J. H. Rutter-Rex Manufacturing Company, Inc. *and* Amalgamated Clothing Workers of America AFL–CIO. Cases 15–CA–721 and 15–CA–723

October 26, 1973

THIRD SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN MILLER AND MEMBERS JENKINS AND KENNEDY

On May 29, 1973, Administrative Law Judge Lowell Goerlich issued the attached Third Supplemental Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the Administrative Law Judge's Decision.

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 Administrative Law Judge's Third Supplemental Decision in light of 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.[1]

ORDER

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 and hereby orders that Respondent, J. H. Rutter-Rex Manufacturing Company, Inc., New Orleans, Louisiana, its officers, agents, successors, and assigns, shall take the action set forth in said recommended Order.

[1] We especially agree with the finding of the Administrative Law Judge that a narrow question was before him in the remand hearing ordered by the Court of Appeals for the Fifth Circuit in *J. H Rutter Rex Manufacturing Company, Inc* v. *N.L.R.B*, 473 F.2d 223, i.e., the question of Fannie Watford's reinstatement offer as determined from an examination of the Board files by witness Lacey. The court stated that the Trial Examiner did err in not requiring the Board to produce the Watford file for the narrow purpose of allowing Lacey to refresh his memory. The court also stated that the Company was entitled to a new hearing before the Board on the Watford claim at which time the Board must permit Lacey to review the Watford file if a similar situation were to arise Thus, we find that the court's language regarding a new hearing was indeed limited, as found by the Administrative Law Judge.

We also find that two inadvertent typographical errors in the Decision of the Administrative Law Judge require correction Thus, the dates shown as 1972 and 1973 on p. 3, l. 7, of the Decision should actually appear as 1962 and 1963. In addition, p 4, l. 24, of the Decision which reads "had been communicated to the discriminatees" should actually appear as "had not been communicated to the discriminatees."

THIRD SUPPLEMENTAL DECISION

LOWELL GOERLICH, Administrative Law Judge: On February 21, 1973, the Board issued an Order Reopening Record and Remanding Proceeding to Regional Direction for Further Hearing as follows:

> On November 5, 1971, following issuance of the opinion of the Supreme Court of the United States in this proceeding, the National Labor Relations Board issued a Second Supplemental Decision and Order in which it ordered Respondent to pay certain enumerated employees the amounts of net backpay awarded them. In particular, the Board ordered Respondent to pay Fannie M. Watford $9,592 with interest.
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> Thereafter, upon a petition to review the Board's Order filed by Respondent, and a cross-application for enforcement thereof filed by the Board, the United States Court of Appeals for the Fifth Circuit enforced the entire backpay order with the exception of the Watford claim. In that case, the Court found that "the Board erred in refusing to produce Watford's file for the purpose of allowing refreshment of witness Lacey's memory" and because such refusal was prejudicial, Respondent "is entitled to a new hearing before the Board on the Watford claim, at which time the Board must permit Lacey to review the Watford file is a similar situation arises." The Court remanded the Watford claim for further proceedings not inconsistent with its opinion. Accordingly, the Board having accepted the remand,
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> IT IS HEREBY ORDERED that the record in this proceeding be, and it hereby is, reopened and that a further hearing be held before an Administrative Law Judge to be designated by the Chief Administrative Law Judge for the purpose of taking evidence on the Watford claim in accordance with the Court's remand of January 16, 1973.
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> IT IS FURTHER ORDERED that this proceeding be, and it hereby is, remanded to the Regional Director for Region 15 for the purpose of arranging such further hearing, and that the Regional Director be, and he hereby is, authorized to issue notice thereof.
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> IT IS FURTHER ORDERED that, upon the conclusion of such further hearing, the Administrative Law Judge shall prepare and serve upon the parties a Third Supplemental Decision containing findings of fact upon the evidence received, conclusions of law, and recommendations; and that following service of the Third Supplemental Decision upon the parties, the provisions of Section 102.46 of the Board's Rules and Regulations, Series 8, as amended, shall be applicable. [Footnotes omited.]

