

United Brotherhood of Carpenters and Joiners of America, Local #1913, AFL-CIO; Los Angeles County District Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, AFL-CIO; J. W. Bernard (Chairman), Charles Love (Acting Co-Chairman), Rex Bowlby, Dean Southerland, Charles Trenta, A. H. Atwood, Warren Driver, C. V. Holder, and John Kuhl, as trustees for Carpenters Pension Trust for Southern California; and Carpenters Pension Trust for Southern California and Michael R. Amato.

United Brotherhood of Carpenters and Joiners of America, Local #1913, AFL-CIO; Los Angeles County District Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, AFL-CIO; J. W. Bernard (Chairman), Charles Love (Acting Co-Chairman), Rex Bowlby, Dean Southerland, Charles Trenta, A. H. Atwood, Warren Driver, C. V. Holder, and John Kuhl, as trustees for Carpenters Pension Trust for Southern California; and Carpenters Pension Trust for Southern California (Fixtures Unlimited) and Michael R. Amato.

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September 19, 1974

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN MILLER AND MEMBERS FANNING AND JENKINS

On April 26, 1974, Administrative Law Judge James S. Jenson issued the attached Supplemental Decision in this proceeding. Thereafter, the General Counsel, the Respondent, and the Carpenters Pension Trust for Southern California and its trustees filed exceptions and supporting briefs, and the General Counsel filed a brief in answer to Respondent's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the Na-

tional 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 briefs and has decided to affirm the Administrative Law Judge's rulings, findings, and conclusions as modified herein.¹

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, United Brotherhood of Carpenters and Joiners of America, Local #1913, AFL-CIO, its officers, agents, and representatives, shall make whole Michael R. Amato by payment to him of the amount set forth in the attached Administrative Law Judge's Supplemental Decision, including interest thereon, as recommended.

IT IS FURTHER ORDERED that, in addition to the amount to be paid directly to Amato, the Respondent shall pay to the Carpenters Pension Trust for Southern California, on Amato's behalf, the sum plus interest recommended by the Administrative Law Judge, and shall take such steps as may be necessary to restore whatever rights under the pension plan would have accrued to Amato if his employment had continued without interruption during the period covered by said contribution.

IT IS FURTHER ORDERED that the trust and its trustees shall, as agents of the Respondent, accept payment of the amounts so awarded for credit to the account of

¹ The General Counsel excepts to the failure of the Administrative Law Judge to find that the Carpenters Pension Trust for Southern California and its trustees are agents of the Respondent Union and therefore obligated to accept payment from it for credit to the account of the Charging Party herein and to administer said account as though such payment was made by an employer-contributor. We find merit in the General Counsel's exception. It is clear on the record herein that the trust in question was established by an agreement between employer-associations and the United Brotherhood of Carpenters and Joiners of America for its southern California district councils and union locals, with which the Respondent Union is affiliated, referred to in the trust agreement as "the Union," pursuant to a collective-bargaining agreement between the same parties or their predecessors; that the board of trustees of the trust consists of an equal number of representatives of the employers and of the "Union"; that the trustees representing the "Union" were appointed by, and are removable by, the "Union"; and that the current master labor agreement and its predecessors continue to give the trust viability, requiring contributions to the trust fund at rates set by negotiation of the successive collective-bargaining agreements. In these circumstances, we find that the trustees herein are agents of the Respondent (*Local 80, Sheetmetal Workers International Association, AFL-CIO, et al.*, 161 NLRB 229 (1966)) and may appropriately be required to accept contributions by the Respondent on the Charging Party's behalf and to administer said contributions in the same manner in which they would have been administered if made by an employer-contributor (*Local Union No. 38 Sheet Metal Workers' International Association, AFL-CIO (Mid-Hudson Sheet Metal Inc.)*, 194 NLRB 76 (1971)). Accordingly, in order to effectively remedy the unfair labor practices found to have been committed by the Respondent herein, we shall require that such contributions be accepted and administered in the manner sought by the General Counsel.

