

A-1 Building Materials and Sales Drivers & Dairy Employees, Local Union No. 166, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 21-CA-17781

June 23, 1981

SUPPLEMENTAL DECISION AND ORDER

On March 12, 1981, Administrative Law Judge Gerald A. Wacknov issued the attached Supplemental Decision in this proceeding. Thereafter, Respondent filed exceptions and the General Counsel filed a response to Respondent's exceptions.

The Board has considered the record and the attached Decision in light of the exceptions and supporting brief 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 the Respondent, A-1 Building Materials, Riverside, California, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

¹ Member Jenkins would award interest on the backpay due in this proceeding in accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge: On January 9, 1980, the National Labor Relations Board, herein called the Board, issued its Order adopting the Administrative Law Judge's decision and directed A-1 Building Materials, herein called Respondent, to reinstate Robert Newton to his former truckdriving position and to make him whole for any and all loss of earnings or benefits he may have suffered by reason of his unlawful discharge, with appropriate interest. A controversy having arisen over the amount of backpay due Newton, a backpay specification and notice of hearing was issued by the Regional Director for Region 21 on May 29, 1980. The hearing in this matter was held in Los Angeles, California, on November 18 and 25, 1980.

The Facts

On December 3, 1979, Administrative Law Judge Claude R. Wolfe issued his Decision in this proceeding

finding that, *inter alia*, employee Robert Newton had been unlawfully discharged by Respondent.¹

Thereafter on December 21, 1979, Respondent's management consultant, Norman Jones, sent the following letter to Newton:

This is in regard to the National Labor Relations Board, Case Number, 21-CA-17781, and the Decision of the Administrative Law Judge in such matter.

We have been in contact with the National Labor Relations Board in such matter, and during several conversations, it was stated that you did not wish to return to A-1 Materials.

However, the Company hereby offers you full reinstatement to your former position in regards to hours and days of work, benefits, and wages for such position, seniority rights, so forth, as set forth by the Decision in this matter.

If you wish to return to your former position, then you should be ready for work at your regular time and place on January 2, 1980.

However, if you do not wish to return to work for A-1 Materials, as we so have been informed, then we would like a note from you stating such. (You can enclose such note in the stamped, self-addressed envelope with this letter.)

In regards to any back pay, as you have been told, you do not have to return to work to collect such monies.

Newton did not receive the letter until January 4, 1980, as he had been seeking employment elsewhere and did not return home until that date. After receiving the letter, Newton telephoned Robert Pentz, owner of Respondent. When Newton identified himself, Pentz abruptly hung up on him.

Thereafter, Newton sent the following letter, dated January 21, 1980, to Respondent's management consultant:

In regards to the letter I received from you on January 4, 1980. In relations to the National Labor Relations Board Case Number, 21-CA-17781.

I am very much interested in returning to work with A-1 Building Materials under the conditions enclosed in your letter and the Decision of the Administrative Law Judge.

I will be available for work immediately after receiving all monies due me.

However, I do think Mr. Pentz and I should discuss the probability of this situation. He may call me at his earliest convenience at (714) 688-8421.

Jones' reply, dated January 31, 1980, is as follows:

This is in regard to our letter of December 21, 1979, and your letter of January 21, 1980, on the subject

¹ No exceptions being filed, the Board adopted the Decision of the Administrative Law Judge on January 9, 1980.

of your employment at A-1 Building Materials, so forth.

You stated that you were available for "work immediately" so you are offered your old position back with the Company, working days are Tuesday through Saturday, eight hours per day, starting on Tuesday, February 5, 1980, starting time is the same time as before.

Also, because of your reported Back problem, we would require a statement from your doctor that you are able to perform the lifting, driving, so forth of your job duties.²

If your [sic] can not have such a statement from your doctor on February 5, 1980, then you can start work any day thereafter up until February 12, 1980.³ If you are not back to work by February 12, 1980, with the doctors' statement, then we will consider that you do not desire to return to work for A-1 Building Materials.

In regard to the back-pay, that matter is handled by the N.L.R.B. and the Company and will be settled in due course.

Your supervisor will be Betty Konhoff during the week and you will take orders on Saturday from either Dale or Robert Pentz.

Upon receiving the aforementioned January 21, 1980, letter, Newton again telephoned Robert Pentz, intending to inquire about the treatment he could expect upon returning to work. Newton commenced the conversation by asking some preliminary questions such as what time he should report to work, whereupon Pentz replied, "You know what the letter says," and again hung up on Newton.

Shortly thereafter, Newton telephoned Supervisor Dale Pentz, Robert Pentz' son. After identifying himself, Newton said he wanted to find out "whether your father wants me to come back to work sincerely as a person," or whether the reinstatement offer was merely an attempt to comply with the law. Dale Pentz replied, "I'm sorry, Bob, my father don't [sic] want you back to work." Newton thanked him, stating that was what he had to know. He has not returned to work for Respondent.

