishes a legal obligation to contribute to the funds, and therefore no proof of monetary loss to any employee is required.

We disagree with the contention of the General Counsel. The contract is not a measure of Respondent's liability. Liability must be determined from the language of the Board's Order in the original Decision in the case. That Order, in pertinent part, required Respondent "upon request by [the Union] execute the contract" that had been submitted to Respondent by the Union and to "make whole its employees for any losses suffered by reason of Respondent's unlawful refusal to sign the contract" 159 NLRB at 1595-96.

The Board, in a backpay proceeding, does not determine private rights arising under a contract. Nor do we determine the insurer's or funds' liability under plans administered by the funds. As the Board has said in similar cases, "We seek only to make whole the employees for the losses suffered by reason of the discrimination."⁶ In this case we make that finding for the limited period the contract was in effect, between February 1965 and April 30, 1968. Thereafter, the Union lost a Board-conducted election and the contract was no longer in effect. Thus general contributions to the insurance and school funds for the relevant period would afford no remedy to the employees of the Respondent who were in the unit.

The General Counsel has made no showing that any employee was disadvantaged by an interruption in insurance coverage. There is no claim that any employee was injured and incurred expenses during the contract period that would have been reimbursed by the medical insurance fund. With respect to the school fund, there is no showing that any employee was denied schooling on account of Respondent's nonpayment into the fund. The General Counsel

makes no claim of benefit to be gained by any employee for contributions to his account. In the absence of such showing, we cannot hold Respondent responsible for such payments.⁷

SUPPLEMENTAL ORDER

Upon the basis of this Supplemental Decision and the entire record in this case, pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge as modified herein and hereby orders that Respondent, Coletti Color Prints, Inc., its officers, agents, successors, and assigns, shall take the action set forth in said Order, as modified below.

In the Administrative Law Judge's Supplemental Decision modify the recommended Order by deleting the name "J. Murphy" and the amount \$1,724.64.

⁶ *Rice Lake Creamery Company*, 151 NLRB 1113, 1129, *enfd* as modified 365 F.2d 888 (C.A.D.C., 1966); *Deena Artware Incorporated*, 112 NLRB 371, 375, *enfd* 228 F.2d 871 (CA 6, 1955)

⁷ *Cf. Overnite Transportation Company, Inc.*, 197 NLRB 894 (ALJD, sec. IV, Conclusions).

ADMINISTRATIVE LAW JUDGE'S SUPPLEMENTAL DECISION

MELVIN POLLACK, Administrative Law Judge: On June 27, 1966, the National Labor Relations Board issued its Decision and Order finding, *inter alia*, that Respondent Coletti Color Prints, Inc. (formerly Coletti Associates) had refused to execute a contract negotiated in its behalf with Local 1, Amalgamated Lithographers of America (herein called the Union), in violation of Section 8(a)(5) and (1) of the National Labor Relations Act, as amended, and ordered Respondent to execute the contract and to make its employees whole for any losses they may have suffered by reason of Respondent's unlawful refusal to sign the contract (159 NLRB 1593). On December 28, 1967, the Court of Appeals for the Second Circuit entered its decree enforcing in full the order of the Board. 387 F.2d 298. The parties having been unable to agree on the amount of backpay due the employees, the case is before me on a backpay specification and notice of hearing issued by the Regional Director for Region 29 on February 29, 1972, and the answer of the Respondent dated March 18, 1972.

The hearing was held before me in Brooklyn, New York, on May 2 and 3, 1972. Briefs have been filed by Respondent and the General Counsel. Upon the entire record in the case,¹ including my observation of the demeanor of the witnesses, I make the following:

¹ A stipulation between Respondent and the General Counsel modifying Appendixes E and F of the backpay specification is received in evidence as Joint Exh 1

employees, sales, professional, sketch artists, office and clerical, nonworking supervisors, and plant superintendents."

FINDINGS AND CONCLUSIONS

A. *The Bargaining Unit*

The collective-bargaining contract between Respondent and the Union ran from February 28, 1965, to April 30, 1968, and applied to a bargaining unit of lithographic production employees. Respondent contends that eight employees included in the backpay computation were not in the bargaining unit during the backpay period and hence are not entitled to backpay.

Gary Matz worked for Respondent throughout the backpay period, at times on a full-time basis and at other times as a regular part-time employee working at least 14 hours a week. Matz credibly testified that he spent the bulk of his working time in the lithographic pressroom, loading, lubricating, and cleaning the press. I find that Matz was properly included in the backpay specification as an employee within the bargaining unit.