Michael R. Amato, and shall administer said account as though such payment was made by an employer-contributor.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

JAMES S. JENSON, Administrative Law Judge: On March 31, 1971, the Board issued its Decision and Order¹ directing Respondent, United Brotherhood of Carpenters and Joiners of America, Local #1913, AFL-CIO, to make whole Michael R. Amato for loss of pay resulting from Respondent's unlawful discrimination against him. On October 24, 1972, the United States Court of Appeals for the Ninth Circuit entered its judgment enforcing the Board's Order. Controversy having arisen over the amount of backpay due Amato under the terms of the Board's Order, on October 23, 1973, the Regional Director of Region 31 issued a backpay specification and notice of hearing. On November 2 and 29 and December 10, 1973, Respondent filed an answer, amended answer, and second amended answer, respectively. On November 5, 1973, the Carpenters Pension Trust for Southern California and its trustees filed an answer. On November 23, the General Counsel filed a motion for judgment on the pleadings seeking to preclude the Carpenters Pension Trust and its trustees from introducing evidence controverting the allegations of the specification, and further seeking to limit the taking of evidence to Respondent's affirmative defense that Amato did not seek other employment and failed to mitigate damages. The matter was heard before me in Los Angeles, California, on December 18, 1973, at which time the motion was granted and the evidence confined to the issues raised by Respondent's affirmative defenses. All parties were afforded full opportunity to appear, argue orally on the record, and to file briefs. Briefs were filed by both the Respondent and the General Counsel and have been carefully considered.

Upon the entire record,² and from my observation of the witnesses and their demeanor, I make the following:

FINDINGS AND CONCLUSIONS

I. THE POSITIONS OF THE PARTIES

The General Counsel claims backpay for Amato for the period commencing September 15, 1969, and ending August 31, 1970. The hourly rates of pay and the hourly rate of contributions to the pension and vacation funds are not in dispute. While admitting the backpay period began on September 15, 1969, Respondent contends the backpay period on the Fixtures Unlimited job ended on October 2, 1969, and in any event its liability was effectively cut off by a letter dated October 17, 1969, from Respondent's attorney to Amato. Respondent also contends that after November

13, 1969, Amato failed to exercise his obligation to diligently and reasonably seek substantially equivalent employment by failing to register with the Union for class A or forms work;³ by intentionally failing to comply with the hiring hall procedures and answer roll call each Monday morning; by failing to be present in the hiring hall on days when all carpenters available in the hall were dispatched; and by failing to seriously attempt to obtain other work. Respondent further contended backpay liability ceased on December 2, 1969, when Respondent's attorney wrote Amato, with a copy to Robert P. McKee Construction Company, that Respondent had no objections to Amato's employment by that company. Contending Amato had left the labor market in 1969, Respondent points to the fact that Amato commenced receiving social security benefits in February 1970 and that he should not be entitled, as a matter of public policy, to collect backpay for the period he received social security benefits. Respondent further contends backpay was effectively cut off in April 1970 when, on April 6, Amato refused a job dispatch, and on April 7 was not available for dispatch.

II. ANALYSIS

1. The Fixtures Unlimited job and the letters of October 17 and December 2, 1969

The Board found that on September 15, 1969, Respondent unlawfully denied Amato referral to the Fixtures Unlimited job. The record before me shows that from September 15 through November 13, 1969, Fixtures Unlimited was engaged in supplying interior fixtures for Hartfield-Zody Department Stores at three locations in the Los Angeles area, known as the North Hollywood, the Lynwood, and the Fullerton projects. On or about September 15, Fixtures requested seven carpenters from Respondent's hiring hall for work at the North Hollywood project. The record does not disclose that any of the seven had previously worked for the Company. Of the seven carpenters dispatched, four worked a period of 12 days, one worked 11 days, and three worked 10 days. When the North Hollywood project was completed on September 30, two of the seven carpenters obtained through the hiring hall were laid off and five were transferred to the Lynwood project where they worked from October 1 to 13, four of the men working 11 days and one working for 13 days. Upon completion of the Lynwood job, three of the five carpenters were laid off and two were transferred to the Fullerton project which commenced October 31 and ended November 15, working 10 and 11 days, respectively.⁴ The record discloses that at the conclusion of each of the projects the foreman arbitrarily decided which employees would be laid off and which would be transferred to the next project.