Neither Robert Pentz nor Dale Pentz testified in this proceeding.⁴ I credit the testimony of Newton, who appeared to have a vivid recollection of the telephone conversations and find that the conversations occurred as related by Newton.

² Newton had sustained an on-the-job injury to his shoulder in October 1978 and as a result he had been absent from work until mid-December 1978. Neither upon his initial employment nor upon returning to work following his shoulder injury was Newton required to undergo a physical examination. In November 1979, following his unlawful discharge on April 24, 1979, Newton received a settlement from Respondent's insurance carrier regarding the shoulder injury.

³ The backpay period cutoff date in the instant Backpay Specification is February 12, 1980. Additional backpay is dependent upon whether the Respondent's reinstatement offer was valid.

⁴ It was stipulated at that hearing that, if Robert and Dale Pentz were called upon to testify, each would testify that neither had telephone conversations with Newton in regard to reemployment.

Respondent was provided with the opportunity to examine Newton at length concerning his search for work and in this regard was provided with extensive personal records of Newton, including income tax returns and checking account documents. Neither during the examination of Newton at the hearing nor thereafter has Respondent elicited any evidence or proffered any statement of position or analysis which would support its unsubstantiated claim, made in answer to the backpay specification herein, that the amounts or other data and information contained in the backpay specification were incorrect.

Analysis and Conclusion

In agreement with counsel for the General Counsel, I find that Newton has not been validly offered reinstatement in conformity with the Board's Order herein.

Respondent's initial offer of reinstatement, dated December 21, 1979, appears sufficient on its face. The letter clearly reflects that Respondent, having been advised by the Regional Office that Newton did not desire to return to work, believed that its offer would be declined. Significantly, the letter contains no requirement that Newton furnish a doctor's verification of his physical condition prior to returning to work.

Upon being advised by Newton that he was "very much interested" in returning to work and wanted to discuss the matter with Respondent's owner, Robert Pentz, Respondent altered the terms of its original offer, conditioning reinstatement upon a doctor's statement that Newton was able to perform the work. Although Newton specifically requested that Robert Pentz phone him to discuss reinstatement, Pentz never responded. Moreover, Newton's several attempts to contact Pentz were brusquely rebuffed without explanation. Finally, Newton was told by Dale Pentz, a supervisor from whom Newton would be taking orders upon reinstatement, that his father, Robert Pentz, did not want Newton to return to work.

When Newton returned to work for Respondent in December 1978, following his shoulder injury, he was not asked to furnish a doctor's verification of his ability to perform the work and the record shows that Respondent thereafter had no reason to believe that Newton's job performance had been adversely affected as a result of such injury. Under such circumstances, conditioning reinstatement upon a doctor's verification of ability to perform the work does not constitute a valid offer of reinstatement. See *Standard Materials, Inc.*, 237 NLRB 1136 (1978), *enfd.* 604 F.2d 449 (5th Cir. 1979). Moreover, such a condition was clearly an afterthought, as evidenced by Respondent's initial offer, made at a time when Respondent believed the offer would be declined, which contained no such requirement. Thus, it would appear that the real reason for imposing such a condition was to discourage Newton's initial acceptance of the reinstatement offer which he expressed to Respondent in his reply letter of January 21, 1980. The various telephone conversations which, I have found, did occur as related by Newton provide additional support for this conclusion, particularly as Respondent proffered no evi-

dence or explanation to justify such negative responses which appear totally inconsistent with Respondent's written offer of reinstatement.

Newton's testimony clearly shows, and I find, that he made the requisite diligent attempt to seek work following his discharge, but was unable to secure gainful employment. The fact that on several occasions Newton drove a truck for a friend on a gratuitous basis, making trips of short duration, does not establish that during these several brief instances Newton had taken himself out of the job market. I find that Newton is owed the amount of backpay, from the date of his discharge until February 12, 1980, as specified in the backpay specification.

Based on the foregoing, and the entire record herein, I hereby issue the following recommended:

ORDER⁵

The Respondent, A-1 Building Materials, Riverside, California, its officers, agents, successors, and assigns,

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 find-

ings, 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.

shall pay to Robert Newton the sum of \$5,948.66 together with interest as set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), and *Florida Steel Corporation*, 231 NLRB 651 (1977).
Moreover, having found that Respondent has not complied with the Board's Order by making a valid offer of reinstatement to Newton, and that therefore Respondent's backpay liability had not been tolled, it is hereby further ordered that Respondent's backpay liability shall continue until such time as a valid offer of reinstatement has been made.