William Lewis started to work for Respondent during the summer of 1965. Lewis worked primarily in the shipping department and then for about 4 months in the pressroom. He left Respondent in July 1966 but returned to work in the pressroom in November 1967. Lewis' work in the shipping department included the inspection and packing of prints. In the pressroom, he was "like a trainee" and was taught to load, lubricate, and clean the press. During both periods of employment, Lewis also served as a runner between Respondent's pressroom and the shipping and stripping departments. I find that Lewis performed work during the backpay period closely connected with the lithographic production operation and that he was properly included in the backpay specification as an employee within the bargaining unit.

Lloyd Isom and *William Smith* performed work similar to that of Lewis—packing and shipping prints; cleaning, loading, and oiling the press; and running materials between Respondent's departments—and were properly included in the backpay specification as employees within the bargaining unit.

Kenneth Sheridan worked in the stripping section as a trainee. His work involved "laying one film over the other in accurate position." As this work of placing pieces of film "in perfect register" is part of a stripper's component work, I find that Sheridan was a lithographic production employee properly included in the backpay specification.

Jack Raskin worked for Respondent as a stripper from about March 1965 to Labor Day 1967. Respondent contends that he was a supervisor under the Act and hence not within the bargaining unit. Raskin testified that he was hired by Shop Superintendent Bernard Weiss; that his work as a stripper was "to assemble negatives and/or positives into position in preparation for plating"; he worked with two other strippers; the strippers all did the same work; he was never called upon to train new employees; Weiss did all the hiring and firing; Weiss would ask him how a new stripper employee was doing; Weiss checked all the "flats" prepared for plating; he was paid more than the other strippers because he knew more and produced more; and, when he gave Weiss notice that he was leaving, Weiss offered to make him a supervisor with an increase in salary.

Coletti testified that Weiss had been the supervisor of the stripping department and that Raskin was hired to replace Weiss when he was promoted to take "overall charge" of the plant; Raskin was responsible for "checking and scheduling the work" of the strippers and he had to make "minute to minute" decisions in scheduling the work because "it had to be constantly shifted forward and backward to meet not only the production requirements but to meet the customer's delivery requirements"; Raskin assigned employees to do certain jobs "on the basis of the skills involved"; and, while Weiss was in the office or out seeing customers, Raskin "picked up the work from the office and put it into order, doled out the work and saw that it was prepared on time for the pressroom."

Raskin customarily worked in the stripping department with two other employees. He credibly testified that he was an hourly paid production employee who did the same work as the other employees and that Superintendent Weiss made all personnel decisions and checked out the "flats" prepared by the strippers before they were sent to the pressroom. I find that Raskin was not a supervisor under the Act and properly included in the backpay specification.

Ruth Luna was hired in 1963 to type shipping labels and do clerical work. During the backpay period, she worked up to 2 days each week inspecting and shipping prints and the balance of the week doing clerical work. As Luna spent a substantial part of her time during the backpay period doing work closely connected with the lithographic production operation, I find she was within the bargaining unit and properly included in the backpay specification.

Joan Murphy worked for Respondent from the spring of 1966 until August 1968. She worked as an artist who prepared rough and finished layouts for customers, specified type, and did mechanicals and pasteups.² After she had been employed for about 6 months, Respondent installed a small camera in a darkroom near the office where Murphy performed her art functions. Murphy used this camera to enlarge line work "to a paper print that could be used then for reproduction."³ Murphy estimated that she spent about a quarter to a third of her time operating this camera after it was installed. Murphy also spent some time inspecting and packing prints, operating the office switchboard, and helping Superintendent Weiss "set up the production schedule." During the last year of her employment with Respondent, Murphy was also sent out to see prospective customers to "help them to figure out a problem that they had." She spent from 30 to 40 percent of her time contacting customers.

Murphy spent a substantial part of her time arranging and designing materials in connection with Respondent's lithographic process. While her work required artistic ability, it was not the type of art product, such as an original drawing or painting, ordinarily termed creative. Murphy

² Murphy described "layouts" as drawings to give a customer some idea of what his picture would look like; "specifying type" as telling the typographer at a type shop (Respondent did not set its own type) the type sizes to be used and the areas to be filled, "pasteups" as taking paper with type on it and positioning it for reproduction for printing, and "mechanicals" as lines drawn for reproduction usually in conjunction with pasteups

³ Murphy described line work as anything, including typed and ruled material, that was not to be reproduced as a photograph

was hourly paid, subject to the same supervision and conditions of employment as the production employees, and *inter alia*, helped to inspect and ship prints. I find that Murphy was properly included in the backpay specification as a member of the bargaining unit.