Respondent contends that in order to show Amato is entitled to backpay at the Lynwood and Fullerton projects, there would have to be substantial evidence that the fore-

³ The terms "class A" and "forms" work were used interchangeably throughout the hearing.

⁴ As both the Lynwood and the Fullerton projects were located outside Respondent's territorial jurisdiction, Fixtures hired additional carpenters through the local union exercising territorial jurisdiction over those locations.

¹ 189 NLRB 521.

² The General Counsel filed a motion to correct transcript of the record. In the absence of any opposition, the motion is granted.

man would have selected Amato over the other carpenters for transfer to these projects; and that since it is only speculative as to whether Amato would have been transferred from project to project, the backpay liability should be cut off with the conclusion of the North Hollywood project.

The law is clear that "the finding of an unfair labor practice and a discriminatory discharge is presumptive proof that some backpay is owed."⁵ In *Fibreboard Paper Products Corporation*, 180 NLRB 142, the Board stated the applicable law as follows: "Wilful loss of earnings is an affirmative defense, and that burden of proof is on the Respondent. Once the General Counsel has shown the gross amount of backpay due, the burden is on the Respondent to establish facts to negative or mitigate liability to a given employee. And, finally, 'any uncertainty is resolved against the wrongdoer whose conduct made certainty possible.'"

Respondent failed to affirmatively establish that Amato would not have been transferred successively from the North Hollywood to the Lynwood and Fullerton projects. At the most there is uncertainty as to whether he would have been transferred or laid off. As "any uncertainty is resolved against the wrongdoer whose conduct made certainty possible," I find that the Respondent has failed to sustain its burden of proving that Amato would not have been transferred successively from the North Hollywood to the Lynwood and Fullerton projects.

Respondent's argument that a letter from its attorney to Amato dated October 17, 1969, "effectively cut off any backpay liability after October 17, 1969," is without merit. Aside from the fact that the letter was not directed to Fixtures Unlimited or to any other employer, it was not unconditional in that Respondent threatened to reaffirm its position regarding union security which formed the basis for the unfair labor practice charges which initiated these proceedings. Respondent's letter to Amato dated December 2, 1969, with a copy to Robert P. McKee Construction Company, did not have the effect of tolling Respondent's backpay liability for the same reason. That the wording used in the letters was construed as containing a veiled, if not open, threat of trouble for any employer who might hire Amato, is evidenced by McKee's general foreman who, after reading the letter of December 2, declined to consider hiring Amato because "I don't want to get myself in the middle of all of this." Accordingly, I find that neither the October 17 nor the December 2, 1969, letters tolled Respondent's backpay liability.⁶

⁵ *N.L.R.B. v. Mastro Plastics Corporation*, 345 F.2d 170, 178 (C.A. 2, 1965), cert. denied 384 U.S. 972 (1966).

⁶ While not raised by way of answer to the backpay specification, Respondent contended in its brief that a stipulation entered into between counsel for Respondent and counsel for the General Counsel at the time of the trial of the unfair labor practice cases, ". . . establishes that the parties intended, at the time of the stipulation, that the effect of the failure to dispatch Amato was in relation to the North Hollywood Zody's job and to no other job and therefore, the amount of backpay . . . concerning Fixtures Unlimited, is limited to the North Hollywood job." I have carefully studied the stipulation (Resp. Exh. 4) and fail to find even in inference that the stipulation was intended to limit Respondent's backpay liability on the Fixtures' job to the North Hollywood project. The stipulation is to the effect that if Tony Bresickello were called to testify he would testify to certain jurisdictional facts contained therein, and that on September 15, 1969, at Fixtures' request, Respondent referred approximately eight carpenters to the ". . . Fixtures Unlimited job at the Zody's store in North Hollywood . . . and that those