Thereafter, on April 10, 1973, pursuant to the remand, this matter came on for hearing at New Orleans, Louisiana. John T. Lacey, the witness referred to in the court's remand, and John M. Drake testified for the Respondent. During Lacey's examination, the Board's files, as directed by the court, were made available for Lacey's examination. The additional testimony of Lacey and Drake and the briefs and arguments of the parties have been examined in the light of

the record as a whole and the demeanor of the witnesses.

In its opinion on remand, the court of appeals stated that the Respondent's request for Lacey's further testimony "had a very narrow focus and purpose. Lacey had stated on the stand quite clearly that if he could see the file, he might be able to clear up in his own mind the narrow question of Fannie Watford's reinstatement offer." [1] It is this narrow question which is now before the Administrative Law Judge and to which this decision on remand must be confined.[2]

In the Administrative Law Judge's initial decision in this matter it was stated that "[t]he Respondent claims that Watford was offered employment by the Respondent sometime in December 1961. The Respondent produced no credible written or oral substantiating evidence to support this contention." [3] At the remand hearing, certain exhibits and the testimony of Lacey and Drake were seemingly offered to cure this lack. Citing this evidence, the Respondent no longer relies on the December 1961 date, but now asserts in its memorandum, "There are *three distinct possibilities* for an earlier cutoff date on the Watford claim. First, January, 1972; second, September 30, 1973; and, a date in 1967." (Emphasis supplied.)

First: Exhibits offered on remand by the Respondent reveal that Watford filed employment applications with the Respondent on December 4, 1961, and September 27, 1963. In addition, a company "Absentee Form" dated November 27, 1971, was offered, indicating that Watford "called and asked if we had opening—told by J. Drake that she should come in and fill out an application—we have opening for experienced operators.

A letter from Lacey to Respondent's attorney, Lund, dated July 17, 1970, was also offered in which Lacey indicated that he "would recommend in settlement of the Supplemental backpay at this time" certain minimum amounts for discriminatees including Watford. Watford's claim was set at $590. It is suggested that from this low figure it should be concluded that Lacey had information that Watford had been offered a reinstatement which tolled backpay much earlier than that contended by the General Counsel. However, Lacey, after several stabs at explaining the source of the figure, finally testified that the $590 figure was based "on lack of search and also other earnings made at Louisiana Garment." [4]

The "three distinct possibilities" were referred to by Lacey as follows:

First offer, January 1962. Information in regard to this offer was derived by Lacey from information given to another examiner, John Immel, which Lacey "happened" to pick up in the file.[5] This offer followed Watford's telephone call on November 27, 1961, and her application filed on December 4, 1961, and was apparently pursuant to the application. The offer was "limited to her coming back on the particular day in which the call was made and she happened to be sick on that day." Lacey did not consider this offer to be adequate since Watford was not told that she could return when she had recovered from her illness [6] and he believed that offer may have been tied to her application.[7] It further appears that this offer was the one referred to by Watford in her testimony which she fixed as occurring in 1958 or 1959.

Second offer, sometime in 1967. In respect to this offer, Lacey's recollection was refreshed from undated notes in the file which he thought were the result of a communication from Watford in the "general neighborhood of March or April or early May of 1970." Watford related to Lacey that she had received an offer "sometime in 1967"; that prior to the offer she had filled out an application for employment; and that she did not accept the "apparent" offer because she was employed at the time.

