

Winn Dixie Stores Inc. and Freight Drivers, Warehousemen and Helpers, Local Union 390, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America.
Case 12-CA-4410

October 30, 1973

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN MILLER AND MEMBERS FANNING
AND JENKINS

On March 10, 1970, the National Labor Relations Board issued its Decision and Order¹ in the above-entitled proceeding finding that Respondent had discriminated against certain named individuals by discriminatorily discharging them and that it had engaged in this and other conduct in violation of Section 8(a)(3) and (1) of the National Labor Relations Act, as amended. The Board's Order directed, among other things, that Respondent, its officers, agents, successors, and assigns, offer reinstatement to five discriminatees and make them whole for losses suffered as a result of this discrimination.

On March 28, 1972, the United States Court of Appeals for the Fourth Circuit enforced, in part,² the Board's Order. Specifically, the court granted enforcement only as to three of the five discharges which we found to be unlawful and it also declined to enforce our finding that the strike which was called after the discharge of several employees was an unfair labor practice strike. Thereafter, a backpay specification and notice of hearing was issued by the Acting Regional Director for Region 12 and a hearing was held on November 8 and 9, 1972, before Administrative Law Judge Ivar H. Peterson to determine the amount of backpay due the three discriminatees, Joseph B. Gause, Leonzie Jones, and Willie Hightower. As hereinafter discussed, the only substantive issue raised before the Administrative Law Judge was whether or not backpay for three discriminatees should be tolled during a period, subsequent to their discharges, when they allegedly participated in a strike at Respondent's store.

On February 7, 1973, the Administrative Law Judge issued his Supplemental Decision and Order finding that the three discriminatees were active members of the Union who supported the strike and that their backpay should be tolled for the period that they participated in this strike. Thereafter, the General Counsel filed exceptions to the Administrative Law

Judge's Supplemental Decision and Order along with a supporting brief and the Respondent filed an Answering Brief to the General Counsel's exceptions.

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, and recommendations of the Administrative Law Judge only to the extent that they are consistent with the following Decision.

The record in this matter discloses, and it is undisputed, that, prior to their discharge, the three discriminatees very actively demonstrated their support for the Union, a factor which was found to have played a decisive part in Respondent's decision to discharge them in violation of Section 8(a)(3) and (1) of the Act.

Hightower, Gause, and Jones were discharged respectively on October 1, October 31, and November 5, 1968. Approximately 5 days after Jones' discharge, the Union called a strike which lasted from November 10, 1968, until June 23, 1970. Throughout the strike period, Respondent did not offer reinstatement to the discriminatees herein. However, during the strike and while picketing was going on, Hightower went to Respondent, on his own, on March 30, 1970, applied for reinstatement and was permitted to return to work. Jones and Gause were offered reinstatement on June 23, 1970, when the strike ceased along with a great majority of the strikers who desired to do so.

Based upon evidence that the three discriminatees had been very active in the Union, that they had participated in negotiations and that they had voted to join the strike, the Administrative Law Judge concluded that it was reasonable to presume that they continued to support the strike during its duration. Such a presumption is of course contrary to established Board policy. The Board has consistently held, in cases involving employees who have been unlawfully discharged before an economic strike is called, that the entire duration of the strike is includible in the backpay award period because the employer's own discrimination against the claimants makes it impossible to ascertain whether such claimant would have gone out on strike in the absence of the discrimination and the resulting uncertainty must be resolved against the employer. See e.g., *Spitzer Motor Sales*, 102 NLRB 437, *East Texas Steel Castings Co.*, 116 NLRB 1336.

As noted, the Respondent herein never offered the reinstatement to these discriminatees which would have resolved the uncertainty it had created. The validity of the principle of resolving the uncertainty

¹ 181 NLRB 611.

² 448 F.2d 8.

against the wrongdoer is demonstrated here by the only affirmative evidence bearing upon the discriminatees' attitudes toward accepting reinstatement during the strike. We refer, of course, to the action of discriminatee Hightower in seeking reinstatement on his own volition and returning to work while the strike was in progress. This evidence shows the fallacy of presuming, as did the Administrative Law Judge, that individuals recognized as union activists will automatically refuse an offer of reinstatement in order to demonstrate their support for the union during the strike. To hold that an employer who has wrongfully discharged an employee prior to a strike may escape the consequences of his misconduct by simple inaction in failing to offer reinstatement to the employee would reward the employer for his misconduct. To require the fired employee to apply to the employer who has evinced no retreat from his unlawful conduct appears hardly reasonable, and also contrary to the well-established legal principle that a condition once established—the employer's refusal to employ the employee—is presumed to continue in the absence of evidence showing a change has occurred.³

In sum, after consideration of all the relevant facts disclosed in the record, we conclude that the Respon-

dent has not sustained its contention that Gause, Jones, and Hightower were not available for work,⁴ in the cases of Gause and Jones, from November 10, 1968, to June 23, 1970, and, in the case of Hightower, from November 10, 1968, to March 30, 1970.

Accordingly, we find that they are entitled to backpay from the date of their unlawful discharge to the respective dates of their reinstatement including the period that the strike was in progress.⁵ The Board therefore enters the following:

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Winn Dixie Stores, Inc., Hialeah, Florida, its officers, agents, successors, and assigns, shall:

1. Pay Joseph B. Gause \$17,960.45 and transmit to him a watch which it normally presents to 10-year employees.

2. Pay Leonzie Jones \$5,570.24.

3. Pay Willie Hightower \$2,559.74.

In each case there shall be added interest at the rate of 6 percent per annum calculated in the manner set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716, less any required tax withholdings.

³ See *Knickerbocker Plastic Co., Inc.*, 132 NLRB 1209, 1212, including fn. 6, wherein the Board granted backpay over the duration of a strike to a prestrike discriminatee who joined the strike but was not offered reinstatement during its course, while denying backpay for the strike period to another prestrike discriminatee because she refused an offer of reemployment as long as the strike lasted. To us, that case is illustrative of the validity of our approach and holding herein.

⁴ To the extent that *N.L.R.B. v. Rogers Mfg. Co.*, 427 F.2d 712 (C.A. 6, 1970), is inconsistent with the above, we respectfully disagree with the court's rationale for the reasons above set forth.

⁵ In view of our determination herein, we find it unnecessary to pass on the General Counsel's contention that the Administrative Law Judge, in reaching his decision, failed to consider the oral argument offered by the General Counsel at the hearing.