2. Amato's search for work

The Board found that Respondent "caused" a condition which brought about the unlawful refusal to refer Amato to the Robert P. McKee Construction Company job on November 13, 1969, and ordered that he be made whole for any loss of pay between the date of denial of such referral to the date Respondent notified McKee, in writing, that it had no objection to the employment of Amato. It is undisputed, and I find, that McKee employed carpenters from November 13, 1969, to August 31, 1970, when Respondent notified McKee in writing that it had no objection to the employment of Amato. The amount of backpay owed Amato for that period is \$12,088.34 plus \$1,147.30 due the Carpenters Pension Trust for Southern California for credit into the pension account of Amato, unless the Respondent sustains the burden of proving a "wilful loss of earnings" to negate or mitigate its liability to Amato.

The carpenters hiring hall procedures (Resp. Exh. 1) contain the registration and dispatching rules. They provide, *inter alia*, that roll call shall be held each Monday at 7:30 a.m., or immediately after dispatching, which is from 7:30 to 9 a.m. daily; a workman shall personally sign and classify himself on the employment list;⁷ jobs shall be dispatched under a daily rotation system by job classification as specified by the individual, starting at the top of the registration list each day; and registered workmen shall be removed from their position on the registration list by: (1) failing to answer roll call at the designated time (Monday morning); (2) dispatch to a job (unless rejected by the employer); (3) failing to accept suitable employment on two occasions during the current week of registration; (4) being unavailable for work during the current week of his registration; and (5) failing to report to a jobsite.

The evidence shows that between October 22, 1969, and August 28, 1970, Amato was registered on the out-of-work list in 36 of the 45 weeks. He had classified himself on the registration list under commercial and/or house finish from October 22, 1969, until he signed the list on April 1, 1970, and listed both commercial finish and forms. From April 17, 1970, through the end of the backpay period, he was classified only under commercial finish. Amato testified he was a journeyman carpenter and qualified to do all forms of carpentry work. He further testified that class A or form work is divided into two categories, skilled and labor, the former consisting of the design and building of forms (benchwork), the latter, the hanging and locking together of the forms for the receipt of concrete. Amato further testified that while form work entailed both facets, it was not common for a man of 62 years⁸ to do form work because of the physical requirements and that his prior employment with McKee had been limited to the designing and building of forms.

Contending that Amato did not exercise due diligence or carpenters so referred were employed on *that job* for approximately two weeks." (Emphasis supplied.) I find, therefore, that Respondent's contention lacks merit.

⁷ The five classifications on the registration list are rough housing, housing finish, commercial framing, commercial finish and forms. A workman may classify himself in as many or few classifications as he wishes, assuming he is qualified.

⁸ Amato was 62 in 1969 and 67 at the time of the hearing in this matter.

make a serious attempt to obtain work during the backpay period, Respondent asserts Amato should have classified himself at all times on the out-of-work list under "forms," and that had he done so and answered roll call regularly, he would have been dispatched to a forms job shortly after November 13, 1969. Respondent contends the employment list and summaries (Resp. Exh. 7(a) through 7(yy), 8, and 9) show a pattern that whenever Amato acquired a low number on the registration list, he deliberately failed to answer a Monday roll call and, as a consequence, lost his place on the list. Thus, when he re-registered, he acquired a high number and was not likely to be dispatched.

I have carefully examined the employment lists and summaries and, in the light of all the evidence, am not convinced that Amato's failure to answer roll call on each and every Monday morning, nor his failure to register for forms work throughout the entire backpay period, establish as a fact that he was avoiding dispatch. Amato testified without contradiction that 95 percent of his past jobs were the result of his own job-seeking efforts and that only about 5 percent had come through dispatch from the hiring hall. Therefore, it made more sense to him to personally look for work than to answer roll call and wait for the Union to dispatch him. While he testified that 95 percent of all his work from 1966 to 1969 was "forms" work for McKee Construction Company, he further testified ". . . [McKee] used my skills to make them not manual labor, let's say, because I am not a young man anymore. I couldn't climb and McKee knew that." Amato also claimed the Union's records would show that in the past he had not been able to hold forms jobs very long, other than with McKee, because of his age.