Third offer, exact date not established. Lacey testified that the offer was made to Attorney Jackson by either Attorney Read or Attorney Lund, but was never communicated to Watford. Lacey did not consider the offer a "proper" offer because it had been communicated to the discriminatees.[8]

Second: The Board's Order in the instant case (115 NLRB 388, 391) enforced by the Court of Appeals for the Fifth Circuit (245 F.2d 594) required among other things that the Respondent "Upon application, offer immediate and full reinstatement to their former or substantially equivalent positions to all those employees who went on strike April 21, 1954, or thereafter,[9] *without prejudice to their seniority or other rights and privileges,* dismissing if necessary all persons hired on or after that date, and make such applicants whole for any loss of pay suffered by reason of the Respondent's refusal, if any, to reinstate them, in the manner set forth in the section of the Intermediate Report entitled "The Reme-

[1] *J. H. Rutter-Rex Manufacturing Co., Inc.* v. *N.L.R.B.*, 473 F.2d 223, 239 (C.A. 5, 1973).

[2] Thus the contention of the Respondent that Watford should be barred from backpay during the period 1961 through 1963 because of willful loss of earnings is not before the Administrative Law Judge for decision on remand. However, if it were a consideration, Lacey's testimony on this subject was so vague and speculative that it warrants no probative value in the light of Watford's heretofore credited testimony.

[3] In this respect the court of appeals opined (*J. H. Rutter-Rex Manufacturing Co., Inc.* v. *N.L.R.B., supra,* 235), "The Company lacked specific documentation for its allegation that Watford was offered reinstatement in 1961, and sought the testimony of Lacey."

[4] In any event the figures set out in Lacey's letter do not support the conclusion, since, by comparison with the Board's findings, many are inaccurate. For example, Beatrice White Lane: Lacey—$680, Board—$3,007; Learson: Lacey—$2,725, Board—$1,591; Landry. Lacey—$952, Board—$192; Green: Lacey—$2,645, Board—$3,536; Johnson. Lacey—$2,176, Board—$2,772, Allen: Lacey—$1,960, Board—$2,543. In reference to Watford's figure, Lacey explained, "I am rather convinced from having reviewed the files that it was quite an inexact figure . . . this figure that I had arrived at, $590, which appears in one of these letters, was obviously inexact . . . . And there again in making that determination of that figure I doubt at that time I had any records which would have reflected what Watford would have earned had she been employed at Rutter-Rex itself." Lacey's testimony on this subject sheds no light on whether Watford had received a valid offer of reinstatement

[5] As noted by the court of appeals this kind of testimony ascends to the "second level of hearsay" and the use of such testimony "cannot be considered conducive to the ascertainment of a reliable factual picture and indeed might be counterproductive to the search for truth."

[6] The Respondent had a policy of allowing employees to return to work after illnesses. See court of appeals decision, *supra*

[7] By this, apparently Lacey meant that she, in response to the application, was offered employment as a new employee rather than as a reinstated employee with all rights and privileges.

[8] Apparently the Respondent does not claim that the third offer tolled backpay because in the conclusion of its memorandum it contends only that "the backpay of Fannie Watford should be tolled as of January 1962. Alternatively, in event this date is considered inappropriate, the claim should be tolled no later than September 30, 1963."

[9] Watford was in this group.