B. The Backpay Computations

Appendix A of the backpay specification computes on a quarterly basis (the *Woolworth* formula, 90 NLRB 289) the backpay owing certain employees attributable to the difference between the weekly rates actually paid and the rates prescribed by contract. Respondent contends that the *Woolworth* formula is inapplicable and that the General Counsel erred in failing to grant Respondent a credit when it paid above the contract rate. I find Respondent's contention without merit as the Board specifically provided for the use of the *Woolworth* formula in computing the losses Respondent's employees may have suffered by reason of Respondent's refusal to sign the contract (159 NLRB at 1595).

Appendix B of the backpay specification computes backpay for overtime attributable to a reduction in the contract workweek from 40 to 35 hours, effective January 2, 1967. The backpay is computed on the basis of the employee's contract wage rate or his actual wage rate, whichever is the higher. Respondent contends, *inter alia*, that the contract wage rates should have been used as the basis for computation.⁴ The union contract sets "minimum wage scales" and does not restrict an employer from paying "premium" rates.⁵ It is entirely speculative to assume that Respondent, absent its unlawful refusal to sign the contract, would have strictly adhered to the minimum wage rates specified in the contract. I therefore find no merit in Respondent's contention that the contract rates rather than the actual rates paid should have been used to compute the amounts due certain employees for overtime work.

Respondent further contends that it complied with the 35-hour contract workweek because it gave the employees two 15-minute break periods and a 10-minute washup time at the end of the day. Respondent makes no claim, however, that these working conditions did not prevail before the contract period. It is uncertain whether they would have been discontinued had Respondent adhered to the contract. I find that Respondent has not established that it maintained a 35-hour workweek in accordance with the contract.

Appendix C of the backpay specification computes backpay attributable to the difference between Respondent's overtime practices and double-time and mealtime provisions of the contract. Respondent contends that the computation erroneously allows pay for mandatory one-half hour

lunch and supper periods on the ground that it was Respondent's "unvarying practice to allow any employee who had overtime to use at least half an hour of the time he was on overtime, while he was receiving overtime pay, as a lunch period for himself." Representative timecards put in evidence by the General Counsel indicate that employees on overtime were in fact paid only for time actually worked. I find that Respondent has not shown substantial compliance with the double-time and mealtime provisions of the contract.

Appendix G of the specification computes employer contributions payable under the contract to the Union's sickness and accident fund, and Appendix H computes employer contributions payable to the Union's lithography school fund. The General Counsel, however, has shown no losses suffered by Respondent's employees during the contract period by reason of Respondent's failure to make payments to these funds. As the Board's Order provides only for making the employees whole, I find merit in Respondent's contention that no payments are due and owing to the funds under the Order.

RECOMMENDED ORDER ⁶

Upon the basis of the foregoing findings and conclusions, it is ordered that the Respondent Coletti Color Prints, Inc., its officers, agents, successors, and assigns, shall pay to the employees involved in this proceeding, as net backpay,⁷ the amount set forth opposite their names:

P. Gambino	3881.60
P. Gentry	2913.93
C. Hahl	3101.12
J. Hutton	680.58
J. Nalty	745.08
E. Sollitto	3650.51
R. Luna	2241.25
G. Matz	739.41
J. Murphy	1724.64
R. Berliner	816.33
M. Caltabiano	109.50
V. Chasse	99.00
L. W. Isom	1068.14
S. Kramer	899.73
W. J. Lewis	758.57
R. Pankowski	57.00
J. Raskin	1884.69
B. F. Scarth	563.78
K. Sheridan	757.33
W. R. Smith	756.67

⁶ 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.

⁷ Interest is to be added at the rate of 6 percent per annum on the respective amounts of backpay, computed in the manner prescribed in *Isis Plumbing & Heating Co.*, 138 NLRB 716. The net backpay awards are to be reduced by such tax withholdings as are required by Federal and state laws.

⁴ Respondent makes the same contention with respect to the computation in Appendixes C, D, and E of the specification.

⁵ The Union's financial secretary credibly testified that 40 to 50 percent of the employers under contract with the Union pay premium rates to certain employees and that overtime for these employees is invariably computed on the basis of their actual wage rates.