While contending Amato should have registered for forms work during the backpay period, Respondent failed to prove that Amato had registered for forms work in the past, or that it was his practice to perform all aspects of forms work as opposed to Amato's testimony that he was only physically capable of fabricating and designing forms and not erecting or hanging them. Moreover, Amato testified that he had solicited work during the backpay period from former employers, both in person and by telephone, including McKee on several occasions, Oberg Construction Company, Columbia Fixtures, Standard Fixtures, Gartz Construction Company, Sure Stop, and even solicited maintenance work at industrial plants, all to no avail. Additionally, he registered with the California Department of Human Resources Development for carpentry, maintenance, or any other type work but was not offered a job. Furthermore, it appears from the record to have been Amato's practice to register through the hiring hall only for house and/or commercial finish work, but that he personally sought other work, including forms work, insofar as it was limited to the fabrication of forms as opposed to their erection or hanging which was more physically demanding and dangerous for a man of his age. Accordingly, on the basis of the foregoing, I find that Amato was diligent in his search for employment during the backpay period.

Respondent contends, however, that the backpay period should be cut off on April 6 when, according to its dispatching records, Amato refused a dispatch to a forms job. As noted above, on April 1, 1969, in addition to re-registering for commercial finish work, Amato registered for forms

work for the first time. His placement on the list was No. 177. Respondent's records show that on Monday, April 6, Amato, now 106 on the list, answered roll call and was offered a job which he refused; and on April 7 was not available in the hall when his name was called when another job opening in one of his designated categories was available. Amato's reason for registering for forms work on April 1 was "I was getting pretty desperate for work at that time and I would have taken either one of those jobs." Amato testified that on April 6 he was present in the hiring hall and answered the dispatcher's call for "finish work . . . and I said I'd accept the job," but before the referral slip was made out, he was informed by the dispatcher that the contractor ". . . will not take out any social security, will not take out any benefits, health and welfare, pension fund, or anything like that." He testified further that he "did not like the smell of it . . . I had to refuse, because I figured I was being trapped into something." He testified that it was not until the job was given to another man that he learned by looking at the referral slip that it was for a Veterans' Administration Hospital and that had he known it was for the U. S. Government, he would have taken the job.⁹ While the above conversation, which purportedly occurred more than 3-1/2 years before this hearing, may or may not have occurred as Amato testified, Respondent failed to call Sam Cowan, whom Amato testified was the dispatcher on April 6, as a witness to either refute Amato's testimony or testify concerning the circumstances. However, inasmuch as Amato admits he was offered and declined a dispatch on April 6, I find it unnecessary to determine whether it was for a class A or forms job or for a commercial finish job, because of the following circumstances. Respondent's Exhibit 9 discloses that on April 6 six men were dispatched to class A or forms jobs, and three men to either house or commercial finish jobs.¹⁰ Respondent did not establish which of the six men accepted the dispatch which Amato refused, or whether in fact that individual was hired as a consequence of the dispatch, or the duration of the employment. While Dispatching and Business Agent Joseph Riviezzo testified that two of the employers to whom men were dispatched on that date were involved in construction projects lasting from 1-1/2 to 2 years, the dispatch records (Resp. Exh. 7(a) through 7(yy)) disclose that all of the six men dispatched to class A or forms work on April 6 re-registered on the out-of-work list on the following dates: Izzo—April 10; Paige—April 16; Slike—April 13; Meisinger—April 17; Farmer—May 18; Fusillo—April 7. It also shows that of the three men dispatched to commercial fixtures jobs on April 6, Fragione re-registered on April 13; Worsley on May 7; and Holmes on April 7. Moreover, the dispatch records show that of the four registered men shown to have been dispatched to class A or forms jobs on April 7—the date Respondent contends Amato would have been dispatched had he been present in the hiring hall and answered to a dispatch call—Hynes re-registered on April 7; Poetsch and

⁹ Resp. Exh. 9 discloses two individuals were dispatched to commercial finish jobs at a Veterans' Administration Hospital on September 8, 1970. The parties stipulated that was the only Veterans' Administration Hospital job during the period involved herein.