dy." [10] (Emphasis supplied.) Thus the offer required under the Order was more demanding than a bare offer of a job. It was the Respondent's obligation by its offer to afford "full and complete reinstatement privileges" to Watford. (Cf. *Mission Rubber Company, Inc.* 202 NLRB No. 17.) This meant that the Respondent, in order to have tolled backpay, must have offered Watford not only her "former or substantially equivalent" position but also all privileges and rights, including seniority rights which obtained to her job.[11] "The reinstatement obligation properly rests with the Respondent and is satisfied only by a valid and unconditional offer of reinstatement," [12] which is only valid and unconditional if the offer is coextensive with the order for reinstatement. An offer to return as a new employee [13] or an offer which does not allow reasonable time in which to report for work [14] or does not allow reasonable latitude in reporting because of illness does not constitute an offer which will toll backpay. Lacey's testimony, if given its greatest probative weight, does not establish that the Respondent was affording Watford "full and complete reinstatement privileges." Indeed the implication is that by these offers, shortly following Watford's applications for employment, the Respondent meant to treat her as a new employee. Such conclusion surely follows from Drake's communication to Watford on November 21, 1961, in which he told her that he had openings but that she should fill out an application. Had he intended to treat her other than as a new employee, it seems reasonable that he would have offered her a job forthwith. Moreover, while Lacey testified that the Respondent had offered Watford jobs, there is no credible evidence that these jobs were the same as her position or substantially equivalent positions. Nor is there a scintilla of evidence that the job offers contemplated a restoration of her seniority, if any, and her other full and complete reinstatement privileges.[15] To produce such proof was the burden of the Respondent for the "burden of proving facts that show no liability or that mitigate the extent of damages" is on the employer in a backpay case arising out of an employer's unfair labor practices. *N.L.R.B.* v. *Robert Haws Company, supra* at 981. See also *J. H. Rutter-Rex Manufacturing Company, Inc.* v. *N.L.R.B.,* 399 F.2d 356 (C.A. 5). The Respondent has not met this burden as to Watford's claim by the evidence offered in this proceeding.[16] In this regard, the testimony of Lacey and Drake and the exhibits offered in the remand hearing have been weighed.

Accordingly, it is found that backpay owed Watford is the same as in the Board's Second Supplemental Decision and Order—$9,592.

Upon the basis of the foregoing findings of fact and conclusions of law, and the entire record before the Administrative Law Judge, and pursuant to Section 10(c) of the Act, it is recommended that the Board issue the following:[17]

THIRD SUPPLEMENTAL ORDER

Respondent, J. H. Rutter-Rex Manufacturing Company, Inc., New Orleans, Louisiana, its officers, agents, successors, and assigns, shall make Fannie M. Watford whole by payment to her of $9,592, together with interest at the rate of 6 percent per annum, commencing June 2, 1964, and continuing until the amount is paid in full, but minus tax withholding required by Federal and state laws.

[10] The "Remedy" required "payment to each of them of a sum of money equal to that which he would normally have earned, less his net earnings, during the period from 5 days after the date on which he applies for reinstatement to the date of the Company's offer of reinstatement."

[11] "In computing backpay awards the Board endeavors to restore the employee to the status quo he would have enjoyed if he had not been discriminatorily discharged." *N L.R.B.* v. *Robert Haws Company,* 403 F.2d 979, 980 (C.A. 6).

[12] *Harrah's Club,* 158 NLRB 758, 759, fn 1

[13] See *Tennessee Packers, Inc, Frosty Morn Division,* 158 NLRB 1316.

[14] See *Harrah's Club,* 158 NLRB 758

[15] While Lacey reported that Watford turned down the second offer because she was employed elsewhere, the offer turned down for such reason would not have tolled backpay because there is no persuasive evidence that the offer which was tendered by the Respondent included in its scope an offer of her former position or a substantially equivalent position and restoration of her full and complete reinstatement privileges Cf *Burnup and Sims, Inc.,* 157 NLRB 366, enfd. 383 F.2d 987 (C.A. 5); *Rushton & Mercier Woodworking Co., Inc. and Rand & Co, Inc.,* 203 NLRB No. 17.

[16] In respect to the 1967 offer, the Respondent claims that it was tendered in 1963 Its claim is based on the fact that the offer followed an application for employment with the Respondent and that the last application filed by Watford with the Respondent was in September 1963. Further corroboration is claimed in the fact that Watford turned the offer down because she was working elsewhere. Since she was not working in 1967 but was on strike from Louisiana Garment and was working the last quarter of 1963, the Respondent reasons that being unemployed in 1967 she would not have turned the job down, but would have rather turned the job down in 1963 when she was employed. Whether the offer occurred in 1963 or 1967 need not be decided since, whether the offer was tendered in 1963 or 1967, it was an invalid offer.

[17] 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 Third Supplemental 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.