¹⁰ Amato was registered for forms and commercial finish work.

Summers re-registered on May 6 and Dorenbrach on May 7.¹¹ While three men were dispatched to commercial finish jobs on April 7, two were higher on the dispatch list (#'s 35 and 36) than Amato (# 106), and Jim Hynes, with # 136, was the third. Page 4 of Respondent's Exhibit 7(bb) indicates that for some reason Hynes retained his position on the list and the following week rose to #47. Respondent, having failed to prove that by refusing the dispatch on April 6 Amato thereby forfeited employment for an ascertainable period, I find that his refusal of the dispatch does not warrant a reduction or tolling of the backpay owed Amato by the Respondent. See, for example, *Alaska Chapter of the Associated General Contractors of America, Inc.*, 119 NLRB 663, 670-671.¹²

Respondent also contends that Amato's prior history of working a relatively few hours for many years and the fact he hasn't worked for almost 4 years is an indication he has left the labor market. Respondent's Exhibits 5 and 6 show that contributions were made to the Carpenters Pension Fund between 1960 and 1969 based on the following hours of work per year by Amato:

1960—967 hours	1965—704 hours
1961—298 hours	1966—1350 hours
1962—687 hours	1967—970 hours
1963—592 hours	1968—702 hours
1964—985 hours	1969—148 hours

No contributions are shown thereafter. The record does not disclose if jobs were any more or less available in those years, or thereafter, than in 1969 when Amato encountered difficulty with Respondent which resulted in the unlawful discrimination against him leading to this backpay hearing. Moreover, the backpay specification alleges that but for the

¹¹ Robert Blazier was dispatched on April 7, although his name does not appear on the out-of-work or employment list. Circumstances surrounding his dispatch were not elicited on the record.

¹² The same reasoning applies with respect to his absence from the hall on April 7.

unlawful discrimination against Amato in 1969 he would have worked only 553 hours in addition to the 148 hours worked prior to his difficulties with Respondent, for a total of 701 hours, a figure 1 hour less than he worked in 1968. Furthermore, but for the unlawful discrimination against him, the backpay specification alleges Amato would have worked 1,405 hours in 1970, which I find is clearly in line with the 1,350 hours worked in 1966. Nor do I attach any significance to the fact that Amato was drawing unemployment insurance benefits, and in February 1970 commenced receiving social security benefits. The record herein shows that he had not been able to get a job, and he testified convincingly that he applied for social security at a 25-percent reduction in benefits because he had no other income.¹³ Accordingly, I find no merit in Respondent's contention. Having determined that the discrimination against Amato caused by Respondent resulted in his loss of wages and pension benefits and that Respondent has failed to sustain the burden of proving wilful loss of earnings, and as Respondent has tendered no evidence controverting the figures in the Backpay Specification, I find that it correctly states the amount of backpay which the Respondent is required to pay to Amato.

Recommendations

Accordingly, I hereby approve and adopt the calculations made in the Backpay Specification and recommend that Respondent's obligations to make whole Michael R. Amato shall be satisfied by payment to him of the amount of \$12,088.34, and by payment to the Carpenters Pension Trust for Southern California, which it shall credit to the pension account of Michael R. Amato, the amount of \$1,147.30. Interest shall be paid to Amato and to the Carpenters Pension Trust for Southern California at the rate of 6 percent per annum from September 15, 1969, to the date of payment as set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1963).

¹³ Amato testified that he finally gave up searching for work in 1972, sometime after the end of the backpay period.